



This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

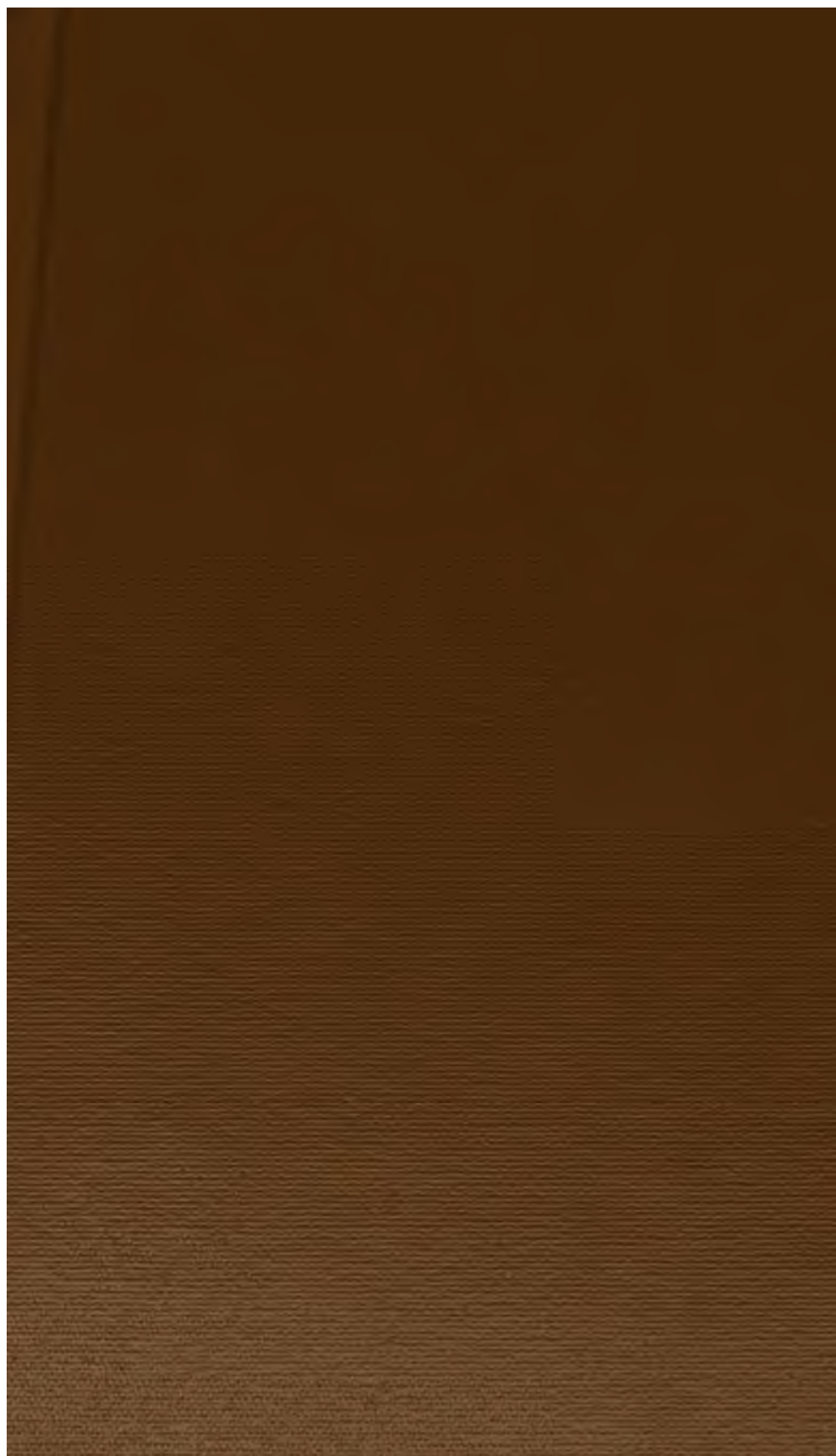
Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

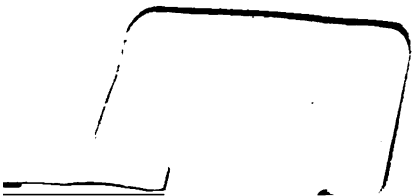
We also ask that you:

- + *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
- + *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
- + *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
- + *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at <http://books.google.com/>





EH
A
P-7





A TREATISE
ON THE
LAW OF EVIDENCE
IN
CRIMINAL ISSUES.

BY
FRANCIS WHARTON, LL.D.,
MEMBER OF THE INSTITUTE OF INTERNATIONAL LAW,
AUTHOR OF TREATISES ON "CRIMINAL LAW," "EVIDENCE," "CONFLICT OF LAWS,"
"NEGLIGENCE," "CONTRACTS," AND OF "COMMENTARIES
ON AMERICAN LAW."

IN ONE VOLUME.

NINTH EDITION.

PHILADELPHIA:
KAY & BROTHER,
LAW PUBLISHERS, BOOKSELLERS, AND IMPORTERS.
1884.

L10023
DEC 31 1934

Entered according to Act of Congress, in the year 1846, by
JAMES KAY, JR., AND BROTHER,
in the Office of the Clerk of the District Court of the United States, in and for the
Eastern District of Pennsylvania.

Entered according to Act of Congress, in the year 1852, by
JAMES KAY, JR., AND BROTHER,
in the Office of the Clerk of the District Court of the United States, in and for the
Eastern District of Pennsylvania.

Entered according to Act of Congress, in the year 1855, by
KAY AND BROTHER,
in the Office of the Clerk of the District Court of the United States, in and for the
Eastern District of Pennsylvania.

Entered according to Act of Congress, in the year 1857, by
KAY AND BROTHER,
in the Office of the Clerk of the District Court of the United States, in and for the
Eastern District of Pennsylvania.

Entered according to Act of Congress, in the year 1861, by
KAY AND BROTHER,
in the Office of the Clerk of the District Court of the United States, in and for the
Eastern District of Pennsylvania.

Entered according to Act of Congress, in the year 1868, by
KAY AND BROTHER,
in the Office of the Clerk of the District Court of the United States, in and for the
Eastern District of Pennsylvania.

Entered according to Act of Congress, in the year 1874, by
KAY AND BROTHER,
in the Office of the Librarian of Congress, at Washington.

Entered according to Act of Congress, in the year 1880, by
FRANCIS WHARTON,
in the Office of the Librarian of Congress, at Washington.

Entered according to Act of Congress, in the year 1884, by
FRANCIS WHARTON,
in the Office of the Librarian of Congress, at Washington.

W. H. COLLINS

COLLINS PRINTING HOUSE,
705 Jayne Street.

PREFACE.

IN the four years which have elapsed since the publication of the eighth edition of this volume, nearly one thousand cases have appeared bearing on the particular topics it discusses. Most of these cases are affirmatory of the positions taken in the text, and are noted as such; but many of them present new distinctions which it has been necessary to introduce in detail. The task has been laborious; but it has not been without interest. The vast increase of reported cases, while adding to the value of treatises in which these cases are cited and classified, is preparing the way for the adoption of a general national system of criminal law in which local peculiarities will be gradually absorbed. Of this an interesting illustration will be found in a case hereafter noticed,* in which the Supreme Court of Massachusetts, a State remarkably retentive of judicial traditions, has abandoned, on a question of great importance, in deference to the opinions of other courts and of the profession at large, a position which that court previously had zealously vindicated. It is only

* *Infra*, § 83.

PREFACE.

by this gradual process of systematization and assimilation that, in the necessary absence of a national criminal code, we can obtain a national criminal jurisprudence. And the importance of this result may afford an additional stimulus to the labors of those who, in collecting the decisions of the courts, endeavor to combine these decisions in a harmonious system.

F. W.

NARRAGANSETT PIER, R. I.,
July 15, 1884.

ANALYSIS.

CHAPTER I.

PRELIMINARY CONSIDERATIONS.

- PROOF OF GUILT TO BE BEYOND REASONABLE DOUBT, § 1.
- PROBABILITY THE STANDARD, §§ 6-9.
- ALL EVIDENCE CIRCUMSTANTIAL, §§ 10-19.
- LOGIC THE BASIS OF EVIDENCE, § 20.
- VALUE OF HYPOTHESIS, § 21.

CHAPTER II.

RELEVANCY.

- RELEVANCY A QUESTION OF LOGIC, §§ 23-28.
- COLLATERAL MATTERS INADMISSIBLE, § 29.
 - EXCEPT AS PART OF RES GESTAE, § 31.
 - OR AS PART OF SYSTEM, § 32.
 - OR AS SHOWING GUILTY KNOWLEDGE, § 39.
 - OR AS SHOWING INTENT, § 46.
 - OR AS SHOWING IDENTITY, § 47.
 - OR AS RELEVANT TO PARTICULAR ISSUES, §§ 50 *et seq.*
- PERTINENT CHARACTER OF DEFENDANT RELEVANT, §§ 57 *et seq.*
- OTHERWISE AS TO CHARACTER OF DECEASED, § 68.
- EXCEPT IN CERTAIN CASES OF SELF-DEFENCE, § 69.

CHAPTER III.

VARIANCE.

- I. AGENCY BY WHICH WRONG IS INFLICTED, § 91.
- II. NAMES OF PERSONS, § 94.
- III. TIME AND PLACE, § 103.
- IV. WRITTEN INSTRUMENTS AND RECORDS, § 114.

CONTENTS.

- V. WORDS SPOKEN, § 120 *a*.
- VI. GOODS, NUMBERS, AND SUMS, § 121.
- VII. NEGATIVE AVERMENTS, § 128.
- VIII. DIVISIBLE AVERMENTS, § 129.
- IX. SURPLUSAGE, § 138.
- X. INTENT, § 140.

CHAPTER IV.

PRIMARINESS AS TO DOCUMENTS.

- I. SECONDARY EVIDENCE OF DOCUMENTS USUALLY INADMISSIBLE, § 152.
- II. EXCEPTIONS TO RULE, § 163.
- III. COPIES, § 174.
- IV. OF UNPRODUCIBLE EVIDENCE, SECONDARY PROOF MAY BE RECEIVED, § 199.
- V. SO OF DOCUMENTS IN HANDS OF OPPOSITE PARTY, § 212.

CHAPTER V.

PRIMARINESS AS TO ORAL TESTIMONY.

- I. HEARSAY GENERALLY INADMISSIBLE, § 220.
- II. EXCEPTION AS TO WITNESS ON FORMER TRIAL, § 227.
- III. EXCEPTION AS TO MATTERS OF GENERAL INTEREST, § 232.
- IV. EXCEPTION AS TO PEDIGREE, BIRTH, MARRIAGE, AND DEATH, § 233.
- V. EXCEPTION AS TO SELF-DISSERVING DECLARATIONS OF DECEASED, § 248.
- VI. EXCEPTION AS TO BUSINESS ENTRIES OF DECEASED, § 251.
- VII. EXCEPTION AS TO GENERAL REPUTATION WHEN AT ISSUE, § 254.
- VIII. EXCEPTION AS TO REFRESHING MEMORY, § 261 *a*.
- IX. EXCEPTION AS TO RES GESTAE, § 262.
- X. EXCEPTION AS TO DECLARATIONS OF PARTY AS TO HEALTH, ETC., § 271.
- XI. EXCEPTION AS TO DYING DECLARATIONS, § 276.

CHAPTER VI.

JUDICIAL NOTICE, § 308.

CHAPTER VII.

INSPECTION, § 311.

CONTENTS.

CHAPTER VIII.

BURDEN OF PROOF, § 319.

CHAPTER IX.

WITNESSES.

- I. PROCURING ATTENDANCE, § 345.**
- II. OATH AND ITS INCIDENTS, § 353.**
- III. PRIVILEGE FROM ARREST, § 356.**
- IV. COMPETENCY AND CREDIBILITY, § 357.**
- V. NUMBER OF, § 386.**
- VI. HUSBAND AND WIFE, § 390.**
- VII. EXPERTS, § 403.**
- VIII. DEFENDANTS, § 427.**
- IX. ACCOMPLICES AND CO-DEFENDANTS, § 439.**
- X. EXAMINATION, § 446.**
- XI. IMPEACHING AND SUSTAINING, § 481.**
- XII. REEXAMINATION, § 493.**
- XIII. PRIVILEGED COMMUNICATIONS, § 496.**

CHAPTER X.

DOCUMENTS.

- I. GENERAL RULES, § 519.**
- II. STATUTES: LEGISLATIVE JOURNALS: EXECUTIVE DOCUMENTS, § 522.**
- III. NON-JUDICIAL REGISTRIES AND RECORDS, § 526.**
- IV. RECORDS AND REGISTRIES OF BIRTH, DEATH, AND MARRIAGE, § 530.**
- V. BOOKS OF HISTORY AND SCIENCE, MAPS AND CHARTS, § 537.**
- VI. GAZETTES AND NEWSPAPERS, § 540.**
- VII. PICTURES, PHOTOGRAPHS, AND DIAGRAMS, § 544.**
- VIII. PROOF OF DOCUMENTS, § 546.**
- IX. INSPECTION, § 564.**

CONTENTS.

CHAPTER XI.

JUDGMENTS AND JUDICIAL RECORDS.

- I. BINDING EFFECT OF JUDGMENTS, § 570.
- II. WHEN JUDGMENTS MAY BE IMPEACHED, § 594.
- III. ADMINISTRATION, PROBATE, AND INQUISITION, § 597.
- IV. JUDGMENTS IN REM, § 600.
- V. JUDGMENTS VIEWED EVIDENTIALLY, § 601.
- VI. RECORDS AS ADMISSIONS, § 613.

CHAPTER XII.

MODIFICATION OF DOCUMENTS BY PAROL, § 620.

CHAPTER XIII.

CONFESSIONS.

- I. GENERAL CHARACTERISTICS, § 623.
- II. JUDICIAL CONFESSIONS, § 638.
- III. WRITTEN CONFESSIONS, § 643.
- IV. EFFECT OF THREATS AND PROMISES, § 646.
- V. EFFECT OF SLEEP AND DRUNKENNESS, § 675.
- VI. HOW FAR ORIGINAL IMPROPER INFLUENCE IS SUPPOSED TO CONTINUE, § 677.
- VII. HOW FAR EXTRANEOUS FACTS DISCOVERED THROUGH AN INADMISSIBLE CONFESSION MAY BE PROVED, § 678.
- VIII. ADMISSIONS BY SILENCE AND CONDUCT, § 679.
- IX. WHAT CONFESSIONS CAN PROVE, § 684.
- X. HOW THEY ARE TO BE CONSTRUED, § 688.
- XI. BY WHOM ADMISSIBILITY IS DETERMINED, § 689.
- XII. SELF-SERVING DECLARATIONS, § 690.
- XIII. ADMISSIONS OF AGENTS, § 695.
- XIV. ADMISSIONS OF CO-CONSPIRATORS, § 698.

CHAPTER XIV.

PRESUMPTIONS.

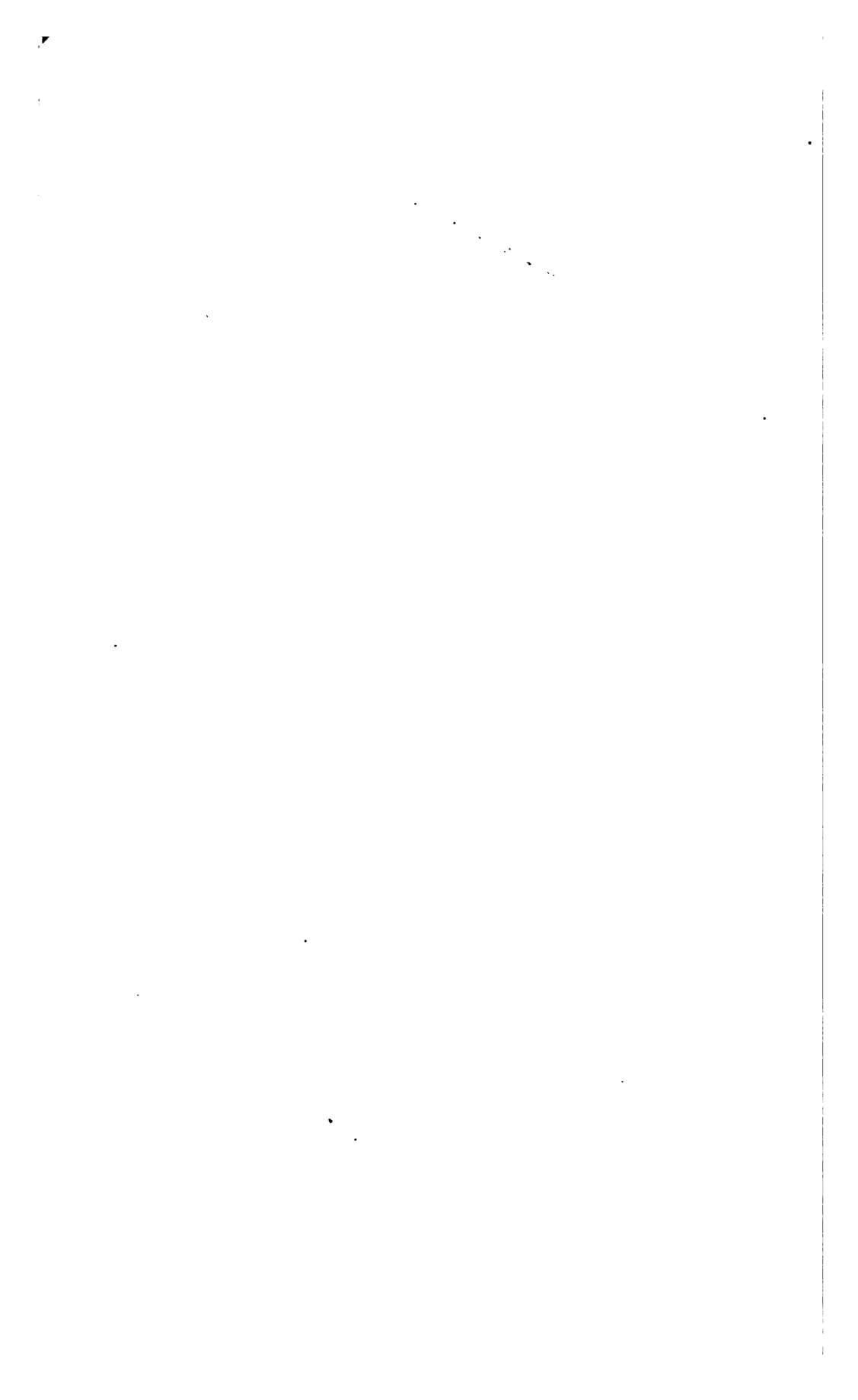
- I. GENERAL CONSIDERATIONS, § 707.
- II. PSYCHOLOGICAL PRESUMPTIONS, § 717.
- III. INFERENCES FROM MECHANISM OF CRIME, § 764.

CONTENTS.

- IV. INFERENCES FROM LIABILITY TO ATTACK, § 784.**
- V. INFERENCES IN MARITAL HOMICIDES, § 785.**
- VI. INFERENCES IN POISONING, § 787.**
- VII. INFERENCES FROM EXTRINSIC INDICATORY PROOF, § 795.**
- VIII. PHYSICAL PRESUMPTIONS, § 800.**
 - FROM INFANCY, § 800.**
 - OF IDENTITY, § 802.**
 - OF DEATH, ETC., § 809.**
- IX. PRESUMPTIONS OF UNIFORMITY AND CONTINUANCE, § 816.**
- X. PRESUMPTIONS OF REGULARITY, § 827.**
- XI. DISTINCTIVE INFERENCES IN FORGERY, § 844.**

CORRECTIONS.

- Page 3, 2d col. 8th line, *for* "McChung," *read* "Ah Chung."
- " 58, last line of note 5, *change* "Md." *to* "Ind."
- " 59, at end of 19th line of second column of note, *add* "chastity may be set up to a charge of adultery; Com. v. Gray, 129 Mass. 474."
- " 82, 2d col. of note, 2d line, *for* "60 Ala." *read* "68 Ala."
- " 99, 2d col. of note, 2d line, *for* "62 Ga. 584," *read* "62 Ga. 58."
- " 107, 2d col. of note, 3d line, *for* "64 Ga. 591," *read* "64 Ga. 61."
- " 111, note 4, line 6, *for* "120 a," *read* "191."
- " 131, in note 4, *after* "Barber v. State," *enter* "50 Md. 161."
- " 217, end of note 5, *add* "Infra, § 393."
- " 262, line 12, *for* "8 Heisk." *read* "3 Heisk."
- " 287, end of note 1, *add* "Halley v. Webster, 21 Me. 361."
- " 333, note 1, *after* "R. v. Brittleton," *add* "L. R. 12 Q. B. D. 266."
- " 338, note 8, *for* "53 Cal.," *read* "58 Cal."
- " 344, note 9, 1st line, *for* "100 Mass." *read* "99 Mass."
- " 461, end of note 2, *add*, "S. C., 43 L. T. (N. S.) 209."
- " 648, line 20, *for* "towns," *read* "terms."



CRIMINAL EVIDENCE.

CHAPTER I.

PRELIMINARY CONSIDERATIONS.

Proof of guilt must be beyond reasonable doubt, § 1.	Fallacy of distinction between "direct" and "circumstantial" evidence, § 10.
Proof is sufficient reason for a proposition, § 2.	All evidence is circumstantial, § 11.
Evidence is proof admitted on trial, § 3.	Causation always an inference, § 12.
Object of evidence is juridical conviction, § 4.	And so of identity of party charged, § 13.
Analogy the means of juridical proof, § 5.	And so of his free agency, § 14.
Conclusions to be reached by a cumulation of probabilities, § 6.	And so of his sanity, § 15.
No evidential fact can be demonstrated, § 7.	And so of his intent, § 16.
Even scientific conclusions cannot be demonstrated, § 8.	Witnesses dependent on character for credibility, § 17.
The highest expert testimony falls in this respect, § 9.	Perjury always possible, § 18.
	Prejudice is conditioned by circumstances, § 19.
	Reasoning in such cases to be logical, § 20.
	Juridical value of hypothesis, § 21.

§ 1. SUBJECT to exceptions to be hereafter specifically noticed, the tests for the admission of evidence are the same in criminal as in civil issues. As to the weight of evidence, however, when admitted, a fundamental distinction exists. In civil suits both parties are subjects of the State, with equal rights in the eye of the law. For the one or the other a verdict must be found, and this verdict must be on a preponderance of proof, however slight, no matter how long a jury may hesitate, no matter how evenly the scales may for a time hang. The parties, viewing them in the aggregate, enter the contest with advantages about equal, and are entitled to equal privileges. On the other hand, in a criminal prosecution, the State is arrayed against the subject; it enters the contest with a prior inculpatory finding of a grand jury in its hands; with unlimited command of

Proof of guilt must be beyond reasonable doubt.

means; with counsel usually of authority and capacity, who are regarded as public officers, and therefore as speaking semi-judicially; and with an attitude of tranquil majesty, often in striking contrast to that of a defendant engaged in a perturbed and distracting struggle for liberty if not for life. These inequalities of position the law strives to meet by the rule that there is to be no conviction when there is a reasonable doubt of guilt. What is reasonable doubt, in this sense, has been greatly discussed. Without attempting to examine in detail the mass of cases in which this discussion has been pursued, we may say, as a general rule, that in criminal trials there should be acquittals in all cases in which, if the issue were in a civil suit, the verdict on the one side or the other would rest on a bare preponderance of proof. The rule is not that there must be an acquittal in all cases of doubt, because, as we shall presently see, this would result in acquittals in all cases, since there is no cases without doubt. Doubt, of the character that requires an acquittal, must be far more serious than the doubt to which all human conclusions are subject. It must be a doubt so solemn and substantial as to produce in the jury grave uncertainty as to the verdict to be given.¹ "It is not mere possible doubt; because," says Chief Justice Shaw,² "everything relating to human affairs, and depending upon moral evidence, is open to some possible or

¹ *Infra*, § 330; *R. v. Tichborne*, Hiller *v. State*, 4 Blackf. 552; *Sumner v. State*, 5 Blackf. 579; *Line v. State*, 51 Ind. 172; *Jarrell v. State*, 58 Ind. 293; *Earl v. People*, 73 Ill. 329; *People v. Finley*, 38 Mich. 482; *People v. Niles*, 44 Mich. 606; *State v. Collins*, 20 Iowa, 85; *State v. Dineen*, 10 Minn. 407; *State v. Rover*, 13 Nev. 17; *State v. Hamilton*, 13 Nev. 386; *Shultz v. State*, 13 Tex. 401; *State v. Glass*, 5 Oreg. 73; *People v. Shuler*, 28 Cal. 493; *People v. Ah Sing*, 51 Cal. 372; *People v. Beck*, 58 Cal. 212; *People v. Hardisson*, 61 Cal. 378; *Jackson v. State*, 9 Tex. Ap. 114.

² *Bemis's Webster Case*, 190; *Com. v. Webster*, 5 Cush. 320; *Com. v. Goodwin*, 14 Gray, 55. See *R. v. White*, 4 F. & F. 383.

imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition, that they cannot say they feel an abiding conviction to a moral certainty of the charge."¹ Serious doubt on the part of a single juror is not, however, to be regarded as requiring from the jury as a body a verdict of acquittal. It is more proper, unless this doubt amount to a clear conviction of innocence, that the minority should yield to the majority than that the majority should yield to the minority. On the other hand, when the doubts of a strong minority are grave and persistent, it should be proof to a majority of the jury that the case as a whole is beset with such uncertainty as to make a conviction improper.

¹ See, also, 1 Phillips Ev. 156; 1 Starkie on Ev. 478; 3 Greenl. Ev. § 29; People v. Bennett, 49 N. Y. 144; Donnelly v. State, 2 Dutch. (N. J.) 601; French v. State, 12 Ind. 670; Castle v. State, 75 Ind. 146; State v. Ostrander, 18 Iowa, 435; Sloan v. State, 55 Iowa, 217; State v. Richart, 57 Iowa, 245; James v. State, 45 Miss. 572; Pilkinton v. State, 19 Tex. 214; Territory v. Owings, 3 Mont. 137; Territory v. McAndrews, id. 158; People v. Beck, 58 Cal. 212. See Miles v. U. S., 103 U. S. 304. In Wright v. State, 69 Ind. 163, it was said that the limitation of a reasonable doubt to something suggested by or arising out of the evidence was too narrow. See Wade v. State, 69 Ind. 535; State v. Willingham, 33 La. An. 537. See remarks of Gray, C. J., Com. v. Costley, 118 Mass. 21.

"A reasonable doubt must be an honest and conscientious difficulty in believing; one not merely subtle or ingenious, it must arise out of the evidence, and not be fanciful, or be conjured up to escape consequences; it must strike the mind with such force as to compel it to pause in yielding belief." Agnew, C. J., Meyer v. Com., 83 Penn. St. 131.

That an omission to charge as to

reasonable doubt is not error unless such a charge is required by the particular case, see Colee v. State, 75 Ind. 511; People v. Marble, 38 Mich. 117; Hutto v. State, 7 Tex. Ap. 44; Frye v. State, id. 94. And see, generally, Garfield v. State, 74 Ind. 60; People v. McChung, 54 Cal. 398; People v. Anthony, 56 Cal. 397; People v. Kram, 56 Cal. 405. That the attempt to define "reasonable doubt" should be discouraged, see McAlpine v. State, 47 Ala. 78; Tuberville v. State, 40 Ala. 715.

As to burden of proof see *infra*, §§ 319 *et seq.* As to *corpus delicti* see *infra*, §§ 324 *et seq.* As to *alibi*, see § 333; provocation, see § 334; necessity, see § 335; insanity, see § 336. As will be seen (*infra*, §§ 333 *et seq.*), the rule as to reasonable doubt applies to the whole of the prosecution's case. Thus, where it is doubtful which of two persons, between whom there was no concert, shot the deceased, the doubt must operate to work an acquittal. People v. Woody, 45 Cal. 289.

The remarks on this topic in the charge of Cockburn, C. J., in the Tichborne Case (Trial, etc., ii. 816), are peculiarly worthy of consideration.

§ 2. Proof is the sufficient reason for assenting to a proposition as true. It is a *reason*, because our whole system of jurisprudence rests on the assumption that the person to whom, as a juror or judge, is committed the determination of a litigated issue, is governed by his reasoning faculties in coming to the decision he is to give. It in no way derogates from this position that in many cases we are led, and led correctly, to conclusions by the authority of others; since there is no higher exercise of reason than that of deciding, in matters in which we have not ourselves the materials or aptitude for forming a judgment, to what sources we shall resort for advice, and then, when we have made this decision to the best of our powers, adopting and acting on the advice given. And the reason must, at the same time, be *sufficient*; it must not be a whim, known by us to be such. We must feel it to be strong enough to justify us in the conclusion we adopt. And in criminal trials this conclusion, as we have seen, must be beyond reasonable doubt. A juror, to state the proposition before us in the concrete, is bound to take into consideration, in making up his judgment, only two classes of facts: first, those that are put in evidence in the case; and, secondly, those of common notoriety. In arguing from these facts he must act according to his own lights, and must not agree to a verdict of conviction unless he conscientiously holds that guilt is proved beyond reasonable doubt. The conscience under which he acts must be his own conscience; the reason his own reason. But among the arguments he is bound to consider are the inferences drawn from these facts by those persons to whom the law requires him to listen on the trial of the cause. These persons are counsel engaged in arguing the case; the judge, to whom belongs the office of adjudicating the law, and, in most jurisdictions, of summing up the facts; and his fellow-jurors, with whom it is his duty to deliberate. Keeping this distinction in mind, two important sanctions are preserved. The first is, that no case is to be decided on facts which are not either of common notoriety, or are proved in open court according to the rules of law. The second is that while each juror finds his verdict according to his own lights, and in obedience to his own conscience, he is aided in coming to his conclusion, not merely by professional and judicial advice, but by consultations

with his associates. The verdict may be a compromise. But it is not a compromise adopted unreasonably, or under coercion. It is a compromise which is reasonable and conscientious, so far as concerns each party assenting to it, because authority, in the sense in which it is above defined, is here, as well as in multitudinous analogous cases, one of the legitimate arguments by which a conclusion is reasonably and conscientiously reached.

§ 3. "Proof," in the sense in which the term is here used, has a wider meaning than "evidence." Evidence includes the reproduction, before the determining tribunal, of facts either notorious or verified in open court. Proof, in addition, includes presumptions either of law or fact, and citations of law,¹ and comprehends all the grounds on which a conclusion in a litigated case may be reached. Evidence, when not matter of notoriety, recognized as such by the court, is adduced only by the parties, through witnesses, documents, or inspection. Proof may be adduced by counsel in argument, or by the judge in summing up a case.²

Evidence
is proof
admitted
on trial.

§ 4. For the purposes of public justice, it is essential to maintain with rigor the distinction between juridical (*veritas juridica, forensis*) and moral truth. I may have, for instance, as a juror, a moral conviction of the guilt of a defendant on trial. He may have confessed his guilt to me; or I may have learned from persons, not called as witnesses, facts inconsistent with his innocence. This, however, is not to be permitted to have the slightest effect on my juridical reasoning; for, to punish even a guilty man without juridical certainty of his guilt would be recognizing a principle fatal to public justice. The defendant is a bad man, it may be argued, and it is better for the community that he should be put in prison; or he belongs to a political or religious party which it is important to suppress; or we have private information convincing us of his guilt; or he has acted so fraudulently or oppressively in cases not in proof that it may be inferred that he acted fraudulently or oppressively in those under

Object of
evidence is
juridical
conviction.

¹ See *Harvey v. Smith*, 17 Ind. 272. bring, the mind to a just conviction of

² Mr. Livingston (*Works*, ed. of the truth or falsehood of the fact as-
1873, i. 419) defines evidence to be serted or denied."

"that which brings, or contributes to

investigation ; and hence he should be convicted. If such considerations are to be received to affect the judgment of court or jury, there would be no case tried in which some prejudice, popular or personal, on the part of the adjudicating tribunal, would not be made the basis of a verdict. If so, not only would innocent men be convicted in consequence of prejudices extra-judicially invoked against them, but guilty men would escape in consequence of prejudices extra-judicially invoked in their favor. The only safe course, therefore, is to found the verdict exclusively on evidence duly received, and on inferences logically to be drawn from such evidence. The issue in this way is made dependent upon the best proof that can be obtained ; and the defendant is able to meet the evidence adduced against him, to overcome it, if he can, by counter testimony, and to have notice of, and refute if he can, the inferences drawn from the case of the prosecution. The distinction before us is illustrated in criminal prosecutions by the exclusion from the jury-box of all persons who have formed such an opinion on the case as will interfere with their coming to an unbiased conclusion on the proofs admitted on the trial, and by the direction of the court to the jurors to be influenced by no considerations not sustained by such proofs. And a still more complete exhibition of the principle is to be found in the great exclusionary tests adopted in this respect by all jurisprudences. No evidence is to be admitted, in a criminal issue, which does not bear on the question whether the defendant did a particular act specifically charged against him. And no evidence is to be received which is a second-hand rendering of testimony not produced, though producible, by which a higher degree of certainty could be secured.

§ 5. Jurisprudence, as we are reminded by Mr. Bentham, is the science of conflicting analogies ; the object of proof is to show what analogies are, and what are not, applicable. “ The inference of analogy is an inference from particulars or individuals to a coördinate particular or individual. Its scheme is the following :—

Analogy
the means
of juridical
proof.

M. is P.
S. is similar to M.

S. is P.

Or more definitely, since it also gives that in which the similarity consists, the following :—

M. is P.

M. is A.

S. is A.

S. is P.”¹

In other words, we say :—

“M. who fled from trial, was guilty ;

S. is similar to M. in fleeing from trial :

Therefore S. is guilty.”

But to test the force of such an argument we must first inquire how far we can, by induction, reach a general proposition which can be a sound basis for a conclusion affecting S. with the same taint as is attached to M. If, for instance, our induction is sufficiently extensive to enable us to say, “All persons who flee from justice are guilty,” we then can conclude that, because S. flees from justice, S. is guilty. But if the general proposition which we reach is nothing more than this, “The chances are one to three that a person fleeing from justice is guilty ;” then all that we can conclude as to S., who flees from justice, is that it is one to three that S. is guilty.

§ 6. Hence it is that when we reach a conclusion as to the guilt or innocence of a person on trial it is by the cumulation of probabilities, of which one alone is inadequate (unless Conclusion reached by a cumulation of probabilities. in very exceptional cases) to sustain a conclusion. Thus, to take a case of larceny for illustration, it is one to five that because A. was seen prowling about the premises a short time before, he is guilty ; it is one to five that because at the time he had a sudden accession of unexplained wealth, he is guilty ; it is one to five that because he displayed peculiar tremor when arrested, he is guilty ; it is one to two that because he was unable to explain his possession of some parts of the stolen property, he is guilty.

It is true that we may suppose a case in which there is what is

¹ Ueberweg's *System der Logik*. *Logik*, ii. 122, ff. ; De Morgan's *Formal Logic*, or *Calculus of Inference, Necessary and Probable*, pp. 170–210 ; and Lindsay's translation in the above rendering. Mr. Lindsay refers to Mill's *Boole's Laws of Thought*, pp. 243–399.

called "direct" testimony to the fact of guilt; but when we examine this testimony, as will be presently done, we find that it derives its weight from circumstances.¹

§ 7. No evidential fact, therefore, we may broadly state, can be demonstrated.² The most that we can reach is a high probability that the fact in question is true. "I conceive that it is impossible even to expound the principles and method of induction, as applied to natural phenomena, in a sound manner, without resting them upon the theory of probability. Perfect knowledge alone can give certainty, which is clearly beyond our capacities. We have, therefore, to content ourselves with partial knowledge,—knowledge mingled with ignorance producing doubt."³ "Inferences which we draw concerning natural objects are never certain except in a hypothetical point of view. . . . Even the best established laws of physical science do not exclude false inference."⁴ "Like remarks may be made, concerning all other inductive inferences."⁵ "No matter of fact

No evidential fact can be demonstrated.

¹ See *Com. v. Costley*, 118 Mass. 1.

² Jevons's *Principles of Science*, i. 239.

³ *Ibid.* i. p. 224.

⁴ *Ibid.* p. 271 *et seq.*

⁵ *Ibid.* p. 274.

"Probable evidence is essentially distinguished from demonstrative by this, that it admits of degrees, and of all variety of them, from the highest moral certainty to the very lowest presumption. We cannot, indeed, say a thing is probably true upon one very slight presumption for it; because, as there may be probabilities on both sides of a question, there may be some against it; and though there be not, yet a slight presumption does not beget that degree of conviction which is implied in saying a thing is probably true. But that the slightest possible presumption is of the nature of a probability appears from hence; that such low presumption, often repeated, will amount even to moral certainty. Thus a man's having observed the ebb and

flow of the tide to-day affords some sort of presumption, though the lowest imaginable, that it may happen again to-morrow; but the observation of this event for so many days, and months, and ages together, as it has been observed by mankind, gives us a full assurance that it will." Butler's *Analogy*, Int., adopted by Gray, C. J., 118 Mass. 21. Compare, also, Balfour's *Defence of Historic Doubt*, London, 1879.

"The proposition of Bishop Butler, that probability is the guide of life, is not one invented for the purposes of his argument, nor held by believers alone. Voltaire has used nearly the same words:—

"Presque toute la vie humaine roule sur les probabilités. Tout ce qui n'est pas démontré aux yeux, ou reconnu pour vrai par les parties évidemment intéressées à le nier, n'est tout au plus quo probable. L'incertitude étant presque toujours le partage de l'homme, vous vous détermineriez très-rare-

that is to say, no actual phenomenon of external nature, can, in any possible state of human knowledge, be a matter of demonstration."¹ There is no statement, however simple, as will presently be seen more fully, that does not contain at least four elements of incertitude. (1.) Language in itself more or less ambiguous. (2.) Doubt as to the identity of the subject; *e. g.*, W. testifies that A. did a particular thing, and the question is whether A. was the person whom W. really saw.² (3.) Doubt as to the copula; *i. e.*, it can never be perfectly demonstrated whether what A. did was a real or only an apparent act. (4.) Doubt as to the object; *i. e.*, whether the object operated upon was or was not B.

§ 8. Undoubtedly scientific conclusions, so far as they deal with abstractions, can be demonstrated. It is demonstrable, for instance, that a straight line is the shortest distance between two points; but no particular road between two places (*e. g.*, New York and Boston) can be demonstrated to be perfectly straight.³ If we assume a perfectly un-

Even scientific conclusions cannot be demonstrated.

ment, si vous attendiez une démonstration. Cependant il faut prendre un parti; et il ne faut pas prendre au hasard. Il est donc nécessaire à notre nature faible, avengle, toujours sujette à l'erreur, d'étudier les probabilités avec autant de soin, que nous apprenons l'arithmétique, et la géométrie.'

"Voltaire wrote this passage in an Essay not on religion, but on judicial inquiries (*Essai sur les Probabilités en fait de Justice*), and the statement of principle which it propounds is perhaps on that account even more valuable.

"If we consider subjectively the reasons upon which our judgments rest, and the motives of our practical intentions, it may in strictness be said that absolutely in no case have we more than probable evidence to proceed upon; since there is always room for the entrance of error in that last operation of the percipient faculties of men, by which the objective becomes subjective; an operation antecedent, of

necessity, not only to action, or decision upon acting, but the stage at which the perception becomes what is sometimes called a 'state of consciousness.' " Gladstone, *Gleanings of Past Years*, vol. vii. p. 154, London, 1879.

¹ Mansel on the Limits of Demonstrative Science, Letters, Lectures, etc., 1873, p. 98; and see *Coleman v. State*, 59 Ala. 52.

² See as illustrating the fallibility of human testimony in this relation, *Ram on Facts*, 3d Am. ed., 291.

³ "In measurement we can never attain perfect coincidence. Two measurements of the same base line in a survey may show a difference of some inches, and there may be no means of knowing which is the better result. A third measurement would probably agree with neither. To select any one of the measurements would imply that we knew it to be the most nearly correct one, which we do not. In this state of ignorance, the only guide is the theory of probability, which proves

resisting medium, and a perfectly constructed pistol, we can determine beforehand what will be the course of a ball sent by such a pistol through such a medium; but we cannot beforehand determine absolutely the course of a pistol ball which passes through the human frame.¹ It is a demonstrable conclusion that two bodies equal to a third are equal to each other, and on this our whole system of measurement and weight rests. The proposition, however, as we now give it, is an abstraction, touching in no respect our practical life. When we come to the concrete question, whether, for instance, two yards of cloth, separately measured by the same standard, have the same length, or whether two pounds of coffee weighed separately in the same scales have the same weight, then a conclusion can be only proximately reached.

§ 9. We may turn for further illustration to physical science in her most solemn attitude, when she stands with uplifted hand in the witness-box, and swears, by the most sacred sanctions that the law can propose, to tell, as to the particular matters propounded to her, the truth, the whole truth, and nothing but the truth. The cases in which she is thus required to speak are not rare or exceptional. There is no topic, humble or sublime, within the whole range of physical investigation, as to which she is not called upon to testify. Wherever there is a specialty in which there is an expert, there the expert may be examined as to the specialty. Hence we have had experts examined as to the measurements by astronomers of the stars, and as to the measurements by tailors of coats. We have had experts examined as to the habits of fish seeking to ascend in the spring on Maine rivers, and as to the habits of cattle as they sweep in droves over the Texas plains. We have had them examined as to whether sewerage produces certain infusoria, and whether these infusoria produce pestilence. There is not a poison as to which their testimony is not invoked; there is not a wound whose effects they may

that in the long run the mean of different quantities will come nearly to the truth. In all other scientific operations whatsoever, perfect knowledge is impossible, and when we have exhausted all our instrumental means in the attainment of truth, there is a

margin of error which can only be safely treated by the principles of probability." Jevons's *Principles of Science*, i. 230-31.

¹ See *Saunders v. State*, 37 Tex. 310; *infra*, § 771; see 3 Whart. & St. Med. Jur. §§ 666, 807, 809.

not be called to detail. What the telescope can assure us of; what the microscope can assure us of; what we can be assured of by chemical tests; what we can be assured of by careful induction produced by long and accurate observation—as to all these lines of information experts are summoned to give their testimony under oath. They are, in the main, highly cultivated men, sensitively conscientious. They are usually selected from among the front ranks of their class. They have ample time given to them for their investigations. They are liberally paid for their services, so as to enable them to take any trouble requisite for their special inquiries. Yet, notwithstanding this, there is scarcely a case in which expert testimony is summoned where we do not find, after two or three experts have testified on one side, about the same number ready to testify on the other side. Not only do they give us their evidence, however positive may be their assertions, probable proof as distinguished from absolute demonstration, but, when we weigh their testimony, we find that we have to add to the doubt incident to all probable proof a new set of doubts as to the authority of the several experts.¹

¹ See *infra*, § 420.

Human disease, to take a prominent illustration, is an object to which physical science has been directed for centuries, and is the topic in which, of all that concern it, society feels the deepest interest. On the education of those devoting themselves to this study the greatest care and expense have been lavished; they have been protected by legislation from the intrusion of impostors or of persons imperfectly trained; they constitute a profession not only highly honorable and generously remunerated, but embracing some of the most intelligent, cultivated, benevolent, and high-minded men who adorn society. Yet not only does medical science in our generation reject the remedies which in a previous generation it regarded as indispensable, but in every litigated issue of medicine or surgery eminent specialists are found to testify on either side. Is

it material to determine, as in Fisk's case, whether death was caused by the assassin's pistol or by the maltreatment of the attending surgeon? Two or three specialists are called by the defence to swear that it was maltreatment that caused the death, and then about as many by the prosecution, to swear that the death flowed in immediate sequence from the pistol wound. Is it essential to know whether certain symptoms in a sick person were produced by a particular poison? Then, as in Palmer's case, we have the same inevitable conflict. That such should be the case; that physical science should be elastic and progressive; that it should move onward, as do all other sciences, with fluctuating step; that its advance should be attended with collision in its ranks; that it should be incapable of demonstrating any fact which touches moral agency so as to make that fact appear absolutely true

§ 10. Much embarrassment has arisen from the position advanced by two eminent text writers,¹ that, to justify the inference of legal guilt from *circumstantial* evidence, the existence of the inculpatory facts must be absolutely incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable

Fallacy of distinction between "direct" and "circumstantial" evidence.

—in this it answers to the conditions of all sciences affecting humanity, which, the moment they penetrate the atmosphere that encompasses moral action, are enveloped in the hazes of that atmosphere, and move tremulously, and occasionally with mistaken step. They can, therefore, only reach results which, however probable, are open to doubt and contradiction.

The microscope, also, is supposed to give exact results, and the discoveries of the microscope, as well as of the telescope, are frequently spoken as of demonstrations. Yet what more important question can the microscope approach than that which relates to the distinguishing qualities of human blood, and what more important issue can there be than that which is presented when the life of a human being on trial is made to depend upon the testimony of a microscopist! But, when entering this critical region, the microscopist, no matter how exquisite his instruments, and no matter how ostensibly exhaustive and decisive his tests, finds that he is beset with the infirmities affecting other specialists when deposing as to the application of theory to human life. His sight becomes uncertain, and his utterance indistinct. Sometimes, indeed, we have displayed to us experts boldly swearing on the one side that certain dry blood is human, and experts on the other side swearing with equal boldness

that it is not human. But, as a general rule, the accomplished and conscientious expert is obliged to admit that, no matter how accurate may be his tests speculatively, they are not such as to produce that certainty which would make them a safe basis for conviction. See *infra*, § 777.

A suit was brought, in 1868, in the United States Circuit Court, in Boston, by a lady of New York, to recover her deceased aunt's estate, amounting to two millions of dollars. The plaintiff's case rested on two writings, by which it was alleged the aunt agreed, in consideration of a will concurrently executed by the niece in favor of the aunt, to leave her entire estate to the niece, and to do nothing to revoke a prior will to that effect in the niece's hands. The defendants set up a subsequent will by the aunt, by which half of the aunt's property was given to the niece, the remainder being distributed among the testator's relatives and friends; and it was maintained by the defendants that the alleged writings on which the plaintiff relied, as binding the testator to make no subsequent will, were forgeries. Upon this issue a vast amount of evidence was taken. The defendants' case was that the signatures to the contested documents not only bore on their face, in the shape of the letters, the marks of forgery, but that they were evidently produced by being traced over the signature to the

¹ Wills on Circum. Ev. p. 149; Starkie on Ev. p. 838.

hypothesis than that of his guilt. Judges, on hearing these expressions, have been apt, in the hurry of a trial, to accept and

prior undisputed will in the niece's possession. Three distinct lines of expert testimony were invoked. The first was as to whether the contested signatures, compared with other signatures of the testator, were on their face forgeries; and whether (apart from the question of tracing) they bore the marks of the constraint and hesitancy which distinguish forged writings. The testimony being before an examiner, who had not power to exclude on the ground of cumulativeness, the parties ransacked the land for witnesses whose authority, in this respect, would be likely to have weight. Photographers and other artists were employed to reproduce, in various exaggerated scales, the signatures, and then testimony was taken by each side to prove and to disprove the allegation that the photographers employed on the other side were not reliable. Presidents of commercial colleges and teachers of penmanship gave weeks of uninterrupted study to the contested writings, and the standards with which they were to be compared. Bank presidents and bank tellers were examined and cross-examined for the same purpose. Engravers, who had spent years in poring over lines of writings and of drawings, and whose eyes were trained to such exquisite delicacy of perception, that the faintest aberrations could be discovered by them, were also summoned to give their aid. The result of the combination of testimony was, that about as many experts were produced to swear that the contested signatures were forged, as there were to swear that they were genuine.

But this was followed by a still more extraordinary conflict. If there is anything demonstrable we should hold

that whether one line coincides with another could be demonstrated. In the case before us a million of dollars hung upon the question whether the words of the testator's name, in the contested writings, exactly coincided with the same name in the uncontested will held by the plaintiff. Upon this question an eminent professor of Harvard College, deservedly one of the most authoritative of living mathematicians, was called, and testified that the chance of the genuine production of such a coincidence as that of the three signatures was that of one to two thousand six hundred and sixty-six millions of millions of millions of times (2,666,000,000,000,000,000,000). He naturally added that "this number far transcends human experience. So vast an improbability is practically an impossibility. Such evanescent shadows of probability cannot belong to actual life. . . . Under a solemn sense of the responsibility involved in the assertion, I declare that the coincidence which has here occurred must have had its origin in an intention to produce it." He added that there were other conditions which multiplied the improbability of undesigned coincidence by at least two hundred millions. His testimony was sustained by that of another distinguished mathematical professor, and by that of microscopists and experts in penmanship, who swore that the two signatures alleged to be spurious coincided exactly with the standard from which it was assumed they were copied. On the other side, to meet this testimony, the plaintiff produced a series of signatures of John Quincy Adams, of George C. Wilde, of C. A. Walker, and of the examining magistrate, F. W. Palfrey,

apply them; and hence have sprung up a series of dicta to the effect that circumstantial evidence is to be viewed with distrust,

in which, even when greatly enlarged by photographs, there were many cases of coincidence sworn by experts to be far more exact than those to which had been assigned so high a standard of improbability. And as to the particular signatures immediately in dispute, there was a mass of expert testimony to the effect that, so far from coinciding, no single letter in them exactly covered the alleged standard. Yet this is a question on which, beyond all others, we might suppose it possible to obtain demonstration.

The remaining conflict is, if possible, even still more extraordinary. Were the marks of tracing discoverable under the ink of the disputed signatures? If such tracing is apparent to one microscopist, we would suppose that it would be apparent to other microscopists, using instruments of similar grade, and with the same power of eyesight. Yet we have Dr. Charles T. Jackson, a specialist in this line of extraordinary skill and reputation, backed by other experts of distinction, testifying positively and unreservedly that under the ink of the disputed signatures the microscope brought to light marks of tracing; while Professor Agassiz and Professor Oliver Wendell Holmes testified that the microscope brought to light no such marks. It would be impossible to select experts more eminent and more unimpeachable. Yet on a question which we should suppose to be peculiarly susceptible of demonstration—whether a particular microscope can detect certain marks—these experts, in the most unqualified manner, testify to contradictory opposites. Of this contradiction there is but one explanation. When even the most exact of physical sciences

undertakes to enter into practical life, it is beset with the same incertitudes that beset whatever appeals to our moral judgment. It can demonstrate only things that do not affect our action. As to things that affect our action, or concern litigated issues, the best it can do is to establish a preponderance of proof.

For an interesting review of this important case, see 4 Am. Law Jour. 625; and for the ruling of the Circuit Court of the United States, by which the case was dismissed on technical grounds, see *Robinson v. Mandell*, 3 Cliff. 169. Compare article in *Princeton Review* for July, 1878, and rulings in *Belt v. Lawes*, as cited *infra*, § 420.

“It is very curious how often the most acute and powerful intellects have gone astray in the calculation of probabilities. Seldom was Pascal mistaken, yet he inaugurated the science with a mistaken solution. Montucla, *Histoire des Mathematiques*, vol. iii. p. 386. Leibnitz fell into the extraordinary blunder of thinking that the number twelve was as probable a result in the throwing of two dice as the number eleven. Leibnitz Opera, Dutens’s edition, vol. vi. part i. p. 217; Todhunter’s *History of the Theory of Probability*, p. 48. In not a few cases the false solution first obtained seems more plausible to the present day than the correct one since demonstrated. James Bernoulli candidly records two false solutions of a problem which he at first thought self-evident (Todhunter, pp. 67–9); and he adds an express warning against the risk of error, especially when we attempt to reason on this subject without a rigid adherence to the methodical rules and symbols. *Ibid.* p. 63. Montmort was not free

and that, to justify a conviction on circumstantial evidence, it is necessary to exclude every possible hypothesis of innocence.¹ It

from similar mistakes (*ibid.* p. 100); and as to D'Alembert, great though his reputation was, and perhaps is, he constantly fell into blunders which must diminish the weight of his opinions. *Ibid.* pp. 258, 259, 286. He could not perceive, for instance, that the probabilities would be the same when coins are thrown successively as when thrown simultaneously. Todhunter, p. 279." Jevons's *Principles of Science*, i. 244. Compare to the same effect an article by Dr. Peabody in the *Princeton Review* for March, 1880.

"Absolute language, by which is meant language which absolutely expresses all that is to be expressed, neither more nor less, for every mind, is possible in mathematics only; and mathematics move within a narrow circle of ideas." Lieber's *Hermeneutics* (3d ed.), 15. To this Mr. Hammond adds a learned note showing that even the exception of mathematical and algebraic signs is illusory. He illustrates this by *Smith v. Wilson*, 3 B. & Ad. 728, where a "thousand" rabbits were construed to mean twelve hundred when used in a lease, and *Slater v. Cave*, 12 Oh. St. 80, where "twenty-one" years of age was interpreted to mean eighteen. As to explaining the meaning of "double" shares, see *Millard v. Bailey*, L. R. 1 Eq. 382. Of the inexactitude of measurements see cases in *Wh. on Ev.* § 947. "What words are more plain than 'a thousand,' 'a week,' 'a day.' Yet the cases are familiar in which 'a thousand' has been held to mean twelve hundred; 'a week' only a week during the theatrical season; 'a day' only a working day." Coleridge, J., *Browne v. Byrne*, 3 E. & B. 703. "Square yard," also, may

be explained by parol proof. *Walls v. Bailey*, 49 N. Y. 467, and other cases cited *Wh. on Ev.* § 961 *a*.

¹ See *Algheri v. State*, 25 Miss. 584; *Houser v. State*, 58 Ga. 78; *Otmer v. People*, 76 Ill. 149; *Mickle v. State*, 27 Ala. 20. In Georgia it is provided by the Constitution that a conviction on "circumstantial" evidence may be commuted. *Merritt v. State*, 52 Ga. 82; *Regular v. State*, 58 Ga. 264.

Judge Story, while admitting the distinction, argues that it is merely one of logic. *U. S. v. Gibert*, 2 Sumner, 27; see *Moore v. State*, 2 Oh. St. 500; *State v. Norwood*, 74 N. C. 247.

To the same effect is the language of Chief Justice Whitman, of Maine. "Circumstantial evidence," he said, "is often stronger and more satisfactory than direct, because it is not liable to delusion or fraud. It was not strange," he said, "that in the vast number of persons who had suffered the penalties of the law, some should have suffered wrongfully." *State v. Thorne*, 6 Law Rep. 54.

"Circumstantial evidence," said Gibson, C. J., in a capital case, in his charge to the jury, "is in the *abstract* nearly, though perhaps not altogether, as strong as positive evidence; in the concrete it may be infinitely stronger. A fact positively sworn to by a single eye-witness of blemished character is not so satisfactorily proved, as a fact which is the necessary consequence of a chain of other facts sworn to by many witnesses of doubtful credibility. Indeed, I scarcely know whether there is any such thing as evidence purely positive. You see a man discharge a gun at another; you see the flash, you hear the report, you see the person fall a lifeless corpse, and you *infer* from

may relieve some difficulty, in meeting such points as these, to keep in mind, in addition to the remarks made in the sections immediately preceding, the following propositions:—

all these circumstances that there was a ball discharged from the gun, which entered his body and caused his death, because such is the usual and natural cause of such an effect. But you did not see the ball leave the gun, pass through the air, and enter the body of the slain; and your testimony to the fact of killing is thereby only inferential—in other words, circumstantial. It is *possible* that no ball was in the gun, and we *infer* that there was, only because we cannot account for the death on any other supposition. In cases of death from the concussion of the brain, strong doubts have been raised by physicians, founded on appearances verified by post-mortem examinations, whether an accommodating apoplexy had not stepped in at the nick of time to prevent the prisoner from killing him, after the skull had been broken into pieces. I remember to have heard it doubted in this court-room, whether the death of a man, whose brains oozed through a hole in his skull, was caused by the wound or a misapplication of the dressing." (A remarkable illustration of this will be found in *Mitchum v. State*, 11 Ga. 615.) "To some extent, however, the proof of the cause which produced the death rested on circumstantial evidence.

"The only difference between positive and circumstantial evidence is, that the former is more immediate and has fewer links in the chain of connection between the premises and conclusion; but there may be perjury in both. A man may as well swear falsely to an absolute knowledge of a fact, as to a number of facts from which, if true, the fact on which the question of innocence or guilt depends must inevitably follow. No human testimony is superior to doubt. The machinery of criminal justice, like every other production of man, is necessarily imperfect; but you are not therefore to stop its wheels. Because men have been scalded to death or torn to pieces by the bursting of boilers, or mangled by wheels on a railroad, you are not to lay aside the steam-engine. Innocent men have doubtless been convicted and executed on circumstantial evidence; but innocent men have sometimes been convicted and executed on what is called positive proof. What then? Such convictions are accidents which must be encountered; and the innocent victims of them have perished for the common good as much as soldiers who have perished in battle. All evidence is more or less circumstantial, the difference being only in the degree; and it is sufficient for the purpose when it excludes disbelief—that is, actual and not technical disbelief; for he who is to pass on the question is not at liberty to disbelieve as a juror while he believes as a man." (See comments on this expression by Dillon, J., 20 Iowa, 90.) "It is enough that his conscience is clear. Certain cases of circumstantial proofs to be found in the books, in which innocent persons were convicted, have been pressed on your attention. These, however, are few in number, and they occurred in a period of some hundreds of years, in a country whose criminal code made a great variety of offences capital. The wonder is that there have not been more. They are constantly resorted to in capital trials to frighten juries into a belief that there should be no conviction on merely circumstantial evi-

§ 11. There is no evidence admissible in a court of justice that does not depend more or less on circumstances for credit.¹ Let us,

denice. But the law exacts a conviction wherever there is *legal* evidence to show the prisoner's guilt beyond a reasonable doubt, and circumstantial evidence is legal evidence. If the evidence in this case convinces you that the prisoner killed her child, although there has been no eye-witness of the fact, you are bound to find her guilty." *Com. v. Harman*, 4 Barr, 269. See, also, *M'Cann v. State*, 13 Sm. & M. 471; and the judicious remarks of Shaw, C. J., in *Com. v. Webster*, 5 Cush. 335; Bemis's *Webster Case*, 462-4. See, as to rule laid down in *Texas, Hunt v. State*, 7 Tex. App. 212.

As agreeing in the main with the text may be cited the following criticism of Sir J. Stephen, *Crim. Law*, p. 266: "The distinction which writers on circumstantial evidence have in their minds is, in fact, a double distinction. In some crimes the whole transaction is continuous, in others it is discontinuous; and of course where it is discontinuous, the different items of evidence are proportionably numerous, and require a greater degree of inference and combination, than where all the facts lie together in one group. The indiscriminate application of the phrase 'circumstantial evidence' to cases of discontinuous crimes, and to the cases in which the evidence of the transaction, continuous or not, is incomplete, conceals the distinction between continuous and discontinuous crimes, which is not without importance, and slurs over the fact that juries may have to act on incomplete evidence."

Indications, under which head all incidental facts may be grouped, have been variously classified. By some of the older Roman law authorities they

are spoken of as either causal or co-existent. (Glaser, *Beiträge zur Lehre vom Beweis in Strafprozess*, Leipzig, 1883.) In another aspect, to which we shall recur when we treat distinctively of presumptions, they may be viewed as physical or psychical. The more prevalent divisions among Roman lawyers is into antecedent (*judicia antecedentia*), concurrent (*co-existentia, concurrentia*), and subsequent (*subsequentia*). To this, however, Glaser objects on the ground that the causal relation, viewed in this connection, has two distinct sides, the "indication" being in one sense the cause of the "event," the "event," in another sense, the cause of the indication.

¹ See *Com. v. Malone*, 114 Mass. 295. Compare, on the topic in the text, the introductory sections discussing presumptions in the closing chapter of this volume, §§ 707 *et seq.*

"In the first place, as has been already explained, all circumstantial evidence must be proved by direct evidence. Hence, whatever infirmities may be incidental to direct evidence must in the nature of things be incidental to circumstantial evidence also. In the next place it is easy to show that these infirmities are so great that it is nearly impossible to put a case in which direct evidence can be acted upon in a satisfactory way, unless it is supported by circumstantial evidence to a greater or less extent. The inference from these two propositions is that the supposed opposition between direct and circumstantial evidence is a mere superficial error, and that the phrases ought to be dismissed from both legal and popular language.

"That circumstantial evidence has to be proved by direct evidence is self-

All evidence is circumstantial.

as the simplest illustration, suppose that an eye-witness testifies that he saw A. kill B. by a gunshot. Now, in order to sustain a conviction on such evidence, the following conditions must be established:—

evident (when the clumsy phrase is understood), and requires no illustration; though we may just observe that a policeman who proves that as he was taking the prisoner to the station the prisoner said to him, "I was drunk when I did it" (which, being direct evidence of an admission, is circumstantial evidence), is quite as likely to be discredited as if his evidence was direct, and for the very same reasons.

"The weakness of direct evidence if wholly unsupported by circumstantial evidence is less obvious, and may therefore justify a little more illustration. Suppose a respectable man were to tell this story: 'I saw A., the prisoner, cross the bridge over the Severn, at Gloucester. The river was in flood, and was rushing furiously down towards the sea. There was no one else on the bridge. A. had with him a little girl apparently about four or five years old. When he got to the middle of the bridge he took her up in his arms and threw her over into the river, where she instantly disappeared. A. being a much younger and more powerful man than I, I was afraid to arrest him, but I followed him to the next police station and gave him at once into custody on the charge of murder.' Suppose further, that no girl was missed, no body found, that there was no single circumstance to corroborate B.'s evidence. Here is a case of direct evidence unsupported by any circumstance (unless the fact that B. gave A. into custody is considered as one), but also uncontradicted by any circumstance. The alleged facts would account for the absence of the

body. The nature of the crime might account for the difficulty of finding any other traces of the fact. It cannot be said that the intrinsic improbability of the story itself is greater than the intrinsic improbability that a rational man would falsely tell such a tale without a strong motive, but in such a case is it possible to suppose that any jury would convict the accused man, though he might say nothing except that he was not guilty? Any one who has had any experience either of the common affairs of life or of the administration of justice would say at once that the matter was far too doubtful for one to take the responsibility of action upon such evidence. Here is one instance in which direct evidence, which may be supposed by slightly varying circumstances to be as strong as such evidence given by a single person could be, would be felt to be insufficient to warrant a belief to its truth and action upon that belief.

"Endless instances of the same kind may be given. No class of cases is so unsatisfactory as cases where the crime alleged to be committed consists of words spoken or of acts done of such a nature as to leave no material traces behind them. A charge of rape or indecent assault preferred by a woman against a man who happens to have been alone with her is an instance. In cases of this kind it is true that juries do at times convict on the wholly uncorroborated evidence of the woman. It is another question whether they ought to be allowed to do so. Almost the only artificial rules of evidence known to our law apply to cases of

§ 12. First, it must appear that the deceased died from the shot.¹ "I saw the gun aimed: I heard the report: I saw the man fall: I saw the wound." But what are these, Causation always an inference. argues Chief Justice Gibson, in a remarkable opinion just quoted,² but circumstances from which you *infer* a certain result? The deceased may have expired from fright, as has been sometimes the case in executions, before he was struck by the fatal shot. He may have only been in a trance, and was killed really by the surgeon who probed the wound. Among cases of violent deaths, perhaps only one in ten thousand may have been thus caused. But if it is one to ten thousand that the death may be traced to such a cause, then there is a possible, though improbable, hypothesis inconsistent with the defendant's guilt.³

this sort. In actions for breach of promise of marriage, and in applications for bastardy orders, it is necessary that the evidence of the plaintiff or of the mother, as the case may be, should be corroborated in some material particular. By a practice having nearly the force of law, though not amounting to absolute law, the same rule applies to cases in which the only evidence sufficient, if true, to convict the accused is that of an accomplice. Every one, indeed, who has much practical acquaintance with such matters must, we think, be of opinion that the problem which taxes most severely the wisdom and the firmness of every one whose duty is to determine upon matters of fact is this: how much weight ought attach to the mere oath of an unknown person that he has seen or heard this or that? The very simplicity of the question increases its difficulty. When there are facts to be compared, arranged in order of time and place, and made the subject of a variety of inferences, there is something for the mind to do. But when the question resolves itself into this, 'aye or no, shall I believe this to be true because A. says he saw it, and

sticks to it under cross-examination?' the difficulty of deciding is small, but the difficulty of deciding with any confidence on the truth of the decision arrived at ought to be at its height for a person who has studied the principles of the subject.

"These are instances of the occasional weakness of direct evidence, and of the great difficulty which there is in acting upon it with satisfaction when it is absolutely uncorroborated by circumstances. As to the strength and weakness of circumstantial evidence, it would be impossible in any moderate compass to attempt even to illustrate the subject. In a very few words it may be said that the question whether it is safe to infer one fact from another or others is the great problem of science, and that the only answer to it is to be found in the study of inductive logic, the logic of facts as distinguished from the logic of words." *Pall Mall Gazette*, Dec. 1881. See *Collins v. People*, 98 Ill. 584; *State v. Russell*, 33 La. An. 135.

¹ See *supra*, § 9.

² *Com. v. Harman*, 4 Barr. 269.

³ See *Campbell v. State*, 23 Ala. 44; *Mitchum v. State*, 11 Ga. 615.

§ 13. But another step is necessary to produce a conviction of the party charged. It is necessary to prove not only that the deceased died by violence from the hand of a person having a specific appearance, but that the defendant at the bar is the person by whom the death of the deceased was caused.¹ But here comes another question of inference. Is the defendant the person by whom the shot was fired? Supposing that the day was clear, and the witness near at hand; supposing that the witness was dispassionate, collected, observant, and unbiassed—points which will be hereafter discussed—are men always so distinctly individuated that one can under no circumstances be mistaken for another? Men's faces and figures, like their handwritings, may sometimes be so similar that the keenest observer is baffled when seeking to discover a difference.² The witness is asked how he knows that the prisoner at the bar is the person who fired the fatal shot; and his answer is, "I infer it from a similarity of eyes, of hair, of height, of manner, of expression, of dress." Human identity, therefore, is an inference drawn from a series of facts, some of them veiled it may be by disguise, and all of them more or less varied by circumstances. In addition, therefore, to the inference drawn as to the connection of the shot and the death, we have another inference to be made circumstantially as to the identity of the shooter with the defendant on trial. "As Mr. Mill remarks, it is too much to say, 'I saw my brother.' All I positively know is that I saw some one who closely resembled my brother as far as could be observed. It is by judgment only I can assert he was my brother, and that judgment may possibly be wrong."³

¹ As to identity see *infra*, §§ 27, 807. That such proof is inferential see *R. v. Cheverton*, 2 F. & F. 833; *McCulloch v. State*, 48 Ind. 109. As to identification by voice see *Com. v. Scott*, 123 Mass. 222; *Brown v. Com.*, 76 Penn. St. 319. As to identification of deceased person see *infra*, §§ 326, 804.

² See, on this point, 3 Wh. & St. Med. Jur. §§ 620, 627, 674; *inf.* §§ 803 *et seq.*

³ Jevons's Logic, Less. xxvii. 6. As

to Tichborne Case on this point, see Whart. on Ev. § 9.

A mother's testimony in identification of her son might be considered direct in the strongest sense. Yet Lady Tichborne's recognition of the claimant as her son was so weakened by the circumstances of the case—her own passionate desire to recover her lost child, and the arts shown to have been resorted to by the claimant to deceive her—that it was in an eminent degree open to the criticism which is applied

§ 14. But to justify a conviction, a step further must be taken. One who performs a guilty act under compulsion is not amenable to punishment. It is necessary, therefore, to distinguish the case before us from that of a public execution, or that of a man pressed to the wall by an assailant. "The prisoner," says the witness, "shot the deceased without necessity, and without compulsion." But how do you know this? Can a conclusion as to such an issue be reached except by inference? And yet, does not such an issue arise, explicitly or implicitly, in every criminal trial? We have, therefore, another inference to add to those already enumerated: an inference drawn only from circumstances.

§ 15. Then comes another step: was the defendant responsible? It is true that the law presumes sanity from every rational act. But was the homicide in question a rational act? Are there not some homicides—*e. g.*, a wife and mother, in her own home of comfort, killing her new-born child—which on their face are insane acts; and is there any one who would question Judge Story's humane declaration that in such a case we must infer insanity? In other words, in certain acts we infer sanity; in other acts, insanity, but it is inference in either case. Of course when we invoke the prisoner's past history, and collect facts from which to draw our conclusions, then the evidence must on all sides be

to "circumstantial" evidence by those who hold to the distinction between "direct" and "circumstantial." The fact is that in both the Tichborne trials the testimony for the claimant was mainly what is called "direct," consisting of testimony by witnesses most of whom were unimpeachable, that he was Roger Tichborne. The effective testimony on the other side was mainly "circumstantial," *e. g.*, proof of the disparity between the size of the claimant's feet and that of Roger, as given by the latter's shoemaker, the claimant's ignorance of Roger's early history, and the absence on his person of certain marks that were on the person of Roger. But what is called "direct" testimony as

to identity is really only secondary circumstantial evidence. In other words, it is the opinion of a witness drawn from certain circumstances. The same criticism is applicable to the testimony of accomplices to identity. It is called "direct" by those who hold to the distinction here excepted to; yet no testimony depends for credit more exclusively on circumstances. See *Com. v. Cunningham*, 104 Mass. 548, which held that where the only question is as to the identity of the prisoner with the guilty party, the jury may be justified in returning a verdict of guilty, although no witness will swear positively to the identity. Compare *infra*, § 806, as to presumption of identity.

admitted to be what is called "circumstantial." But even as to the conclusion of the eye-witness of the homicide, and as to the conclusion we draw from *his* conclusion, the process, also, must be circumstantial. It is an inference drawn from circumstances, from a narrow range of circumstances, but from circumstances still. Here, then, is a fourth inference to be made, and a fourth possibility of innocence to be set aside, before we can convict upon what is called direct testimony.

§ 16. Yet there is another constituent of guilt to be proved; and this a constituent which, as all parties agree, the prosecution must make out—the constituent of *intent*. And so of his intent. In most indictments intent is averred or implied; in all such cases it must be proved by the prosecution. Yet what human eye has witnessed the processes of intent in another's mind? It may be said that intent is to be inferred from an intelligent act, and so it is; but so far as concerns the question before us, this is a *petitio principii*, because if you ask the witness how he knows the act was intelligent, or if you ask yourself why you infer it was intelligent from what the witness says, the answer is, *circumstances*. Add to a shooting certain circumstances—*e. g.*, a furtive or an angry approach, a careful aim, an accurate use of the weapon, a threat, a subsequent attempt at flight—and you make out the homicidal intent. Divest the killing of such circumstances, assume a weapon lifted on the spot without aim, an approach purely fortuitous or friendly, a manner from which no suspicion of attempt can be extracted—let the case come to you in such a shape, with no effort on the part of the prosecution to make out malice or passion, or to show subsequent consciousness of guilt, and you have a case on which no conviction of malicious homicide could be sustained. Here, then, we have a fifth and most important inference, namely, that of intent, which must be made before conviction.¹

§ 17. Yet even at this point we have not exhausted the inferences to be drawn before the testimony of an eye-witness can be regarded as sufficient to sustain a verdict of guilty. The conditions we have just noticed are those which concern the person charged with a crime; and it

Witnesses
dependent
on circum-
stances for
credibility.

¹ R. v. Hincks, Canada Q. B. 10; Cent. L. J. 127. See Robbins v. People, 95 Ill. 175.

has been seen that even if the evidence be that of eye-witnesses, pure and simple, a conviction that he is guilty can only be reached by probable reasoning,—by reasoning consisting, as does all other probable reasoning, of logical induction from circumstances. This, indeed, is a condition necessarily emanating from the subject matter of trial, namely, a supposed moral agent charged with voluntary intentional crime. Let us next see how the same condition results from the necessary character of all witnesses.¹

Now to exclude from the issue all evidence that is called “circumstantial,” we have to suppose the case of a witness who appeals to our credence simply and merely because he is a witness. He is known by no antecedents; there is nothing before us by which his veracity can either be sustained or disputed. For, the moment you add to him such circumstances, the testimony becomes, on all showing, “circumstantial.” Suppose, then, we have present a witness of whom nothing can be known or inferred except that he claims to have seen a certain guilty act; is this testimony on which a conviction can be satisfactorily rested? Strip the major premise in Paley’s famous syllogism of the statement it contains as to the pure characters and holy lives and deaths of the evangelic historians; make it simply read: “No man can assert a falsehood; Matthew was a man; therefore Matthew could not assert a falsehood;” and to what does the conclusion amount? The whole force of the reasoning rests upon the character of Matthew and his co-historians; their simplicity, their uniform heroism and coherence in their narration of the disputed facts; the improbability that ethics so lofty and conceptions so sublime should have sprung from men who were consciously fabricating falsehoods; the further improbability that for the sake of such fabrications such men would expose themselves to the infamy and ruin which the promulgators of such statements would invoke. So it is with all other forms which the testimony of eye-witnesses assumes. Suppose the question to be, whether it is more probable that a given abstract man (the witness) should have committed one crime, that of perjury, than that another given abstract man (the defendant) should have committed another crime, that of murder; here, if we divest the issue of all circumstances on either side, there is simply a balance of improbabilities,

¹ See *infra*, §§ 369 *et seq.*

in weighing which the mind must incline, if it incline at all, to the acquittal of the darker crime.¹

§ 18. But here, as it was in scanning the probabilities of guilt in reference to the offender himself, there are other steps to be taken before we can discharge the possibilities of innocence with which the issue is beset. Even supposing we could rest a conviction upon the statement, unsustained by circumstances, of an alleged eye-witness, could we do so without, in the next place, remembering the possibility that such witness may have testified falsely? Perjury, indeed, is never to be presumed; but we cannot shut our eyes to the fact that convictions have sometimes been based on perjured testimony; and though the probability of perjury may be but one to a hundred, yet this is only another way of saying that it is probable to a very high degree, but not certain, that there is no perjury in the testimony brought before us in any given case.² It is true that there may be forgery of facts, as well as falsification by witnesses; and it is true, also, that with the exception of such objects as can be brought into court on trial, the adjudicating tribunal must become cognizant of indicatory facts through witnesses who may be as much tempted to perjure themselves in giving this kind of testimony as in giving other kinds of testimony. But it cannot be denied that perjury in respect to that of which a witness says he was the only observer is more easy than perjury in respect to extrinsic facts open to common observation, and, *à fortiori*, more easy than the forgery of such facts. Perjury of the first class is skilful in eluding detection; is self-contained and self-verifying; it can be consummated without observation and without machinery; it is thus easily concocted and not easily exposed. On the other hand, extrinsic facts cannot be forged without attracting more or less attention, nor testified to without that possibility of exposure inherent in all fabrications of matters extrinsic. False "direct" testimony, also, hangs ordinarily on a single link, and if that link is sufficiently strong the case succeeds. But it is of the essence of what is called "circumstantial" evidence, —*i. e.*, evidence dependent on the collection of numerous self-supporting facts—that if one of these facts should turn out to be

¹ See *Ram on Facts*, 3d Am. ed. 291.

² See *infra*, §§ 373 *et seq.*, as to influences leading to perjury.

forged, the taint affects the whole system. The probability of detection of falsification is therefore in proportion to the number of issues presented.

§ 19. But if perjury is probable only in the proportion of one to a hundred, is it so with prejudice? The late Mr. John Sergeant, a great and grave jurist, once told a jury, in discussing this kind of evidence, of a trial for damages accruing from collision between two sloops carrying lawyers to a Circuit Court to be held at Wilmington. The question arose as to which sloop was the aggressor; and on this question every lawyer swore with his sloop. The difficulty was, not that any one of the lawyers consciously perverted the truth, but that they all were prejudiced, so that the truth was unconsciously perverted by them. More or less does this bias exist in every witness, whether from unconscious prejudice, or from the impossibility of any man using language that exactly expresses the truth. Of unconscious prejudice another illustration may be found in the fact that the purest and most high-minded of experts, in matters involving the identity of handwriting, are known to have much difficulty in divesting their minds of the predisposition to accept as to such identity the view which is unconsciously received by them from the party who first puts the papers in their hands.¹ And in the same line may be noticed the tendency observable in those engaged in ferreting out crime to view the extrinsic facts which come to their observation in such a way as best to support some preconceived hypothesis as to the guilty agency.²

Of the inadequacy of memory and language exactly to represent a particular scene as it really took place, we have constant illustrations in the cross-examinations and re-examinations of witnesses during every long contested trial. There is one probability in a hundred that a witness may be perjured; there is one in fifty or twenty or ten that he may be so prejudiced as unconsciously to misstate; there is a far higher probability that his statement may not be exactly true.³ All these probabilities the jury have to weigh; and the conclusions they reach must be inferences from circumstances. Even in the case of the abstract witness, without antecedents or circum-

¹ See *infra*, § 376.

² See *infra*, § 373.

³ Glaser, *Lehre vom Beweis* (1884),

141 *et seq.*

jacents, whom this hypothesis presents to us, the jury would infer, if such a witness were possible, a want of credibility from the very circumstance that the witness comes forward in this anomalous isolation. But no such witness exists or can exist. Every witness has some circumstances about him from which inferences as to his veracity and capacity may be made. Every case depending nominally upon what is called direct testimony, depends really upon that which is circumstantial. Hence if we are to hold that in circumstantial evidence there can be no conviction if the facts "are capable of explanation upon any other reasonable hypothesis than that of guilt," we must hold this to be the case with all evidence. If we do not hold this as to evidence in general, we must not hold it as to that kind of evidence popularly called circumstantial.

§ 20. The conclusion to which the reasoning we have been following leads us is this: All evidence is more or less circumstantial; all statements of witnesses, all conclusions of juries, are the results of inferences. There is therefore no ground for the distinction between "circumstantial" and "direct" evidence. All evidence admitted by the court is to be considered by the jury in making up their verdict; and their duty is to acquit if on such evidence there is reasonable doubt of the defendant's guilt; if otherwise, to convict.¹ It may be objected that the views just expressed land us in scepticism, being destructive of certainty of conclusion. But scepticism, while it frequently results from the assumption that no conclusion is to be believed that is not demonstrated, is reduced within proper bounds by the recognition of the position above stated, that it is only by inference from facts that conclusions as to human actions can be reached. The process has two sides: (1) The prejudice against what is called "circumstantial" evidence is dispelled. That this prejudice is

¹ The following cases may be consulted as to the points made in the text: *State v. Daley*, 41 Vt. 564; *Com. v. Annis*, 15 Gray, 197; *Com. v. Drum*, 53 Penn. St. 9; *Schusler v. State*, 29 Ind. 394; *Kingen v. State*, 45 Ind. 510; *State v. Johnson*, 19 Iowa, 230; *State v. Collins*, 20 Iowa, 85; *Orr v. State*, 34 Ga. 342; *Martin v. State*, 38 Ga. 293; *Hall v. State*, 40 Ala. 698; *Mose v. State*, 36 Ala. 211; *Chisholm v. State*, 45 Ala. 66; *Coffman v. Com.*, 10 Bush, 495; *Phipps v. State*, 3 Cold. (Tenn.) 244; *Conner v. State*, 34 Tex. 659; *Bowler v. State*, 41 Miss. 570; *People v. Strong*, 30 Cal. 151; *People v. Dick*, 32 Cal. 213; *People v. Cronin*, 34 Cal. 191; *People v. Morrow*, 60 Cal. 142.

deeply seated is illustrated by the fact that in some States by statute, or by constitutional provision, capital sentence cannot be awarded when the evidence is only "circumstantial;" though if the fact be, as has just been argued, that no conviction ought to stand that does not rest upon a cumulation of probabilities, it is necessary, in order to carry out the limitations in this respect just noticed, to assign to the word "circumstantial" a meaning very different from that assigned to it in this chapter.¹ But aside from positive limitations there is a superstition with regard to "circumstantial" evidence which often prevents conscientious jurors from rendering convictions in cases in which justice demands such convictions. To avert such perversions of justice it is important that it should be understood that all trustworthy evidence derives its credit from facts. (2) The equally superstitious assignment of peculiar sanctity to the testimony of eye-witnesses, by which unjust convictions have been secured, will also be dispelled. A jury will not, if rightly advised in this relation, feel bound to find its verdict on grounds other than those on which its members would form conclusions on matters of every day-life. And the position is reached that the reasoning in courts of justice is the reasoning of common sense, by which men of common sense and justice are guided in forming their opinions as to the conduct of others. Certain exclusionary limits, indeed, are adopted, by which hearsay and irrelevant matter are shut out. But these exclusions will be found, when examined, to be based on common sense; and when the best evidence which the nature of the case permits is brought in, and irrelevant matters are excluded, then the reasoning which the jury is to apply is not fettered by artificial and arbitrary rules, but is that which is usual in all matters in which solemn judgments are reached out of court.

§ 21. The evidence on trial consisting, therefore, of a series of facts more or less closely connected, argument consists in the application to these facts of particular hypotheses; and in criminal issues, if there be no probable hypothesis of guilt consistent, beyond reasonable doubt, with the facts of the

Juridical
value of
hypothesis.

¹ The difficulty, in these States, may be obviated by regarding the term "circumstantial evidence" as convertible with "evidence which admits of a probable solution not consistent with guilt." But in such cases there should be no conviction at all.

case, the defendant must be acquitted.¹ But this is not the only use of hypothesis. It is only by appealing to hypothesis that questions of relevancy, as will presently be more fully seen, can be determined. "My hypothesis," so argues the prosecution, "is that the act charged is part of a system of guilty acts." To support such an hypothesis, proof of such a system is relevant.² Or the defence argues, "No man of good character would commit a crime such as here charged," and to sustain this hypothesis evidence of good character is relevant.³ Hypothesis, thus, is the basis on which admissibility of evidence must rest, as it is the basis on which must rest either acquittal or conviction.

¹ See *Beavers v. State*, 58 Ind. 350.

² *Infra*, § 57.

³ *Infra*, § 32.

CHAPTER II.

RELEVANCY.

Relevancy is that which conduces to the proof of a pertinent hypothesis, § 23.

Whatever so conduces is relevant, § 24.

Process is one of logic, § 25.

Illustrated by questions of authenticity of documents, § 26.

So by questions of identity, § 27.

Conditions may be prior, contemporaneous, or subsequent, § 28.

Collateral disconnected facts generally irrelevant, § 29.

Hence collateral crimes are inadmissible, § 30.

(1) Exception when extraneous crime forms part of *res gestae*, § 31.

(2) Exception in cases of system and conspiracy, § 32.

Illustrated by successive blows, § 33.

By successive forgeries and cheats, § 34.

By successive adulteries, § 35.

By successive firings, § 36.

By successive poisonings, § 37.

By subsequent offences, § 38.

(3) Exception in cases where guilty knowledge is to be shown, § 39.

In cases of guilty knowledge in counterfeiting, § 39.

In cases of guilty knowledge in receiving stolen goods, § 44.

Subsequent offences admissible for this purpose, § 45.

(4) Exception in cases where intention is disputed, § 46.

(5) Exception in question of identity, § 47.

Conditions of such exceptions, § 48.

Proof of prior attempts in like manner admissible, § 49.

Distinctive rules in cases of poisoning, § 50.

In cases of marital homicide, § 51.

In cases of libel, § 52.

In cases of fraud, § 53.

In cases of negligence, § 54.

In cases of good faith, § 55.

In cases of prudence and diligence, § 56.

Character relevant in criminal issues, § 57.

"Character" is convertible with reputation, § 58.

Burden on party assailing character, § 59.

Defendant may show a character inconsistent with the crime charged, § 60.

Prosecution cannot rebut by particular facts, § 61.

No presumption to be drawn from non-production of such evidence, § 62.

Prosecution cannot rebut by showing bad character subsequent to guilty act, or in localities where defendant had not lived, § 63.

Prosecution cannot impeach unless defendant puts in issue, § 64.

Tendency or ability to commit offence inadmissible, § 65.

Weight to be attached to character, § 66.

Bad character of party injured generally irrelevant, § 68.

But in cases of self-defence relevant to prove deceased's ferocity, strength, and vindictiveness, in order to show *bona fides* of defendant's belief that he was in extreme danger, § 69.

England, § 70.

New York, § 71.

New Jersey, § 72.

Pennsylvania, § 73.

North Carolina, § 74.

South Carolina, Georgia, Alabama, Kentucky, Tennessee, Mississippi, § 75.

Indiana, § 76.

Michigan, § 77.

Minnesota, § 78.

Iowa, § 79.

Missouri and Texas, § 80.

California and other States, § 81.

Inconclusiveness of the cases cited to the contrary, § 82.

In Massachusetts such evidence is now admissible, § 83.

Summary of the law, § 84.

§ 23. RELEVANCY is that which conduces to the proof of a pertinent hypothesis; a pertinent hypothesis being that which logically affects the issue.¹ A person is found dead, for instance, with marks of violence on his body, and at once a series of hypotheses are tried in turn, as keys to a lock, to see if they will disclose the secret of the death. Were the wounds homicidal or suicidal? If homicidal, was the motive avarice, or jealousy, or an old grudge? If a person is on trial for the homicide, then against him are admissible all facts that sustain any hypothesis which implies his guilt. When it is his turn to develop his defence, then any facts are admissible that would sustain the hypothesis of his innocence.

§ 24. Relevancy is therefore to be determined by free logic, unless otherwise settled by statute or controlling precedent. All facts, that go either to sustain or impeach a hypothesis logically pertinent, are admissible.² But

Whatever
so con-
duces is
relevant.

¹ See, as to hypothesis; *supra*, § 21.

² Whart. on Ev. § 21; *R. v. Pearce*, Pea. R. 75; *R. v. Egerton*, R., & R. 375, cited by Holroyd, J., in *R. v. Ellis*, 6 B. & C. 148; *R. v. Briggs*, 2 M. & Rob. 199, per Alderson, B.; *R. v. Rooney*, 7 C. & P. 517; *R. v. Fursey*, 6 C. & P. 81; *Anglesey v. Hatherton*, 10 M. & W. 235, per Ld. Abinger; *Furneaux v. Hutchins*, 2 Cowp. 807; *Doe v. Sisson*, 12 East, 62; *Schuchardt v. Allens*, 1 Wall. 359; *Butler v. Watkins*, 13 Wall. 457; *Deitsch v. Wiggins*, 15 Wall. 540; *State v. Hill*, 72 Me. 238; *State v. Witham*, 72 Me. 531; *Hovey v. Grant*, 52 N. H. 569; *State v. Hannett*, 54 Vt. 83; *Raynes v. Bennett*, 114 Mass. 424; *Com. v. Dowdican*, 114 Mass. 257; *Huntsman v. Nichols*, 116

Mass. 521; *Willis v. Hulbert*, 117 Mass. 151; *Com. v. Sturtivant*, 117 Mass. 122; *Com. v. Costley*, 118 Mass. 1; *Com. v. Adams*, 127 Mass. 15; *Com. v. Allen*, 128 Mass. 46; *Com. v. Dunan*, id. 422; *Blanchard v. N. J. S.*, 59 N. Y. 292; *Pierson v. People*, 77 N. Y. 424; *Eighmy v. People*, 79 N. Y. 546; *Ryon v. People*, 79 N. Y. 593; *Pontius v. People*, 82 N. Y. 339; *Pratt v. Richards*, 69 Penn. St. 53; *Thompson v. Stevens*, 71 Penn. St. 161; *Brandt v. Com.*, 94 Penn. St. 290; *Brooke v. Winters*, 39 Md. 505; *Costley v. State*, 48 Md. 175; *Robinson v. State*, 53 Md. 151; *Dean v. Com.*, 32 Grat. 912; *State v. Mickle*, 81 N. C. 552; *State v. Howard*, 82 N. C. 623; *State v. Morris*, 84 N. C. 756; *Sartin v. State*, 7 Lea, 679; *Welch*

no fact is relevant which does not make more or less probable such a hypothesis.¹ Relevancy, therefore, involves two distinct

v. Ware, 32 Mich. 77; *Marquette R. R. v. Langton*, 32 Mich. 251; *Willoughby v. Dewey*, 54 Ill. 266; *Hough v. Cook*, 69 Ill. 581; *Tracy v. People*, 97 Ill. 101; *Danenhoffer v. State*, 79 Ind. 75; *McIlvain v. State*, 80 Ind. 69; *Hancock v. Wilson*, 39 Iowa, 47; *State v. Waltz*, 52 Iowa, 227; *State v. Kline*, 54 Iowa, 183; *Johnson v. Filkington*, 39 Wis. 62; *Yanke v. State*, 51 Wis. 464; *Selma v. Keith*, 53 Ga. 178; *Wilson v. State*, 66 Ga. 591; *Walker v. State*, 63 Ala. 150; *State v. Clifton*, 30 La. An. 951; *State v. Dufour*, 31 La. An. 804; *State v. Crowley*, 33 La. An. 782; *State v. Emery*, 76 Mo. 348; *Scott v. State*, 56 Miss. 287; *Brown v. State*, 57 Miss. 474; *Spivey v. State*, 58 Miss. 858; *State v. Corsell*, 12 Nev. 337; *People v. Soto*, 53 Cal. 415; *People v. Hall*, 57 Cal. 569; *Wells v. State*, 11 Neb. 409; *Bouldin v. State*, 8 Tex. Ap. 332; *Dubose v. State*, 10 Tex. Ap. 230.

As to inferences of this class see *infra*, §§ 734 *et seq.*; and see *Com. v. Piper*, 120 Mass. 185; *Murphy v. People*, 63 N. Y. 590; *Long v. State*, 52 Miss. 23.

A party, for instance, is charged with the robbery of a watch and chain, which, by the hypothesis of the prosecution, were torn from the prosecutor at a particular place. It is admissible, in such case, for the prosecution to put in evidence the fact that at that very spot was found a ring, such as is used to fasten watches, and which the prosecutor could not distinguish from his own, which had the appearance of having been forcibly wrenched. *Com. v. Watson*, 109 Mass. 354. See, also, *Com. v. Tolliver*, 119 Mass. 312. Com-

pare *infra*, §§ 816 *et seq.*; *People v. Collins*, 48 Cal. 277.

A woman being under indictment for bigamy, it is relevant to show that the alleged second wife was in the Endowment House in Salt Lake City where secret and clandestine marriages are solemnized on a certain day, and that on that occasion she wore a dress like those usually worn by those who go there to contract such marriages. *Miles v. U. S.*, 103 U. S. 304.

In *People v. Carrier*, 46 Mich. 441, which was a prosecution for enticing away a female of less than 16 years of age for purposes of prostitution, it was held that although evidence of prior illicit relations between the defendant and the female was relevant as bearing upon his intent, it might properly be dispensed with where the proof of his subsequent conduct was conclusive as to his intent.

In an indictment for larceny, a witness, to show want of motive, testified that he had kept the defendant supplied with money at the time when the larceny was alleged to have occurred. Held that he might be asked whether defendant was not at that time in need of money and owing pressing debts. *Fulmer v. Com.*, 97 Penn. St. 503.

It is also relevant, where the prosecution proves that the defendant went to a particular place to commit a crime, for a defendant to prove that he went there on legitimate business. *State v. English*, 67 Mo. 137.

When the prosecution puts in evidence motives likely to have prompted the defendant to the act charged, it is relevant for the patient to put in evi-

¹ See cases in Whart. on Ev. § 22; *Berney v. State*, 69 Ala. 233.

inquiries to be determined by logic, unless otherwise arbitrarily prescribed by jurisprudence: (1) Ought the hypothesis proposed, if proved, to affect the issue? (2) Does the fact offered in evidence go to sustain this hypothesis?¹ When the question at issue is fraud, peculiar latitude in the reception of facts, both inculpatory and exculpatory, is allowed, as it is only by induction from all the circumstances of the cases that in issues of this class a just conclusion can be reached.²

§ 25. What has been said applies to all lines of investigation of truth.³ Certain exclusionary limits are indeed to be firmly imposed. We must refuse to admit secondary evidence, or evidence of independent crimes, on the part of the party charged. But aside from these limitations, which are exacted by the policy of the law, the tests we apply in jurisprudence are the tests we apply in historical and

Process is logical, and applicable to all lines of investigation.

dence stronger motives operating on other; *State v. Johnson*, 30 La. An. 921; or counter motives operating on himself. *R. v. Grant*, 4 F. & F. 322. See *Mack v. State*, 48 Wis. 271.

On an indictment for false pretences it is admissible for the defendant to prove the prior dealings between the parties to show that his conduct was fair. *State v. Rivers*, 58 Iowa, 102.

On a trial for murder, where the defendant sets up suicide, it is admissible for him to put in evidence the prior tendency to melancholy on part of the deceased. *Blackburn v. State*, 23 Oh. St. 146.

On a trial for rape it is relevant for the defendant to prove that his previous relations with the complainant were of a friendly character. *Hall v. People*, 47 Mich. 636.

In *McManus v. Com.*, 91 Penn. St. 57, it appearing that the defendant belonged to a secret illegal society, it was held that the object of this society was relevant to show motive for the commission of the murder by the defendant, to explain the relations existing between a witness and the defen-

dant, and to show why certain declarations and admissions of the latter were made. See *Hinds v. State*, 11 Tex. Ap. 238.

The defence, on the trial of A. for killing his wife, having relied on his offer to return to her (after a long separation), as a mark of friendliness, which she repelled, it was held relevant, on the part of the prosecution, to put in evidence the bank deposit books of husband and wife, to show that the latter had, and the former had not, money. *Sayres v. Com.*, 88 Penn. St. 291.

¹ Thus, on an indictment for a negligent collision, when the only charge in the indictment is that the defendant ran the train with unreasonable speed, evidence of neglect to ring the bell is inadmissible. *Com. v. Fitchburg R.*, 126 Mass. 472.

² That the position in the text is eminently applicative to questions of fraud, see Whart. on Ev. § 33; *The-rasson v. People*, 82 N. Y. 238; *inf.* § 34.

³ Whart. on Ev. § 22.

social criticism. Lord Bacon's alleged venality, for instance, is to be proved or disproved by historical critics by the same kind of induction we would apply were he now to be impeached for the same offence before the House of Lords; and whatever facts are admissible, as yielding a logical inference in the former case, are admissible as yielding a legal inference in the latter case. A stone claimed to be a petrified giant is produced; whatever facts would be relevant on the question of this pretension, viewing the question as a matter of scientific criticism, would be relevant if the supposed fabricator of the giant was on his trial for a cheat. The facts which a sound historical critic would adduce, as bearing on the guilt of Queen Caroline or of Warren Hastings, would be held relevant by a court to whom the trial of Queen Caroline or of Warren Hastings should be committed. And thus, in this sense, all facts tending to exhibit motive are admissible.¹

§ 26. A similar series of progressive tests may be applied in order to exhibit the meaning of any controverted writing.² A memorandum, for instance, in a foreign language, is put in evidence, for the purpose of proving a debt. The plaintiff sets up, first, that the instrument is, we may say, in German; secondly, that certain phrases in it have, by the custom of trade, a meaning different from that they bear in ordinary use. Here are two hypotheses successively presented in order to get at the meaning of the instrument; and whatever goes to prove either of these hypotheses is relevant. The number of the hypotheses increases with the complication of the case. If, for instance, Sir Philip Francis's title to the authorship of Junius is under investigation, we have a series of concentric hypotheses, each of which is pertinent, and the innermost of which closely surrounds the point of identity. It is pertinent to argue that the author of Junius, during the Chatham and Grafton ministries, was familiar with English public life; that he possessed a practised pen; that he was cognizant of the traditions of the war-office; that his animosity to Lord Mansfield, and his attachment to Lord Chatham, were strong; that he had cogent motives for concealment both at that particular period and for years afterwards; that he ceased to

Illustrated
by ques-
tions of
authentic-
ity of docu-
ments.

¹ *Infra*, § 784.

Casket Letters in the 7th volume of his

² See Fronde's marshalling of the History of England.
arguments as to the genuineness of the

write about 1773; that his writing had certain marked peculiarities. Each of these hypotheses being pertinent, it is relevant to prove that Sir Philip Francis was, during the period when the Junius Letters appeared, familiar with English public life; that his style was polished, vigorous, and not unlike that of Junius; that he had been for some time a clerk in the war-office; that his political relations repelled him from Lord Mansfield and connected him with Lord Chatham; that to him discovery would be political ruin; that about the time the Junius Letters closed he left the country; that his handwriting was strikingly similar to that of Junius.

§ 27. In questions of identity we have abundant illustrations of the principles just announced.¹ No matter how slight the inference of identity to be drawn from any single fact, it is admissible as a fragment of the material from which the induction is to be made. One hundred thousand persons may be in a city at the time when in that city a particular crime is committed, and proving A. to have been in the city at the time makes a case against him, as perpetrator, which is by itself only as one against one hundred thousand; yet it is nevertheless relevant to prove that he was at the time in the city.² Multitudes of persons having to work with kerosene have kerosene stains on their clothes, yet, when on the trial of a person charged with burning a house, the hypothesis of the prosecution is that an accomplice of the defendant fired the building by means of a can of kerosene oil furnished for the purpose by the defendant, it is relevant for the prosecution to prove that the shirt of the alleged accomplice had on it kerosene stains.³

The fact that a horse is found in a stable at daybreak, smoking with sweat, and with the marks of having been just violently exercised, may be in itself trivial; yet it is not only relevant, but of decisive moment when the issue is whether the horse was used that night by some one having access to the stable.⁴

In the identification of goods, also, whatever marks or labels on them may tend to individuate them, are admissible.⁵

¹ See *supra*, § 13; *infra*, §§ 47, 806.

⁴ *People v. How*, 2 Wheel. C. C.

² 3 Wh. & St. Med. Jur. §§ 620, 817.

412; 3 Wh. & St. Med. Jur. § 836.

³ *State v. Kingsbury*, 58 Me. 239.

⁵ *Com. v. Collins*, 134 Mass. 203.

See *infra*, § 776.

§ 28. Conditions, the presence or absence of which may be thus proved, may be regarded as prior, contemporaneous, or subsequent. A homicide, for instance, is committed, and is charged upon a particular individual on trial. Among the prior conditions of the homicide we may notice preparations and indications of enmity; among the contemporaneous conditions is collision between the parties; among the subsequent conditions are confessions and attempts at flight.¹

Conditions may be prior, contemporaneous, or subsequent.

§ 29. No fact, as already seen, which, on principles of sound logic, does not sustain or impeach a pertinent hypothesis, is relevant, and no such fact, therefore, unless otherwise provided by some positive prescription of law, should be admitted as evidence on a trial.² The reasons for this rule are obvious. To admit evidence of such collateral facts would be to oppress the party implicated by trying him on a case for preparing which he has had no notice, and sometimes by prejudicing the jury against him by publishing offences of which, even if guilty, he may have long since repented, or which may have long since been condoned. Trials would by this process be injuriously prolonged, the real issue obscured, verdicts taken on side issues. To sustain the introduction of such facts, they must be in some way capable, as will presently be seen more fully, of being brought into a common system with that under trial.³

Collateral disconnected facts generally irrelevant.

¹ See *infra*, §§ 742 *et seq.*

² Thus, it is inadmissible to prove that a third party committed the offence unless this excludes the defendant's participation. *State v. Baxter*, 82 N. C. 602; *State v. Beverly*, 88 N. C. 632.

³ *Griffiths v. Payne*, 11 A. & E. 131; *Thompson v. Mosely*, 5 C. & P. 502; *R. v. Mobbs*, 6 Cox C. C. 223; *R. v. Dossett*, 2 C. & K. 306; *State v. Whittier*, 8 Shepl. 341; *State v. Lapage*, 57 N. H. 245; *Com. v. Call*, 21 Pick. 515; *Com. v. Campbell*, 7 Allen, 541; *Goodrich v. Wilson*, 119 Mass. 429; *Com. v. Miller*, 3 Cush. 243; *Com. v. Blair*, 123 Mass. 242; *Williams v. Fitch*, 18 N. Y. 546; *Mailler v. Propeller Co.*, 61 N. Y. 312; *Cole v. Com.*,

5 Grat. 696; *Farrer v. State*, 2 Oh. St. 54; *Miller v. Com.*, 78 Ky. 15; *State v. Miller*, 47 Wis. 930; *State v. Reavis*, 71 Mo. 419; *Tharp v. State*, 15 Ala. 749; *Brock v. State*, 26 Ala. 104; *Hall v. State*, 51 Ala. 9; *Williams v. State*, 45 Ala. 57; *Rogers v. State*, 62 Ala. 170; *Cesure v. State*, 1 Tex. Ap. 19; *Campbell v. State*, 8 Tex. Ap. 84; *Pinckford v. State*, 13 Tex. Ap. 468; *Williamson v. State*, 13 Tex. Ap. 514. See *Iron Mountain Bk. v. Murdock*, 62 Mo. 70. In *Watson v. Com.*, 95 Penn. St. 418, it was held error to admit evidence that another person charged with the same crime with the accused was a relation of the accused, and was in prison for felony.

§ 30 In criminal cases there are peculiar reasons why the test before us should be applied to proof of collateral crimes. Hence collateral crimes are inadmissible. A defendant ought not to be convicted of the offence charged simply because he has been guilty of another offence. Hence, when offered simply for the purpose of proving his commission of the offence on trial, evidence of his participation, either in act or design, in commission or in preparation, in other independent crimes, cannot be received.¹

§ 31. Certain exceptions exist, however, to the rule just stated, which we will now proceed to discuss:—

Exception when extraneous crime forms part of the *res gestae*. (1) When an extraneous crime forms part of the *res gestae* evidence of it is not excluded by the fact that it is extraneous.² Thus, on a trial for murder, evidence that the prisoner, on the same day the deceased was killed, and shortly before the killing, shot a third person, was held admissible, under the circumstances of the case, notwithstanding the evidence tended to prove a distinct felony committed by the prisoner; such shooting, and the killing of the deceased, appearing to be connected as parts of one entire transaction.³ On a trial, also,

¹ *R. v. Mobbs*, 6 Cox C. C. 223; 186; *Barnes v. People*, 48 Cal. 551; *State v. Lapage*, 57 N. H. 245; *Com. v. Wilson*, 2 Cush. 590; *Com. v. Miller*, 3 Cush. 243; *Coleman v. People*, 55 N. Y. 81; *People v. Corbin*, 56 N. Y. 363; *Rosenweig v. People*, 63 Barb. 634; *People v. Gibbs*, 93 N. Y. 471; *Snyder v. Com.*, 85 Penn. St. 519; *Kilrow v. Com.*, 89 Penn. St. 299; *Walker v. Com.*, 1 Leigh, 574; *Cole v. Com.*, 5 Grat. 696; *State v. Merrill*, 2 Dev. 259; *State v. Shuford*, 69 N. C. 486; *Stone v. State*, 4 Humph. 27; *Kinche-low v. State*, 5 Humph. 9; *Brook v. State*, 26 Ala. 104; *State v. Martin*, 74 Mo. 547; *State v. Turner*, 76 Mo. 350; *Dunn v. State*, 2 Pike, 229; *Barton v. State*, 18 Ohio, 221; *Farrer v. State*, 2 Oh. St. 54; *Coble v. State*, 31 Oh. St. 100; *Bonsall v. State*, 35 Ind. 460; *Sutton v. Johnson*, 62 Ill. 209; *Garri-son v. State*, 87 Ill. 96; *Baker v. Peo-ple*, 105 Ill. 452; *State v. Miller*, 47 Wis. 530; *State v. Boyland*, 24 Kan.

People v. Bowen, 49 Cal. 654; *Cesure v. State*, 1 Tex. Ap. 11. See article in *Cent. Law J.*, May 24, 1878. Threats to commit collateral crimes fall under the same head. *Ogletree v. State*, 28 Ala. 683. But in larceny it may be shown that the defendant had in his possession at the time other stolen property. *Webb v. State*, 8 Tex. Ap. 115.

² *State v. Witham*, 72 Mo. 531; *Com. v. Sturtivant*, 117 Mass. 122; *Heath v. Com.*, 1 Rob. (Va.) 735; *Gassenheimer v. State*, 52 Ala. 314; *State v. Sanders*, 76 Mo. 35; *State v. Folwell*, 14 Kans. 105; *Mills v. State*, 13 Tex. Ap. 487. As to scope of *res gestae* see *infra*, § 264.

³ *Heath v. Com.*, 1 Rob. (Va.) 735. See *Walters v. People*, 6 Parker C. R. 15; *State v. Rash*, 12 Ired. 382; *John-son v. State*, 17 Ala. 618. *Cf. R. v. Voke*, R. & R. 531; *Fernandez v. State*, 4 Tex. Ap. 419; *Satterthwaite v. State*,

for breaking into a booking office of a railway station, evidence was admitted that the prisoners had, on the same night, broken into three other booking offices of three other stations on the same railway, the four cases being connected.¹

Again, on an indictment for arson, in setting fire to a rick, the property of A., it was ruled that evidence could be given of the prisoner's presence and demeanor at fires of other ricks, the property respectively of B. and C., occurring on the same night, although those fires were the subject of other indictments against the prisoner, such evidence being important to explain his movements and general conduct before and after the fire of A.'s rick.² It has also been held admissible, on a trial for murder, to prove that the crime was part of a general conspiracy to kill certain obnoxious persons in a wide section of country.³ An offer to bribe, also, and an attempt to escape from commitment for a different offence, are admissible on the trial of the latter offence, when all the offences are connected in one transaction.⁴ And whatever forms part of the preparation of a crime is admissible as material from which the motive of the crime may be inferred.⁵

§ 32. (2) Suppose that it is alleged that the crime in question was one of a system of mutually dependent crimes; is it admissible, on a trial for one of these crimes, to put in evidence such other crimes, for the purpose of showing this system? In several lines of civil cases such evidence has been held admissible.⁶ Nor is there any reason why such evidence should not be received in criminal cases. In order to prove purpose on the defendant's part, system is relevant, and in order to prove system, isolated crimes are admissible from which system may

Exception
in cases of
system and
conspiracy.

⁶ Tex. Ap. 609. Where the defendant was charged with shooting deceased, it is allowable to prove that the defendant had shot and wounded the deceased a short time before. *Washington v. State*, 8 Tex. Ap. 377.

¹ *R. v. Cobden*, 3 F. & F. 833. See *R. v. Rearden*, 4 F. & F. 76.

² *R. v. Taylor*, 5 Cox C. C. 138. It was, however, held, in conformity with the views heretofore expressed, that it was not admissible to prove threats,

statements, or particular acts pointing only to other indictments, and not tending to implicate or explain the conduct of the prisoner in reference to the fire under immediate investigation. *Ibid.*

³ *Carroll v. Com.*, 84 Penn. St. 107.

⁴ *Dean v. Com.*, 4 Grat. 541. *Infra*,

§ 750.

⁵ See *infra*, § 753.

⁶ Whart. on Ev. § 44. See, also, *infra*, § 753.

be inferred. If the evidence is admissible on other grounds, it cannot be excluded because it charges the defendant with an extraneous crime.¹ But when such offences are introduced in evidence, the prosecution will be compelled to elect which it will rely on for a conviction.²

Conspiracy cases give signal illustrations of the rule here stated. The acts of each conspirator emanate from him individually, yet when they are part of a system of conspiracy they are admissible in evidence against his co-conspirators, although each component act may constitute an independent offence.³ The reason for the rule in this and in similar cases is that when once system is proved, each par-

¹ *R. v. Clewes*, 4 C. & P. 221; *R. v. Salisbury*, 5 C. & P. 155; *R. v. Richardson*, 8 Cox C. C. 448; *R. v. Richardson*, 2 F. & F. 343; *R. v. Cobden*, 3 F. & F. 833; *R. v. Reardon*, 4 F. & F. 76; *R. v. Proud*, L. & C. 97; *State v. Neagle*, 65 Me. 468; *State v. Gorman*, 58 N. H. 77; *State v. Morton*, 1 Williams, Vt. 310; *State v. Smalley*, 50 Vt. 736; *Com. v. Sturdivant*, 117 Mass. 122; *State v. Ransell*, 41 Conn. 433; *Coleman v. People*, 55 N. Y. 81; *Osborne v. People*, 2 Park. C. R. 583; *Pierson v. People*, 18 Hun, 239; *Hope v. People*, 83 N. Y. 418; *People v. Gibbs*, 1 N. Y. Cr. Rep. 473; *People v. Noelke*, 1 N. Y. Cr. Rep. 495; *Brown v. Com.*, 76 Penn. St. 319; *Campbell v. Com.*, 84 Penn. St. 187; *Duffy v. Com.*, 6 W. N. C. 311; *Ettinger v. Com.*, 98 Penn. St. 338; *Goersen v. Com.*, 99 Penn. St. 388; *Brown v. State*, 26 Oh. St. 176; *Bainbridge v. State*, 30 Oh. St. 264; *Tarbox v. State*, 38 Oh. St. 581; *State v. Murphy*, 84 N. C. 742; *Com. v. Hopkins*, 2 Dana, 419; *Stafford v. State*, 55 Ga. 592; *Pearce v. State*, 40 Ala. 720; *Mason v. State*, 42 Ala. 543; *Gassenheimer v. State*, 52 Ala. 325; *Ross v. State*, 62 Ala. 224; *Gray v. State*, 63 Ala. 66; *State v. Greenwade*, 72 Mo. 298; *State v. Nugent*, 71 Mo. 136; *State v. Adams*, 20 Kans. 311; *State v. Scott*, 24 Kans. 68; *People v. Robles*, 34 Cal. 591; *State v. Cowell*, 12 Nev. 337; *Galbraith v. State*, 41 Tex. 567; *Street v. State*, 7 Tex. App. 5; *Brown v. State*, 9 Tex. App. 81; *State v. Miller*, 47 Wis. 53. For cases of poisoning, see *infra*, § 50.

That other offences, part of the same system, cannot be excluded because sheltered by the statute of limitations, see *State v. Pippin*, 88 N. C. 646.

As extending the rule to lottery prosecutions, see *Thomas v. People*, 59 Ill. 160; *Miller v. Com.*, 13 Bush, 731. The rule is constantly applied in liquor cases. *Whart. Crim. Law*, 8th ed. § 1520. Thus, evidence that the defendant, the keeper of the Sherman House, kept spirituous liquor for sale there, at a certain date, has a tendency to prove that the defendant, still keeping the Sherman House, kept spirituous liquor for sale there at a later date. *State v. Colston*, 53 N. H. 483.

The plan of a conspiracy against several parties may be shown, though the conspiracy was only executed against one. *Ford v. State*, 34 Ark. 649.

² *Infra*, § 104.

³ *Infra*, §§ 698 *et seq.*; see *Whart. Cr. Law*, 8th ed. § 1398, where the cases are cited. *Com. v. Eastman*, 1 Cush. 189; *Bloomer v. State*, 48 Md. 529; *Marler v. State*, 66 Ala. 55.

ticular part of the system may be explained by the other parts which go to make up the whole.

§ 33. Thus, while one blow given to A. by B. may be accidental, few counsel would have the audacity to claim accident for eight or ten blows given to A. by B. at successive intervals, under varying conditions.¹ This, however, does not make admissible evidence of assaults not part of the same system.²

Illustrated
by successive
blows.

§ 34. A party, to take another illustration, is charged with holding or circulating forged paper, or other documents, as to which it is important to prove his *scienter*. One of such papers he may hold without being justly chargeable with knowledge of its character; when three or four are traced to him, suspicion thickens; if fifteen or twenty are shown to have been in his possession at different times, then the improbability of innocence on his part is in proportion to the improbability that the papers could have been in his possession without his knowing their true character.³ In such case the inference of system is strengthened by proof that the party had notice, on a prior occasion, that suspicion attached to paper of the same character as that he is now charged with illegally holding or passing;⁴ though a mere confession of having committed other forgeries, not part of the same system, or even proof of being concerned in such independent transac-

Illustrated
by successive
forgeries.

¹ R. v. Voke, R. & R. 531; Landell v. Hotchkiss, 1 Thomp. & C. (N. Y.) 80.

² People v. Gibbs, 93 N. Y. 471.

³ R. v. Forster, Dears. 456; R. v. Ball, R. & R. 132; R. v. Jarvis, Dears. 552; 7 Cox C. C. 53; R. v. Fuller, R. & R. 408; R. v. Harris, 7 C. & P. 429; R. v. Roebuck, 36 Eng. L. & Eq. 631; R. v. Pascoe, Pearce & D. 456; U. S. v. Burns, 5 McLean, 23; State v. McAllister, 24 Me. 139; Com. v. Hall, 4 Allen, 305; Com. v. Edgerly, 10 Allen, 184; Lindsay v. State, 38 Oh. St. 507; State v. Twitty, 2 Hawks, 248; Harding v. State, 54 Ind. 389; Carver v. People, 39 Mich. 786; Martin v. Com., 2 Leigh, 745; Reed v. State, 15 Ohio, 207; State v. Mix, 15 Mo. 153; State

v. Fisher, 65 Mo. 437; People v. Farrell, 30 Cal. 316; Speights v. State, 1 Tex. Ap. 551; Francis v. State, 7 Tex. Ap. 501; Taylor on Ev. § 322.

⁴ R. v. Hough, R. & R. 120; R. v. Hodgson, 1 Lew. 103; R. v. Forster, Dears. 456; R. v. Francis, L. R. 2 C. C. 128; State v. McAllister, 24 Me. 139; Com. v. Bigelow, 8 Met. 235; Com. v. Stearns, 10 Met. 256; Bishop v. State, 55 Md. 138; Finn v. Com., 5 Rand. 701; Hendrick v. Com., 5 Leigh, 708; Mason v. State, 42 Ala. 532.

For this purpose, the State may prove the possession or uttering of a particular forged paper of the making and uttering of which the defendant has been acquitted. Bell v. State, 57 Md. 168.

tions, is inadmissible.¹ The same distinctions are applicable to a succession of cheats.²

§ 35. In prosecutions for adultery, or for illicit intercourse of any class, evidence is admissible of sexual acts between the same parties prior to,³ or, when indicating continuousness of illicit relations, even subsequent to, the act specifically under trial.⁴ Prior sexual attempts on the same woman are admissible, under the same limitations, on a trial of rape.⁵

§ 36. A defendant, to take another case, sets up *casus* in answer to the charge of firing his house in order to defraud the insurers. To meet this it is admissible for the prosecution to prove that on prior occasions houses occupied by the defendant had been burned, and that he obtained payment for the same from separate insurance companies;⁶ and for the same object evidence of an attempt three days before, at firing, by the

¹ *People v. Corbin*, 56 N. Y. 363; 13 Ill. 599; *Lovell v. State*, 12 Ind. 18; *Stalker v. State*, 9 Conn. 341; *Fox v. State v. Kemp*, 87 N. C., 538; *State v. Pippin*, 88 N. C. 665; *Lawson v. State*, 20 Ala. 66; *McLeod v. State*, 35 Ala. 395; *Alsabrook v. State*, 52 Ala. 24; *Richardson v. State*, 34 Tex. 142; see *McClung v. McClung*, 40 Mich. 493.

² See *U. S. v. Snyder*, 4 McCr. 618; *Com. v. Jackson*, 132 Mass. 16; *Shipply v. People*, 86 N. Y. 375; *Strong v. State*, 86 Ind. 208; *infra*, § 53; see *Blake v. Ass. Co.*, 40 L. T. N. S. 211.

In *Com. v. Jackson*, 132 Mass. 16, it was held that on an indictment for obtaining money by false pretences it was inadmissible for the prosecution to put in evidence of other cheats by false pretences, "solely for the purpose of showing the intent with which the defendant made the sale." The court limited the exceptions to the rule excluding collateral crimes as follows: (1) To prove guilty knowledge. (2) When system is established. See *infra*, § 46.

³ Whart. Crim. Law, 8th ed. § 1733; *State v. Wallace*, 9 N. H. 518; *State v. Potter*, 52 Vt. 33; *Com. v. Horton*, 2 Gray, 354; *Com. v. Lahey*, 14 Gray, 91; *Com. v. Thrasher*, 11 Gray, 450; *Com. v. Call*, 21 Pick. 509; *Com. v. Nicholls*, 114 Mass. 285; *Com. v. Bowers*, 121 Mass. 45; *People v. Jenness*, 5 Mich. 305; *Searls v. People*,

⁴ See fully Whart. Crim. Law, 8th ed. § 1733; *Boddy v. Boddy*, 30 L. J. P. & M. 23; *State v. Witham*, 72 Me. 531; *State v. Wallace*, 9 N. H. 577; *State v. Bridgman*, 49 Vt. 202; *Thayer v. Thayer*, 101 Mass. 111 (overruling *Com. v. Thrasher*, 11 Gray, 450); *State v. Way*, 5 Neb. 283; *Lawson v. State*, 20 Ala. 65; though see *Coventry v. State*, 13 Ala. 172.

⁵ *Infra*, § 46. As to proof of fornication see *Pollock v. Pollock*, 71 N. Y. 137; *State v. Waller*, 80 N. C. 401.

⁶ *R. v. Gray*, 4 F. & F. 1102; *Com. v. McCarty*, 119 Mass. 354.

In *Kramer v. Com.*, 87 Penn. St. 299, which was a trial for arson, an attempt by the defendant to burn the same property two days subsequent to the act charged was admitted. See *infra*, § 53.

same defendant of the same property, may be received.¹ In the same line may be mentioned a New York ruling, that evidence of an attempt to set fire to a barn in the same village, and on the same night in which the building in litigation was burned, is admissible on the issue of accident.²

§ 37. When poisoning, also, is set up by the prosecution, it is admissible, as will hereafter be more fully seen, in order to rebut accident, to prove other attempts, by the same defendant, to poison other persons, when such attempts are part of a system with that under trial.³

Successive poisonings.

§ 38. When the object is to show system, subsequent as well as prior offences, when tending to establish identity or intent, can be put in evidence. The question is one of induction, and the larger the number of consistent facts, the more complete the induction is. The time of the collateral inculpatory facts is immaterial, provided they be close enough together to indicate that they are part of a system.⁴

Subsequent offences admissible to prove system.

§ 39. (3) Hence, to recur in greater detail to a line of cases noticed in brief in a prior section, if a party is charged with knowingly making, holding, or passing forged paper, and the fact of his possession of the paper is shown, but his knowledge of its character is disputed, it is admissible to show that shortly before or shortly after the event charged he had held or uttered similar forged instruments to an extent which makes it improbable that he should have been ignorant of the forgery.⁵ Thus, in a leading

Exception in cases when guilty knowledge is to be shown. Counterfeiting.

¹ *Com. v. Bradford*, 126 Mass. 42.

As to inference of other firings by steam-engines, see *Whart. on Ev.* § 42.

² *Faucett v. Nichols*, 64 N. Y. 377; *S. C.*, 4 N. Y. Sup. Ct. 597.

³ *Infra*, § 52; see *Goersen v. Com.*, 99 Penn. St. 388.

⁴ *R. v. Reardon*, 4 F. & F. 76; *State v. Bridgman*, 49 Vt. 202; *Com. v. Price*, 10 Gray, 472; *Thayer v. Thayer*, 101 Mass. 111; *Kramer v. Com.*, 87 Penn. St. 299. See *infra*, § 45. For cases of subsequent libels see *infra*, § 52, and of subsequent utterings of forged money, *infra*, § 45.

⁵ *R. v. Hough*, R. & R. 120; *R. v. Ball*, R. & R. 132; *R. v. Hodgson*, 1 Lew. 102; *R. v. Balls*, 1 Mood. C. C. 470; *U. S. v. Craig*, 4 Wash. C. C. 729; *U. S. v. Doeblor*, 1 Bald. 519; *U. S. v. Brooks*, 3 MacArthur, 315; *State v. McAlister*, 24 Me. 139; *Com. v. Stearns*, 10 Met. 256; *Com. v. Hall*, 4 Allen, 305; *Com. v. Edgerly*, 10 Allen, 184; *Spencer v. Com.*, 2 Leigh, 751; *Martin v. Com.*, 2 Leigh, 745; *Hendricks v. Com.*, 5 Leigh, 708; *Wash. v. Com.*, 16 Grat. 530; *Mason v. State*, 42 Ala. 532; *Heard v. State*, 9 Tex. Ap. 1; *McCartney v. State*, 3 Ind.

English case, on an indictment for uttering a Bank of England note, knowing it to be forged, evidence was offered for the prosecution that the defendant had uttered another note forged in the same manner, by the same hand, and with the same materials, three months previously, and that two ten pound notes and thirteen one pound notes of the same fabrication had been found on the files of the company, on the back of which there was the defendant's handwriting, but it did not appear when the company received them. This evidence was admitted, and "the case was referred to the opinion of the judges, the majority of whom were of opinion that it was admissible, subject to observation as to the weight of it, which would be more or less considerable according to the number of the notes, the distance of the time at which they had been put off, and the situation of life of the defendant, so as to make it more or less probable that so many notes could pass through his hands in the course of business."¹ It is not necessary in such cases that the other forged money should be of the same denomination as that under trial.²

§ 40. It was at one time thought that where the second uttering has been made the subject of a distinct indictment, evidence of such uttering might, in the discretion of the judge, be refused.³ The better opinion now is that the fact of another indictment having been found does not alter the rule.⁴ And it has been declared in England to

That indictments have been found for illustrative offences makes no difference.

353; *Steele v. People*, 45 Ill. 152; see, however, *Fox v. People*, 95 Ill. 71.

¹ *R. v. Ball*, R. & R. 132, 1 Camp. 324, cited in *Roscoe's Cr. Ev.* 93.

² *R. v. Harris*, 7 C. & P. 429; *R. v. Oddy*, 2 Den. C. C. 264; 5 Cox C. C. 210; *R. v. Foster*, 24 L. J. M. C. 134; 29 Eng. L. & Eq. 548. See *State v. Smith*, 5 Day, 175; *Stalker v. State*, 9 Conn. 341; *Reed v. State*, 15 Ohio, 217.

³ *R. v. Smith*, 2 C. & P. 633; *Talfourd's Dickinson*. Sess. 359.

⁴ *R. v. Hodgson*, Lew. C. C. 102; *R. v. Kirkwood*, Lew. C. C. 103; *R. v. Forster*, 29 Eng. L. & Eq. 548; *Dears*. C. C. 456; 6 Cox C. C. 521; *People v.*

Curling, 1 Johns. 320; *Hoskins v. State*, 11 Ga. 92. "It has frequently been decided that an acquittal of forging or uttering a particular forged paper will not preclude the State from proving the fact of the possession or the uttering of such forged paper in another prosecution against the same party for a crime of the same character. This principle was fully recognized and applied in the following cases: *Smith & Dougherty's Case*, 4 City Hall (N. Y.) Rec. 167, 168; *State v. Houston*, 1 Bail. 300; *McCartney v. State*, 3 Ind. 354; *State v. Jesse*, 3 Dev. & Batt. L. 103; *People v. Frank*, 28 Cal. 515; *Bandercomb's Case*, 2 Leach, 720;

be impracticable to lay down any general test as to the time within which such previous uttering must have taken place, in order to be admissible.¹

§ 41. Utterings by the defendant's accomplices are as admissible as utterings by himself, accompliceship being first shown.²

Accomplices' utterings may be in like manner proved.

§ 42. The instrument alleged to form the basis of the independent offence must be produced, or accounted for by showing the defendant took it back or destroyed it.³ Unless proved in the same way as is the instrument which the defendant is charged with forging or uttering, it cannot be received.

But illustrative offence must be duly proved.

§ 43. A similar inference is to be drawn from the possession of masses of counterfeit money, and of the implements of counterfeiting. Such facts may be put in evidence when tending to show a part of a system with the act principally charged.⁴ Nor is the evidence in such cases limited to proof of the collateral crime. The defendant's conduct at the time is admissible in order to prove guilty knowledge.⁵

Similar inferences as to masses of counterfeits, etc.

§ 44. Guilty knowledge being the gist of the offence of receiving stolen goods, receptions about the same time of other goods of a similar character stolen from the same person or persons connected with him, may be put in evidence on the trial of an alleged receiver.⁶ But the other occasions on which the stolen property was received must not be so far removed in point of time as to form entirely different trans-

So in cases of receiving stolen goods.

State v. Robinson, 16 N. J. L. 508; Hinman, 1 Bald. 292; U. S. v. Burns, United States v. Randenbush, 8 Pet. 5 McLean, 23; People v. Thomas, 3 288, 290." Grason, J., Bell v. State, Parker C. R. 256; State v. Twitty, 2 57 Md. 384. Hawks, 248; People v. Farrell, 30

¹ R. v. Salt, 3 F. & F. 834. *Supra*, Cal. 316; People v. Page, 1 Idaho, 114. § 38. ² R. v. Tattershall, 2 Leach, 984.

³ *Infra*, §§ 698 *et seq.*

⁴ See R. v. Oddy, 2 Den. C. C. 264;

⁵ R. v. Millard, R. & R. 245; R. v. 5 Cox C. C. 210; People v. Rando, 3 Forbes, 7 C. & P. 224; R. v. Phillips, Parker C. R. 335; State v. Ward, 49 1 Lew. C. C. 105; Com. v. Bigelow, 8 Conn. 429; Kilrow v. Com., 89 Penn. St. 229; Yarborough v. State, 41 Ala. 405; Shriedly v. People, 23 Oh. St. 30; Met. 235; Martin v. Com., 2 Leigh, 745.

⁶ R. v. Fuller, R. & R. 408; U. S. v. Devoto v. Com., 3 Metc. (Ky.) 417.

actions.¹ And the principal act, in order to admit the illustrative acts, must be antecedently proved.²

§ 45. It was at one time doubted whether a guilty receiving or uttering, subsequent to that charged in the indictment, was admissible in evidence.³ It is, however, now settled in Massachusetts that on an indictment for having a counterfeit note in his possession with intent to pass it, evidence that the defendant subsequently had in his possession other and different counterfeit bank bills is admissible.⁴ And in a recent English case,⁵ the Court of Criminal Appeal held, that on an indictment for uttering a counterfeit crown piece knowing it to be counterfeit, proof that the prisoner, on a day subsequent to the day of such uttering, uttered a counterfeit shilling, was ad-

¹ *R. v. Dunn*, 1 Mood. C. C. 150; *R. v. Oddy*, *ut supra*; *Com. v. Hills*, 10 Cush. 530; *Coleman v. People*, 53 N. Y. 130; *Copperman v. People*, 56 N. Y. 591.

In *R. v. Nicholls*, 1 F. & F. 51, the prisoner was indicted for receiving a quantity of lead knowing it to have been stolen. Cockburn, C. J., allowed evidence to be given that on several prior occasions, covering a series of months, the prisoner, in company with another person, had sold lead stolen from the same place and taken a share of the money.

² *Infra*, § 48; *R. v. Oddy*, *ut supra*. And see, *supra*, § 32.

"The positive side of the rule," says Sir J. Stephen (in *Criminal Law*, p. 309), "is of less importance than the negative side; but it is not easy to state precisely on what principle the line between what may and what may not be given in evidence has been drawn. The strongest case of admitting other transactions to show the character of the particular one under inquiry are the cases of the subsequent poisonings and precedent uttering of bad money.

"The strongest case of excluding other transactions is the case of receiv-

ing stolen goods. Where a man is tried for this crime, it is not lawful to give in evidence the fact that the prisoner had knowingly received stolen goods on former occasions, to show that he knew that the particular goods are stolen. *R. v. Oddy*, 2 Den. 264. How this differs from the case of uttering it is hard to understand."

In England, by act of parliament, upon the trial of a person for receiving, evidence may be given of other property, stolen within the previous year, having been found in his possession at the same time as the property the subject matter of the indictment, and evidence of his previous conviction within the preceding five years for any offence involving fraud or dishonesty may also be given. Stephen's *Ev.* part i. c. 3.

It is no objection to the proving of such receptions that they have been prosecuted in distinct indictments. *R. v. Davis*, 6 C. & P. 177. *Supra*, § 40.

³ *R. v. Taverner*, 4 C. & P. 413; *R. v. Smith*, 4 C. & P. 411; *R. v. Oddy*, *supra*.

⁴ *Com. v. Price*, 10 Gray, 472.

⁵ *R. v. Foster*, 24 L. J. M. C. 134; 29 Eng. Law & Eq. 548; *Dears. C. C.* 456; 6 Cox C. C. 521.

missible to prove the guilty knowledge of the prisoner. "The uttering of a piece of bad silver," said the court, "although of a different denomination from that alleged in the indictment, is so connected with the offence charged that the evidence of it was receivable."¹

§ 46. (4) In connection with the last exception are to be noticed cases in which, a party's intention being in issue, acts of a similar character are admissible.² The defendant's manner at the time of passing counterfeit money may also be proved for the same purpose.³ For the same reason, evidence of prior sexual assaults on the prosecutrix are admissible on an indictment for rape,⁴ though not of rapes on other persons.⁵ On the trial, also, of an indictment for murder, committed when attempting a rape, proof of prior sexual attacks on the deceased is admissible.⁶ And to show an old grudge, it is admissible

Exception
in cases
where in-
tention is
disputed.

¹ See also *R. v. Robinson*, 2 Leach, 749. That to show system subsequent offences may be proved has been already mentioned. *Supra*, § 38.

² *R. v. Millard*, R. & R. 245; *R. v. Wylie*, 1 B. & P. N. R. 93; *R. v. Ball*, R. & R. 132; *R. v. Dossett*, 2 Cox C. C. 243; 2 C. & K. 306; *R. v. Weeks*, 1 L. & C. 18; *Bottomly v. U. S.*, 1 Story, 135; *State v. Watkins*, 9 Conn. 47; *State v. Wentworth*, 37 N. H. 196; *Com. v. Tuckerman*, 10 Gray, 173; *Com. v. Bradford*, 126 Mass. 46; *People v. Hopson*, 1 Denio, 574; *People v. Stout*, 4 Parker C. R. 71, 132; *People v. Lyon*, 1 N. Y. Ch. Rep. 400; *Goersen v. Com.*, 99 Penn. St. 388; *Tarbox v. State*, 38 Oh. St. 581; *State v. Kline*, 54 Iowa, 183; *Cole v. Com.*, 5 Grat. 696; *State v. Raymond*, 28 Iowa, 582; *State v. Bash*, 12 Ired. 382; *Johnson v. State*, 17 Ala. 618; *Butler v. State*, 22 Ala. 43; *State v. Larkin*, 11 Nev. 314; *People v. Lopez*, 59 Cal. 362; *Street v. State*, 7 Tex. Ap. 5; *Pinckford v. State*, 13 Tex. Ap. 418; *Dubose v. State*, 13 Tex. Ap. 418.

³ *Butler v. State*, 22 Ala. 43; *Bayley*

on Bills, 449; *Archbold's C. P.*, 9th ed. 103. *Infra*, § 751.

So on a charge of sending a threatening letter, prior and subsequent letters from the prisoner to the party threatened may be shown in evidence, as explanatory of the meaning and intent of the particular letter on which the prosecution is based. *R. v. Robinson*, 2 Leach, 749. *Infra*, § 756.

Guilty knowledge and intent, also, in prosecutions for the sale of intoxicating liquor, may be proved by former convictions for the same offence. *State v. Neagle*, 65 Me. 468. *Supra*, § 39.

⁴ *State v. Walters*, 45 Iowa, 389; and cases cited *infra*, § 49.

⁵ *Ibid.*; *State v. Lapage*, 57 N. H. 245.

⁶ *State v. Lapage*, 57 N. H. 245; *Turner v. Com.*, 86 Penn. St. 54. *Supra*, § 35.

On the trial of an indictment for accusing a person of an unnatural crime with intent to extort money,—the prisoner being a soldier, and the accusation having been made while he was on duty as a sentry,—evidence of declarations made by him on a former

to prove that the defendant had been in prison for a burglary committed in the house of the deceased.¹

occasion, on coming off guard, that he had obtained money from a gentleman by threatening to take him to the guard-house and accuse him of an unnatural crime, is admissible. *R. v. Cooper*, 3 Cox C. C. 547. *Infra*, § 52.

The cases are thus grouped in the 8th edition of Roscoe's *Crim. Ev.* 99 :

"In *R. v. Roebuck*, 25 L. J. M. C. 51; *S. C.*, *Dears. & B. C. C.*, the prisoner was indicted for obtaining money from a pawnbroker by falsely pretending that a chain was silver. The chain was of a very inferior metal, and evidence was admitted, apparently without objection, that twenty-six chains were found on the prisoner, and that these were of similar materials. Evidence was also admitted that the defendant, a few days after the occasion in question, offered a similar chain to another pawnbroker, under similar circumstances. This was objected to, and the point, with other points, reserved. There is no trace of any discussion on this point, or any allusion to it in the judgment of the court in any of the reports; but the conviction was affirmed. The prisoner did not appear by counsel. In *R. v. Holt*, 9 W. R. 74; *Bell C. C.* 280, the prisoner was tried for obtaining, by false pretences, a sum of money from one Hirst. It appeared that the prisoner was employed by his master to take orders for goods, but was forbidden to receive money. On the 30th of April, the prisoner obtained from Hirst the sum of nine shillings and sixpence in payment for goods bought by Hirst of the prisoner's master, and which sum the prisoner falsely represented that he had authority to receive; this was the

offence charged in the indictment. Evidence was also tendered that within a week after the 30th of April the defendant obtained from another customer of his master the sum of eleven shillings by a similar false representation. The evidence was objected to, but received on the ground that it showed the intent of the prisoner when he committed the act charged in the indictment, and the question was reserved for the consideration of the Court of Criminal Appeal. No counsel appeared on either side, and no reasons are given for the judgment; but the conviction was quashed, *Erle, J.*, merely saying that, upon the facts stated in the indictment, the court thought the evidence objected to inadmissible.

"Perhaps the ground upon which this decision proceeded was this: that the only shape in which the evidence was admissible, if at all, was for the purpose of showing that the prisoner knew he did not possess the authority which he represented himself to have; and it may have been thought that for this purpose the evidence was not relevant, because, if any *bona fide* mistake existed upon this point, it would operate in one case as well as another, so that a mere repetition of the act would not, as in many other cases, add anything to the evidence of guilt; though it might seem that this is rather an objection to the weight of the evidence than to its admissibility. In *R. v. Richardson*, 2 F. & F. 343, the prisoner was indicted for embezzlement; three acts of embezzlement were charged in the indictment. It appeared that the prisoner's duty was to make

¹ *Powell v. State*, 13 Tex. Ap. 244.

It is essential, however, that such evidence, if admitted, should be simply to prove intent, and not to prove character, or establish a substantive and independent crime.¹ Thus in 1861, in Massachusetts, a new trial was granted in a case of embezzlement, where evidence of distinct acts of fraud was admitted, but where it did not appear that such evidence was limited by the judge, in his instructions to the jury, to the question of intent.²

various payments on account of his employers, and to keep weekly accounts of the money so expended. The sums so expended were correctly entered, but in casting up the items at the end of each week the totals were made to exceed the real amount by sums varying from £1 to £3. The prisoner, in accounting with his master, took credit for the larger sums. For the prosecution, in order to show that this was not the result of innocent mistake on the part of the prisoner, evidence was tendered that in numerous weeks, both before and after that charged in the indictment, similar mistakes, always in favor of the prisoner, had been made. This evidence was objected to, but Williams, J., ruled that it was admissible to counteract an obvious defence on the part of the prisoner, and he said that Pollock, C. B., entirely agreed with him on the point. So also where the prisoner had to account weekly, and in the indictment he was charged with embezzling the gross weekly amounts, evidence was admitted of the separate items making up the gross amounts, partly on the ground that the fact of having omitted to account for the separate items would go to show that the not accounting was not mere accident. *R. v. Balls*, L. R. 1 C. C. 328; 40 L. J. M. C. 148."

Where a defendant was on trial for breaking and entering the City Hall, at Charlestown, and a mass of burglarious tools and implements, found in his possession at the time of his arrest,

were exhibited to the jury, some of which were adapted to the commission of the offence with which he was charged, it was held that it was not competent for the government to prove that the notch of a key found among such tools and implements was made and fitted by the defendant, for the purpose of opening the door of the building of the Lancaster Bank. *Com. v. Wilson*, 2 Cush. 590. On the other hand, it has been ruled that where the prisoner was seen on the day after the burglary for which he was indicted, under very suspicious circumstances, near the place where it was committed, it was competent to prove that the implements used came from his home. *People v. Larned*, 3 Selden, 445. For proof of guilty knowledge in cases of firing, see *supra*, § 36.

¹ See *Meyer v. People*, 80 N. Y. 364; *Shipply v. People*, 86 N. Y. 375; *Pinckford v. State*, 13 Tex. Ap. 468.

² *Com. v. Shepard*, 1 Allen, 575. See *R. v. Ball*, R. & R. 132; *Com. v. Vaughan*, 9 Cush. 594.

A. was tried for maliciously burning a barn of B., and there was evidence implicating C. in the offence. To show malice on the part of C. toward B., the prosecution proved that he had, before the fire, commenced a criminal prosecution against B., in which the latter was discharged. It was held that A. could not show, in order to disprove malice, that such prosecution was founded on probable cause. *Com. v. Vaughan*, 9 Cush. 594.

§ 47. (5) Proof of a collateral offence may be relevant in order to identify the defendant, or certain articles connected with the offence.¹ Thus, on an indictment for arson, evidence has been admitted to show that property which had been taken out of the house at the time of the fire was afterwards discovered in the prisoner's possession.² And so on an indictment for stabbing, in order to identify the instrument evidence may be adduced of the shape of a wound given to another person by the prisoner at the same time, although such wound be the subject of another indictment.³ When an *alibi* is disputed, it is therefore admissible to prove that at the time at issue the defendant was present perpetrating independent crimes.⁴

Exception
in ques-
tions of
identity.

But ordinarily a defendant may prove that the facts relied on to show guilty intent do not bear such construction. *State v. Morton*, 8 Wis. 352. See *Phillips on Ev.* 470.

¹ *R. v. Rooney*, 7 C. & P. 517; and see *R. v. Briggs*, 2 M. & R. 199; *Goersen v. Com.*, 99 Penn. St. 388; *Yarborough v. State*, 41 Ala. 405; *Satterthwaite v. State*, 6 Tex. Ap. 609.

The true distinction in this respect is well illustrated in a case before the Supreme Court at Albany, in September, 1868. *Hall v. People*, 6 Parker C. R. 671. The defendant was charged with burglariously opening the barn of J. G., and stealing certain articles, which were subsequently found on the defendant's boat, and in his possession. It was held to be erroneous to permit the prosecutor to prove that there was also found on the prisoner's boat other articles of property stolen from a third party, two or three weeks prior to the alleged burglary. "This testimony," said Peckham, J., "is loose and indirect—inconclusive and dangerous. The People might have properly shown the condition of things where this property was found, but they could not prove another felony, unless it was so strongly connected

with the felony charged as to prove, or strongly tend to prove, that the man who committed the one was guilty of the other. I remember a case of one Dunbar, tried for the murder of a boy in Albany County. It appeared that two little boys had been murdered the same afternoon and on the same farm—were left together about midday, and were killed that afternoon. One was found, within a few days, hanging in a tree; the other some distance off, on the same farm, killed by a flail and partly buried. There was other evidence tending strongly to show that the same person must have killed both. On the trial for killing the one found buried, evidence was offered and received that the nails in the prisoner's boots fitted precisely the marks made in climbing the tree where the other boy was found suspended. That testimony, I think, was clearly proper."

² *R. v. Rickman*, 2 East P. C. 1035.

³ Per Gaselee, J., and Park, J., *R. v. Fursey*, 6 C. & P. 81; *Roscoe's Crim. Ev.* 92, giving the above citations.

⁴ *Stephen's Ev.* 10; *R. v. Bleasdale*, 2 C. & K. 265; and see *Turner v. Com.*, 86 Penn. St. 54.

§ 48. To sustain the exceptions heretofore enumerated, however, and to make evidence of independent crimes admissible, the following conditions must exist:—

Conditions
of such ex-
ceptions.

(a) Ground must first be laid implicating the defendant in the case under trial; and unless sufficient evidence of this has in the opinion of the judge been received, all evidence of other offences to prove intent must be excluded. For it is a violation of the fundamental sanctions of our law to admit evidence that the defendant committed one offence in order to prove he committed another.

(b) The extraneous crime cannot be put in evidence without proof that the defendant was concerned in its commission.¹

(c) There must be system established between the offence on trial and that introduced to connect it with the defendant.²

(d) When system has been established the testimony of other offences is not excluded by the fact that the defendant had been indicted for their commission.³

§ 49. What has been said of crimes is applicable to attempts. They may be put in evidence, when relevant, under the same restrictions as have heretofore been stated with regard to crimes.⁴ On an indictment for rape, there-

Proof of
prior at-
tempts in

¹ *R. v. Harris*, 4 F. & F. 342.

A letter to the defendant, inclosing counterfeit money, which letter has been taken from the post-office by the defendant, but not opened by him, or its genuineness acknowledged by him, is not evidence against him. *Com. v. Edgerly*, 10 Allen, 184. *Infra*, § 682. So forged paper found on the wife's person cannot be used against the husband without proving his knowledge. *People v. Thoms*, 3 Parker C. R. 256.

² In *People v. Spielman*, N. Y. Ct. of App. 1879 (20 A. L. J. 96), which was an indictment for procuring goods by false pretences in January, 1876, evidence of similar representations to others in March, 1876, was offered to prove falsity, and was excluded for that purpose, but was admitted to show the knowledge of falsity in January. This

was held error. See other cases *infra*, § 53; *Swan v. Com.*, 14 Weekly Notes, 67.

³ *Supra*, § 40.

⁴ See *infra*, § 753; *R. v. Voke*, R. & R. 531; *Mimms v. State*, 16 Oh. St. 221; *Templeton v. People*, 27 Mich. 501; *State v. Waters*, 45 Iowa, 389; *Defrese v. State*, 3 Heisk. 53. See *Snyder v. State*, 59 Ind. 105.

On an indictment against persons for a conspiracy to carry on the business of common cheats, evidence is admissible of the defendant's having made false representations to other tradesmen besides those named in the indictment. *R. v. Roberts*, 1 Camp. 400; *inf.* § 53.

In another case, upon an indictment for conspiring and unlawfully meeting for the purpose of exciting disaffection and discontent among his majesty's

like manner admissible.

fore, prior attempts to ravish may be put in evidence, when intention is at issue.¹ But such collateral attempts must be shown to be connected with the crime on trial.²

§ 50. On a trial for poisoning, is it admissible to prove prior poisonings perpetrated by the same defendant?³ On the first glance, the answer would be emphatically in the negative, unless such poisonings were first shown to be part of a system with that under trial, or wrought up in the *res gestae*. It is grossly unjust to the defendant to try him for one crime when charging him with another. It is destructive of fairness and regularity of procedure to try more than one issue at a time. Hence to prove a particular poisoning it is inadmissible to put in evidence another independent poisoning.⁴ And it is now settled that to permit several independent poisonings to be introduced by the prosecution in a bunch at the outset,⁵ when only one

subjects at Manchester, it was held that the previous conduct of a portion of the assembly, in training, etc., and in assaulting persons whom they called spies, was competent evidence as to the general character and intention of the meeting, although the effect of it as to each particular defendant was a distinct matter for the consideration of the jury. It was held competent to show, also, as against Hunt (who, though a stranger, except by political connection, had been invited to preside as chairman at the meeting), that at a similar meeting in another place, held for an object professedly similar, certain resolutions had been proposed by that person; it being in its nature a declaration of his sentiments and views on the particular subject of such meetings, and of the topics there discussed. *R. v. Hunt*, 3 B. & Ald. 566.

¹ *State v. Knapp*, 45 N. H. 148; *Strang v. People*, 24 Mich. 1; *State v. Waters*, 45 Iowa, 389; *Williams v. State*, 8 Humph. 583; and cases cited *supra*, §§ 35, 38.

² *State v. Freeman*, 4 Jones (N. C.), 5. *Infra*, § 753.

³ For presumption in cases of poisoning see *infra*, §§ 787 *et seq.*

⁴ To this effect was the ruling of the Superior Court sitting at New Haven, Conn., in April, 1872, on the trial of Mrs. Lydia Sherman, charged with the murder of her husband, Horatio N. Sherman.

⁵ See *Com. v. Blair*, 126 Mass. 40.

The same result, on an issue of a similar nature, was reached by the Supreme Court of Pennsylvania in 1872. "To make," said Judge Agnew, in giving the opinion of the court, "one criminal act evidence of another, a connection between them must have existed in the mind of the actor, linking them together for some purpose he intended to accomplish; or it must be necessary to identify the person of the actor, by a connection which shows that he who committed the one must have done the other. Without this obvious connection, it is not only unjust to the prisoner, to compel him to acquit himself of two offences instead of one,

poisoning is charged in the indictment, is inadmissible, for the reason that this would create several distinct issues, and would subject the defendant to the hardship of being tried, as to all of these issues but one, without any prior notice by which he could prepare for his defence. But suppose that the defendant, conceding the fact that the deceased was poisoned, sets up as a defence that the poisoning was accidental. Would it then be competent for the prosecution to prove in rebuttal that several prior poisonings had taken place in the same household within a short time previous? When we recollect that the rule, in regard to passing forged money, has always been to meet the defence of accident by just this sort of evidence, it would be hard to answer the question in the negative. This does not mean that because A. poisoned somebody ten years ago, somebody else, who died yesterday under suspicious circumstances, was poisoned by A. If such reasoning were correct, it would be easy enough to find a scapegoat on whom all new poisonings could be avenged, since all that would be necessary for this purpose would be to pick out as a defendant some one who had committed some poisoning in former years. What is meant is, that when a defendant says, "I did not know that this drug was poison; or, knowing it, I administered it by mistake," then it is admissible to answer, "There are so many other cases in which you administered the same drug with fatal effect, that we must infer that your defence of accident in this case cannot be sustained." The reasoning is somewhat the same as that which leads us to regard a physician as guilty of malpractice, on facts which would not be regarded as imputing guilt to a lay attendant. We say, "You must have known better." And to this is added the conclusion from proba-

but it is detrimental to justice to burden a trial with multiplied issues that tend to confuse and mislead the jury. The most guilty criminal may be innocent of other offences charged against him, and of which, if fairly tried, he might acquit himself. From the nature and prejudicial character of such evidence, it is obvious it should not be received, unless the mind plainly perceives that the commission of the one tends, by a visible connection, to prove

the commission of the other by the prisoner. If the evidence be so dubious, that the judge does not clearly perceive the connection, the benefit of the doubt should be given to the prisoner, instead of suffering the minds of the jurors to be prejudiced by an independent fact, carrying with it no proper evidence of the particular guilt." *Shaffner v. Com.*, 72 Penn. St. 60. See also *People v. Doyle*, 21 Mich. 221; *Farrer v. State*, 2 Oh. St. 64.

bilities already noticed. We say that it is hard to believe, where there is a series of similar acts each tending to the same object, that these acts were undesigned. The acts mutually illustrate each other's motives, and the more numerous the acts the more clearly is motive proved. Poison may have been communicated to B. by accident, and the evidence as to this may be in equipoise. But when to C., within the same range of objects as B., the same kind of poison at another time is administered, then it may be two to one that the act was designed. And in proportion to the number of persons belonging to a particular class who are poisoned does the defence of accident, set up by the perpetrator of these several acts, vanish. Hence, to meet the defence, evidence of such other poisons may be received.¹ So, indeed, has it been twice held in England. Thus Maule, J., when ignorance of the poisonous character of a "white powder" was set up as a defence, admitted evidence of the prior administering, by the defendant, of the same powder to another person, who died.² And in a much later case, upon the trial of a husband and wife for the murder of the mother of the former by administering arsenic to her, for the purpose of rebutting the inference that the arsenic had been taken by accident, evidence was admitted that the male prisoner's first wife had been poisoned nine months previously; that the woman who waited upon her, and occasionally tasted her food, showed symptoms of having taken poison; that the food was always prepared by the female prisoner; and that the two prisoners, the only other persons in the house, were not affected with any symptoms of poison.³ So in 1873, where a prisoner was charged with the murder of her child by poison, and the defence was that its death resulted from an acci-

¹ See *Crim. Law Mag.* (1880), 29.

² *R. v. Dossett*, 2 C. & K. 306.

³ *R. v. Garner*, 4 F. & F. 346. Sir J. Stephen (*Criminal Law*, p. 308), in discussing this point, says: "Four indictments against a woman for poisoning her husband and two of her sons by arsenic, and for administering arsenic with intent to murder another son, being presented at one assize, evidence as to the administration of the arsenic to the three sons was tendered

on the trial for poisoning the husband, though the sons were poisoned some months after the husband's death. It was admitted, on the double ground that the similarity of the symptoms proved that the husband died of arsenic, and that the recurrence of the same event proved that it was not accidental. *R. v. Geering*, 18 L. J. M. C. 215. The case of *R. v. Gardner*, at Lincoln Lent Assizes, was very similar to this." S. P., *R. v. Heeson*, 14 Cox C. C. 40.

dental taking of such poison, evidence to prove that two other children of hers and a lodger in her house had died previous to the charge under trial from the same poison, was held to be admissible by Archibald, J., after conferring with Pollock, B.¹

§ 51. On the trial of a husband for the murder of his wife, the State has a right to prove a course of ill treatment by the husband of the wife,² and his adultery with another woman.³

Distinctive rules in cases of marital homicide.

§ 52. The hypothesis of the prosecution in libel being that the libel was malicious, to prove malice it is relevant for the prosecution to put in evidence continuous prior defamation by the defendant,⁴ and for this purpose acts of defamation subsequent to that in issue are admissible.⁵ No subsequent libels, however, can be admitted, if they do not relate to the same general subject matter as in that charged;⁶ though repetitions, even after action brought, are admissible.⁷ Insulting acts, preceding or ac-

In libel.

¹ R. v. Cotton, 12 Cox C. C. 400.

² *Infra*, 785; State v. Watkins, 9 Conn. 47; Sayres v. Com., 88 Penn. St. 291; State v. Langford, Busbee, 436; Stone v. State, 4 Humph. 27; Cole v. Com., 2 Grat. 696; State v. Wisdom, 8 Porter, 511; Johnson v. State, 17 Ala. 618; *infra*, §§ 784, 785, 796. See Turner v. Com., 86 Penn. St. 54.

³ Stout v. People, 4 Parker C. R. 132; State v. Rush, 12 Ired. 382. See *infra*, §§ 785, 786, for cases; and see People v. Jenness, 5 Mich. 323; Templeton v. People, 27 Mich. 501; St. Louis v. State, 8 Neb. 81.

On the trial in Massachusetts of a man for the alleged murder of a woman, the judge submitted to the consideration of the jury all the evidence of the relations and intercourse between the prisoner and the deceased for six months before the homicide; refused to rule, as requested by the defendant, that there was no evidence of any engagement of marriage between them; and ruled that the jury should consider all the facts as showing the relations and explaining the conduct of the

parties. It was ruled that the defendant had no ground of exception. Com. v. Costley, 118 Mass. 1.

⁴ Barrett v. Long, 3 H. L. Cas. 395, 414. See R. v. Robinson, 2 Leach, 749; R. v. Boucher, 4 C. & P. 562; R. v. Cooper, 3 Cox C. C. 547; Com. v. Snelling, 15 Pick. 337; State v. Riggs, 39 Conn. 498; State v. Lehre, 2 Brev. 446; State v. Allen, 1 McCord, 525. See Whart. Crim. Law, 8th ed. § 1651.

⁵ *Supra*, § 38; Pearson v. Le Maitre, 6 Scott N. R. 607; 5 M. & Gr. 700. See, also, Hemmings v. Gasson, E., B. & E. 346; Perkins v. Vaughan, 4 M. & Gr. 988.

⁶ See Finderty v. Tipper, 2 Camp. 72; Watson v. Moore, 2 Cush. 133; Townsend on Libel, § 390; though see U. S. v. Crandall, 4 Cranch C. C. 683. Where the charge is slandering a female, words defamatory of other women cannot be given in evidence, though they were uttered in the course of the same conversation. Haley v. State, 63 Ala. 89.

⁷ Townsend on Libel, § 390. See, as to general rule, Baldwin v. Soule, 6

companying a defamatory publication, can also be put in evidence as showing its motive.¹ On the other hand, in civil suits, in mitigation of damages, the defendant has been allowed to prove that he copied the libel from another newspaper,² or that he had been provoked by attacks on him by the plaintiff,³ provided such libels relate to the general subject of the trial,⁴ or are generally calculated to provoke.⁵

§ 53. Fraud being in dispute, it is admissible to prove any facts from which its existence or non-existence may be logically inferred.⁶ Nor is the prosecution confined to the fraudulent misstatements which are the immediate subjects of suit; other illustrative fraudulent misstatements may be put in evidence,⁷ though to make such misstatements admissible they must be part of a system with the offence charged.⁸ Thus, upon a trial for false pretences, it is competent, in order to prove intent, to show that the accused made similar representations about the same time to other

Gray, 321; *Robbins v. Fletcher*, 101 Mass. 115; *Mix v. Woodward*, 12 Conn. 262; *Williams v. Miner*, 18 Conn. 464; *Howard v. Sexton*, 4 N. Y. 157; *Kennedy v. Gifford*, 19 Wend. 296.

¹ *Bond v. Douglas*, 7 C. & P. 626; *Kean v. McLaughlin*, 2 S. & R. 469. See C. v. A. B., 2 Weekly Notes, 291.

² *Saunders v. Mills*, 6 Bing. 213; affirmed in *Pearson v. Le Maitre*, 6 Scott N. R. 607; 5 M. & Gr. 700.

³ *Taylor's Ex.* § 322, citing *Watts v. Frazer*, 7 A. & E. 223; *Tarpley v. Blabey*, 2 Bing. N. C. 437; 4 Scott, 642; *May v. Brown*, 3 B. & C. 113; *Hotchkiss v. Lothrop*, 1 Johns. 286.

⁴ *May v. Brown*, *ut supra*.

⁵ See *Wakley v. Johnson*, Ry. & M. 422; *Thomas v. Dunaway*, 30 Ill. 373; *Boteler v. Bell*, 1 Md. 173; *Pugh v. McCarty*, 40 Ga. 444.

⁶ *R. v. Murdock*, 2 Den. C. C. 298; *R. v. Wortley*, 2 Den. C. C. 334; *R. v. Batts*, 8 Cox C. C. 140; *Blake v. Albion Co.*, 14 Cox C. C. 246; *Com. v. Jeffries*, 7 Allen, 548; *Stockwell v. Silloway*, 113 Mass. 384; *Cook v. Moore*, 11 Cush.

216; *Com. v. Butterick*, 100 Mass. 1, 12; *Calkins v. State*, 18 Oh. St. 366; *People v. Marion*, 29 Mich. 31; and cases cited *supra*, § 16.

⁷ "Fraud being alleged, a wide range is given in proof of circumstances tending to establish it, it being a matter of secrecy generally. It is only by collecting together numerous circumstances oftentimes that it can be brought to the light and exposed." *Hall v. Stanton*, Sup. Ct. Penn., 2 Weekly Notes, 578; *Brown v. Shock*, 77 Penn. St. 471. See, also, *Hall v. Naylor*, 18 N. Y. 588; *Castle v. Bullard*, 23 How. 172. Compare *R. v. Holt*, Bell C. C. 280; *Hovey v. Grant*, 52 N. H. 569.

As to the latitude allowed in cases of fraud see *Simons v. Vulcan Co.*, 61 Penn. St. 202; *Heath v. Page*, 63 Penn. St. 108; *Woods v. Gummert*, 67 Penn. St. 136; *Brown v. Shock*, 77 Penn. St. 471.

⁸ See *supra*, §§ 29 *et seq.*; *Bottomley v. U. S.*, 1 Story, 135.

persons, and by means of such false representations obtained goods;¹ and other acts, part of the same system of fraud, may be put in evidence.² In conformity with the rule just stated, on a trial for embezzlement, cognate embezzlements may be proved;³ and on a trial for perjury, cognate perjuries.⁴

§ 54. Ordinarily, when a party is indicted or sued for injury flowing from negligence imputed to him, it is irrelevant, for reasons already given, to prove against him other ^{In negli-} disconnected though similar negligent acts. On an indictment against a surgeon, for instance, for negligent manslaughter, other acts of negligence by the defendant are inadmissible.⁵ So where the question, in a suit against a railway company, is whether a driver was negligent on a particular occasion, it is irrelevant to prove that he had been negligent on other occasions.⁶

But when a party is charged with the negligent use of a dangerous agency, and the case against him is that he did not use care proportionate to the danger, then the question becomes material whether he knew, or ought to have known, the extent of the danger. On such an issue as this it is relevant for the party aggrieved to prove disconnected acts, of which the defendant should have been cognizant, and which, if he were cognizant of them, would have divulged to him the extent of the danger, and would have made it his duty to take precautions which would have averted the danger. Thus, in an action against a railroad company for injuries sustained from a car running off the track, evidence has been received to prove a series of runnings off the track on the same road, by the same line of cars, in the previous month;⁷ and when an engineer is charged with running a train with undue speed, evidence of the speed with which he drove the train on prior days at the same place has been received.⁸ So in a suit by A. against B. for damages to

¹ *Trodden v. Com.*, 31 Grat. 862. See *State v. Call.*, 48 N. H. 126; *People v. Spielman*, *supra*, § 48; *Whart. Crim. Law*, 8th ed. § 1184.

² *R. v. Francois*, 12 Cox C. C. 612; *L. R.* 2 C. C. 128; *Strong v. State*, 86 Ind. 208; *supra*, § 34.

³ *R. v. Richardson*, 8 Cox C. C. 448; 2 F. & F. 343.

⁴ *State v. Raymond*, 20 Iowa, 582.

⁵ *R. v. Whitehead*, 3 C. & K. 202.

⁶ *Whart on Ev.* § 40; *Maguire v. R. R.*, 115 Mass. 240; *Blair v. Pelham*, 118 Mass. 420; *Coale v. R. R.*, 60 Mo. 232; *Louisville R. R. v. Fox*, 11 Bush, 495.

⁷ *Mobile R. R. v. Ashcroft*, 48 Ala. 15.

⁸ *State v. R. R.*, 58 N. H. 410, citing *State v. R. R.*, 52 N. H. 528; *State v.*

A. from a ferocious dog negligently kept by B., it has been held relevant for A. to show that the dog had previously bitten X., Y., and Z., and that they had complained to B. of their hurts so sustained.¹

§ 55. When good faith is at issue, it is relevant to put in evidence facts from which such good faith is inferable.²

Good faith
may be in-
ferred from
facts.

One of the most striking illustrations of this rule is to be found in homicide cases, in which it is admissible, in order to sustain the good faith of a party who claims that he believed he was acting in self-defence, for him to show that he had been advised of threats by his assailant to take his life.³ So in a leading English case, where the hypothesis on which the plaintiff rested was that he was insane at the time of a particular contract, it was held admissible for him, in order to sustain the good faith of this hypothesis, and the fact that his insanity must have been known to the other contracting parties, to prove, by his conduct at the time in question, that he must have been regarded as insane by those who dealt with him.⁴

§ 56. Prudence and diligence at a particular juncture may in like manner be proved by facts from which such prudence

So as to
prudence
and dili-
gence.

or diligence may logically be inferred.⁵ For instance, on a question as to whether an engineer, in the management of a train at a collision, acted prudently, there is no doubt that it would be admissible to prove the cries of bystanders, without producing such bystanders.⁶ So in all cases in which prudence and diligence are to be shown, it is admissible to put in evidence all the facts by which prudence and diligence are to be gauged.⁷

Colston, 53 N. H. 483; Shailer v. son, 91 U. S. 454; and other cases Bumpsteed, 99 Mass. 112; State v. cited in Whart. on Ev. § 43. Hoyt, 46 Conn. 320.

² See *infra*, § 727.

¹ Stephen's Evidence, 17, citing Roscoe's Nisi Prius, 739; Whart. on Neg. § 912; Worth v. Gilling, L. R. 2 C. P. 1; Kittredge v. Elliott, 16 N. H. 77; Whittier v. Franklin, 46 N. H. 23; Arnold v. Norton, 25 Conn. 92; Buckley v. Leonard, 4 Denio, 500; Cockerham v. Nixon, 11 Ired. L. 269; McCaskill v. Elliott, 5 Strobb. 196; Keenan v. Hayden, 39 Wis. 558. See fully Grand Trunk R. R. v. Richard-

³ Whart. on Homicide, § 694. See *infra*, § 757.

⁴ Beavan v. McDonnell, 10 Exch. 188. For other illustrations see Whart. on Ev. § 55.

⁵ As to presumption of prudence in danger see *infra*, § 732.

⁶ Taylor v. Willans, 2 B. & Ad. 845. See *infra*, § 272.

⁷ *Infra*, § 732. See Whart. on Neg. §§ 26-69.

§ 57. While a defendant's character is presumed to be good until it is impeached, it is always admissible for him to prove that his character was such as to make it unlikely that he would have perpetrated the act charged upon him.¹ It is, also, sometimes relevant to put in evidence the character of the person on whom the crime was alleged to have been committed.² There are, also, cases in which the reputation of persons visiting houses of alleged ill-fame is admissible,³ and it has been held that on an indictment for adultery the bad reputation of the alleged *particeps criminis* may be proved.⁴ It may happen, also, that a party may be charged, under a statute, with being a "common thief," and in such case his reputation as such may make out a *prima facie* case for the prosecution.⁵ But the general rule is that unless the defendant introduces evidence to prove his character to be good, it cannot be assailed by evidence on part of the prosecution.

Character
relevant in
criminal
issues.

§ 58. Character, in the sense in which the term is used in jurisprudence, means the estimate attached to the individual by the community, not the real qualities of the individual as conceived by the witness. In other words, it is not what the individual in question really is, but what he is held to be by the society in which he moves. "Character," therefore, is to be regarded as convertible with "reputation."⁶ A witness, therefore, who is called to speak to character,—unlike a

"Character" is
convertible
with reputa-
tion.

¹ See cases cited *infra*, § 67.

² *Infra*, § 68.

³ See *infra*, §§ 260, 261. As to other questions of reputation see *infra*, § 261; *State v. Haley*, 52 Vt. 476. And see more fully Wh. Cr. Law, 8th ed., § 1452, to the effect that when a house is charged to be one of "ill-fame," its bad reputation may be proved by the prosecution.

⁴ *Com. v. Gray*, 129 Mass. 474.

⁵ *World v. State*, 50 Md. 49. *Infra*, § 261.

⁶ Whart. on Ev. § 564; *R. v. Rowton*, L. & C. 520; 10 Cox C. C. 25; *Knode v. Williamson*, 17 Wall. 586; *Wetherbee v. Norris*, 103 Mass. 566;

Snyder v. Com., 85 Penn. St. 519; *People v. Garbutt*, 17 Mich. 9; *State v. Egan*, 59 Iowa, 636. But see *Martz v. State*, 26 Oh. St. 162; *Haley v. State*, 63 Ala. 83; *Sullivan v. State*, 66 Ala. 48. "Character," said Erskine (*R. v. Hardy*, 24 St. Tr. 1079), "is the slow spreading influence of opinion arising from the deportment of a man in society, as a man's deportment good or bad necessarily produces one circle without another, and so extends itself till it unites in one general opinion. That general opinion is allowed to be given in evidence." See as criticizing the position in the text, *London Law Times*, Jan. 8, 1881, p. 167.

master who is asked for the character of his servant,—cannot give the result of his own personal experience and observation, or express his own opinion, but in strict law he must confine himself to evidence of mere general repute.¹ And in view of the fact that “the best character is generally that which is the least talked about,” the courts have found it necessary to permit witnesses to give negative evidence on the subject, and to state that “they never heard anything *against* the character of the person on whose behalf they have been called.”² But in any view, a witness as to character, confined as he is, as a rule, to proving general reputation in a community, may be examined for the purpose of testing his opportunities of ascertaining such reputation.³

Burden on party assailing character. § 59. Good character, as we have seen, being presumed, evidence to support it will not be received until it is assailed.⁴

Defendant may show a character inconsistent with the crime charged. § 60. While the defendant is allowed to call witnesses to speak generally as to his character, prior to the contested act, he cannot give evidence of particular acts, unless such evidence tends directly to the disproof of some of the facts put in issue by the pleadings.⁵ And the character he is entitled to prove must be such as would make it unlikely that he would be guilty of the particular crime with which he is charged.⁶ Hence evidence in a homicide case that

¹ Taylor's Ev. § 325 A.

² Cockburn, C. J., L. & C. 536; 10 Cox C. C. 34; R. v. Turner, 6 How. St. Tr. 613; Gandolfo v. State, 11 Oh. St. 114; State v. Lee, 22 Minn. 407. See Coxwell v. State, 66 Ga. 309.

³ *Infra*, §§ 487, 489.

⁴ Buller, N. P. 296; R. v. Rowton, L. & C. 520; 10 Cox C. C. 25; State v. Lapage, 57 N. H. 245; Turner v. Com., 86 Penn. St. 54; State v. Carter, 1 Houst. C. C. 402, and cases cited *infra*, § 64; and see Whart. on Ev. § 59, for civil cases.

⁵ Archb. C. P. 104; 2 Russ. Cr. & M. 784; R. v. Stannard, 7 C. & P. 673; Com. v. Hardy, 2 Mass. 317; State v. Wells, Cox R. 424; Com. v. Webster, 5 Cush. 524; Thomas v. People, 67 N.

Y. 218; Kistler v. State, 54 Ind. 460; Hoppe v. People, 31 Ill. 385; State v. Kinley, 43 Iowa, 294; Carson v. State, 50 Ala. 135; Drake v. State, 51 Ala. 30; Davis v. State, 10 Ga. 101; Coffee v. State, 1 Tex. Ap. 548; Lee v. State, 2 Tex. Ap. 338. See McQueen v. State, 82 Md. 73.

⁶ 2 Russ. Cr. & M. 784; 1 Greenl. on Ev. § 54; R. v. Clarke, 2 Stark. 241; R. v. Hodgson, R. & R. 211; R. v. Stannard, 7 C. & P. 673; Com. v. Hardy, 2 Mass. 300; Com. v. Webster, 5 Cush. 524; Andrews v. Vanduzer, 11 Johns. 38; Kauffman v. People, 11 Hun, 82; Frazier v. R. R., 38 Penn. St. 104; Gandolfo v. State, 11 Oh. St. 114; Hoppes v. People, 31 Ill. 385; People v. Garbutt, 17 Mich. 9; Sawyer v.

the defendant when in the army was reputed a good and valiant soldier, is inadmissible.¹ The immediate object for which such evidence is introduced is to disprove guilt, but it is also admissible on a trial for murder, to aid the jury in ascertaining the probable grade of the offence.²

§ 61. Where a defendant has voluntarily put his character in issue, and evidence for the prosecution has been introduced in rebuttal, it has been said that the examination may be extended to particular facts,³ though this has

Prosecution cannot rebut by particular facts.

Eifurt, 2 Nott & M. 511; *Davis v. State*, 10 Ga. 101; *State v. Torney*, 13 Mo. 455; *State v. Dalton*, 27 Mo. 12; *Kee v. State*, 28 Ark. 155; *People v. Josephs*, 7 Cal. 129; *People v. Fair*, 43 Cal. 137; *Coffee v. State*, 1 Tex. Ap. 548; *State v. Pearce*, 15 Nev. 188. As taking a wider range see *People v. Bodine*, 1 Denlo, 281. It has been held not to be error in a homicide case to reject an offer to prove that the prisoner "always had been known as a kind-hearted man," if the rejection be accompanied by permission to show his character for peacefulness, etc., toward the deceased, or in any other matter bearing on the prosecution. *Cathcart v. Com.*, 37 Penn. St. 108. In *Com. v. Twitchell*, 1 Brewst. 563, while the defendant's general character for peace was held admissible, he was not allowed to give evidence of his "mild and pacific habits." That character for peacefulness is admissible in such case, see *Sawyer v. People*, 1 N. Y. Cr. Rep. 249. Compare *People v. Fair*, 43 Cal. 137. *Infra*, § 64.

The reasoning which requires that the character proved should be such as to make it improbable that the defendant committed the offence charged is of the same nature as that which permits, as we have already seen, proof of independent offences, in order to establish system. Such offences must be cog-

nate: if of a different type they cannot be proved. So with character. Thus, to murder, as we have seen, a character for peacefulness may be set up; to larceny, a character for honesty; to treason, that of loyalty; to adultery, that of chastity. See *State v. Bloom*, 68 Ind. 54. When such evidence has been admitted, however, it is error to charge the jury that the defendant's intention can only be determined from his acts. *People v. Casey*, 53 Cal. 360.

"Quiet and peaceable character" may be proved in defence to an indictment for rape. *State v. Lee*, 22 Minn. 407; and truthfulness to an indictment for perjury. *R. v. Hemp*, 5 C. & P. 468; *Whart. Crim. Law*, 8th ed. § 1327.

¹ *People v. Garbutt*, 17 Mich. 9.

² *Carroll v. State*, 3 Humph. 315. See, also, *People v. Stewart*, 28 Cal. 395; *People v. Gleason*, 1 Nev. 173; and see, as differing from the text, *Com. v. Twitchell*, 1 Brewst. 563.

³ *Com. v. Robinson*, Thach. C. C. 230; *State v. Jerome*, 33 Conn. 265.

It has been held in Alabama that when a witness has testified to the character of the accused for peace and quietness, he may be asked, on cross-examination, whether he had not been informed that the accused had killed a man in the State of Georgia. *Ingram v. State*, 67 Ala. 67.

properly been denied in most jurisdictions,¹ and viewing the question in regard to principle, we must hold it to be oppressive to a defendant, as well as irrelevant to the real issue, to admit in rebuttal, on whatever pretext, a series of independent facts, forming each a constituent offence.² Rebutting evidence of bad reputation is, however, admissible.

§ 62. If a person on trial for an alleged offence offer no evidence of his good character, no legal inference can arise from such omission that he is guilty of the offence charged, or that his character is bad.³

§ 63. When the defendant introduces evidence for the purpose of proving his general good character previous to the date of the transaction charged against him, this cannot be

¹ *Fountain v. Boodle*, 3 Q. B. 3; *R. v. Rowton*, L. & C. 520; 10 Cox C. C. 25; *State v. Lapage*, 57 N. H. 245; *Com. v. Webster*, 5 Cush. 295; *Peterson v. Morgan*, 116 Mass. 350; *Com. v. O'Brien*, 119 Mass. 342; *People v. White*, 14 Wend. 111; *Snyder v. Com.*, 85 Penn. St. 519; *McCarty v. People*, 51 Ill. 231; *Keener v. State*, 18 Ga. 194; *State v. Hare*, 76 N. C. 591; *State v. Laxton*, 76 N. C. 564; *Hirschman v. People*, 101 Ill. 568; *Meynecke v. State*, 68 Ind. 401; *Johnson v. State*, 61 Ga. 305.

² *Com. v. Sackett*, 22 Pick. 394; *Com. v. Webster*, 5 Cush. 314; *People v. White*, 14 Wend. 111; *Bennett v. State*, 8 Humph. 118; *Brownell v. People*, 38 Mich. 732; *contra*, *R. v. Burt*, 5 Cox C. C. 284, overruled by *R. v. Rowton*, L. & C. 520; 10 Cox C. C. 25.

A man was indicted for an indecent assault, and upon the trial called witnesses, who gave him a good character as a moral and well-conducted man, and a witness was then called by the prosecution, who was asked, "What is the prisoner's general character for decency and morality?" and in answer

said, "I know nothing of the neighborhood's opinion, because I was only a boy at school when I knew him; but my opinion, and the opinion of my brothers, who were also pupils of his, is, that his character is that of a man of the grossest indecency and the most flagrant immorality." It was held that the answer was not admissible in evidence. The rule was declared to be, that evidence of character must be evidence of general reputation only, and a witness's individual opinion respecting the character and disposition of the prisoner, with reference to the charge, is inadmissible. *R. v. Rowton*, L. & C. 520; 10 Cox C. C. 25.

³ *State v. Upham*, 38 Me. 261; *State v. Tozier*, 49 Me. 404; *Ackley v. People*, 9 Barb. 609; *People v. Bodine*, 1 Denio, 281; *Donaghoe v. People*, 6 Parker C. R. 120; *State v. O'Neal*, 7 Ired. 254; *Cluck v. State*, 40 Ind. 263; *Knight v. State*, 70 Ind. 375; *State v. Kabrich*, 39 Iowa, 277; *State v. Dookstader*, 42 Iowa, 436; *State v. Sanders*, 84 N. C. 728; *Olive v. State*, 11 Neb. 1; though see *State v. McAlister*, 24 Me. 139.

rebutted by evidence of bad character after the act;¹ and in one case the prosecutor was not allowed to inquire of the witness what he had learned of the character of the prisoner previous to the date of the transactions, by conversation had since such date with persons acquainted with the prisoner;² and, as a rule, evidence of bad character subsequent to the crime is not admissible for the reasons above given.³ The prosecution cannot rebut by showing that in *particular localities* the defendant's character was bad, he never having *lived* in such places.⁴

Prosecution cannot rebut by showing bad character after the act, or in localities where defendant had not lived.

§ 64. Unless, however, the defendant puts his character in issue, the prosecution cannot call witnesses to impeach it;⁵ and where the defendant, in part of a confession, said he was an old convict, the court held that part of the confession inadmissible.⁶ Bad reputation, however, when part of the offence (*e. g.*, when the party is charged as a "common thief"), may be proved by the prosecution.⁷

Prosecution cannot impeach unless defendant puts in issue.

¹ *State v. Johnson*, Wins. (N. C.) 152; *Wroe v. State*, 20 Ohio St. 460; *Brown v. State*, 46 Ala. 184; 1 Phil. Ev. c. 7, § 7. See *White v. State*, 80 Ky. 487, where the position in the text is discussed and sustained.

² *Carter v. Com.*, 2 Va. Cas. 169.

³ *Supra*, §§ 32 *et seq.* *Brown v. State*, 46 Ala. 148, 175; *White v. Com.*, 80 Ky. 487. See *Com. v. Sacket*, 22 Pick. 394, where the question is left open.

⁴ *Griffin v. State*, 14 Ohio St. 55.

⁵ *Buller*, N. P. 296; *State v. Lapage*, 57 N. H. 245; *Com. v. Hardy*, 2 Mass. 317; *Com. v. Webster*, 5 Cush. 325; *People v. White*, 14 Wend. 111; *State v. O'Neal*, 7 Ired. 251; *Carter v. Com.* 2 Va. Cas. 169; *Griffin v. State*, 14 Oh. St. 55; *Fanning v. State*, 14 Mo. 386; *State v. Creson*, 38 Mo. 372; *Com. v. Hopkins*, 2 Dana, 418; *Young v. Com.*, 6 Bush, 312; *State v. Thurtell*, 29 Kan. 148.

⁶ *People v. White*, 14 Wend. 111.

See *State v. Lapage*, 57 N. H. 245; *State v. Hare*, 74 N. C. 391.

Upon an indictment for assaulting an officer, where the assault was committed by the prisoner in resisting his arrest by the officer for a felony, the officer cannot, upon his examination in chief, be questioned as to his knowledge of the prisoner's character for the purpose of showing that he had reasonable cause to suspect the prisoner of having committed the felony for which he was arrested. The proper course, under such circumstances, is to ask the officer generally whether he had reason to suspect the prisoner, leaving the prisoner's counsel to inquire into the grounds of suspicion, if he thinks fit to do so. *R. v. Tuberville*, L. & C. 495; 10 Cox C. C. 1.

An exception to the rule above given exists in cases of prosecutions in which it is material to prove that the defendant held himself out as having a particular character. *Antle v. State*, 6 Tex. Ap. 202.

⁷ *Infra*, § 261; *supra*, § 57.

§ 65. While, however, bad character cannot be put in issue by the prosecution, it is permitted, as just seen, to introduce evidence of extraneous misconduct, where it is relevant either (1) as part of the *res gestæ*; (2) as part of a system; (3) to prove guilty knowledge; (4) to prove intention; or (5) to prove identity.¹

But while particular acts may be proved to show malice or *scienter*, it is inadmissible to prove, either in this or in any other way, that the defendant had a *tendency* to commit the crime charged.² Hence, it has been correctly held that on an indictment against an overseer on a plantation for the murder of a slave, evidence as to the prisoner's general habits in punishing other slaves is not admissible for the prosecution.³ For it would be in contravention of the sanctions of the common law, if a man's having been guilty of other offences, or having a tendency to commit them, should be received as evidence to rebut the presumption of his innocence of a particular charge.⁴ Nor is it admissible to prove, as part of the prosecution's case, the defendant's ability to commit the offence; *e. g.*, in cases of forgery, that he was skilful in imitating writing.⁵ On the other hand, that he had by him weapons suitable to the commission of the offence charged, is always a proper ingredient of the case of the prosecution. The question, when evidence of aptitude is offered, is one of logic. Is the aptitude sought to be charged on the defendant one that he possesses in common with a multitude of others? Then proof of such aptitude cannot be received unless, the *corpus delicti* being proved, a defence based on the defendant's inaptitude is set up. On the other hand,

¹ See *supra*, §§ 31 *et seq.*, 46.

² 1 Phillips Ev. 499; *R. v. Oddy*, 5 Cox C. C. 210; 2 Den. C. C. 264; *R. v. Cole*, 1 Russ. C. & M. 939; *State v. Lapage*, 57 N. H. 245; *Albright v. State*, 6 Wis. 74; *People v. Jones*, 31 Cal. 565.

³ *Dowling v. State*, 5 Sm. & M. 664. See *Cheney v. State*, 7 Ohio, 222.

⁴ *State v. Renton*, 15 N. H. 169. See *People v. White*, 14 Wend. 111; *State v. Jackson*, 17 Mo. 544.

On the trial of Mrs. Fair in California, in 1872, for the murder of

Crittenden (*People v. Fair*, 43 Cal. 137; 1 Green C. R. 217), the evidence being that the defendant claimed to have been the mistress of the deceased, the defendant's counsel offered evidence to show that the defendant's prospects had been ruined by the conduct of the deceased. The prosecution then offered to prove the previous bad character of the defendant for chastity. This evidence was admitted by the court trying the case, but this admission was held error by the Supreme Court.

⁵ *State v. Hopkins*, 50 Vt. 316.

when the aptitude is special to himself (*e. g.*, when the offence was committed by a person peculiarly skilled in poisons, or in the mode of inflicting wounds), then the evidence is to be received at least in rebuttal.¹

§ 66. It has been argued by high authorities² that good character is of weight only in doubtful cases. But the better opinion is to the contrary.³ In the first place, it is conceded on all sides that

¹ See *supra*, § 50; *infra*, §§ 772-3.

² 1 Stark. on Ev. (10th Am. ed.) 73; 1 Phillips on Ev. 469; U. S. v. Smith, 2 Bond, 323; U. S. v. Roudenbush, 1 Bald. 514; Com. v. Webster, 5 Cush. 595; Lowenberg v. People, 5 Parker C. R. 414; Rollins v. State, 62 Ind. 46. ³ 2 Green. on Ev. § 25; 2 Ben. & Heard Lead. Cas. 351; People v. Mead, 50 Mich. 228. See, also, Com. v. Hardy, 2 Mass. 317; Felix v. State, 18 Ala. 720; Armor v. State, 63 Ala. 173.

"There may certainly be cases so made out," says Talfourd, J., "that no character can make them doubtful; but there may be others in which evidence given against a person without character would amount to conviction, in which a high character would produce a reasonable doubt, nay, in which character will actually outweigh evidence which might otherwise appear conclusive. It is in truth a fact varying greatly in its own intrinsic value, according to its nature; varying still more in its relative value, according to the proofs to which it is opposed; but always a fact, fit, like all other facts proved in the cause, to be weighed and estimated by the jury." Dickin. Quar. Ses. 6th ed. 563. See Remsen v. People, 57 Barb. 324; Epps v. State, 19 Ga. 102; Harrington v. State, 19 Oh. St. 264. Cf. article in 20 Alb. L. J. 43. Hence it has been held to be error in a judge to tell the jury that, "in a plain case, a good character would not help the prisoner; but in a doubtful case, he had a right to have

it cast into the scales and weighed in his behalf." State v. Henry, 5 Jones (N. C.), 65; the true rule being, that in all cases a good character is to be considered of weight. U. S. v. Whitaker, 6 McLean, 342; U. S. v. Allen, 10 Biss. 90; State v. Daley, 53 Vt. 442; Cancemi v. People, 16 N. Y. 501; Stover v. People, 56 N. Y. 315; People v. Lyon, 1 N. Y. Cr. Rep. 400; Heine v. Com., 91 Penn. St. 145; Com. v. Carey, 2 Brewst. 404; Harrington v. State, 19 Oh. St. 264; Stewart v. State, 22 Oh. St. 477; White v. Com., 80 Ky. 480; People v. Garbutt, 17 Mich. 9; Jupitz v. People, 34 Ill. 516; State v. Northrup, 48 Iowa, 583; State v. Gustavson, 50 Iowa, 194; State v. Horning, 49 Iowa, 158; Kistler v. State, 54 Ind. 400; State v. Ford, 3 Strobb. 517; Epps v. State, 19 Ga. 102; Fields v. State, 47 Ala. 603; Carson v. State, 50 Ala. 134; Williams v. State, 52 Ala. 411; Coleman v. State, 59 Miss. 48; State v. McMurphey, 52 Mo. 251; State v. Underwood, 76 Mo. 630.

In People v. Stewart, 28 Cal. 396, it was intimated that good character is of weight only in doubtful cases. This was overruled in People v. Ashe, 44 Cal. 288, where it was held that good character is always entitled to weight. S. P., People v. Bell, 49 Cal. 486; People v. Shepardson, 49 Cal. 629; People v. Doggett, 62 Cal. 27. On the other hand, it has been held that the defendant is not entitled to an unqualified charge that five unimpeached witnesses to character are en-

Weight to be attached to character. evidence of character, when offered by the defence in criminal cases, is always relevant. Technically, therefore, it is always material. If immaterial, it should be rejected as irrelevant; but it can never be rejected as irrelevant, therefore it can never be regarded as immaterial. To this it is answered that the court, when admitting it as relevant, does not decide on its materiality, materiality being for the jury. But this virtually concedes that the question is one of logic and not of law. It makes the weight of evidence as to character dependent, not on any rules arbitrarily pre-assigned, but on the facts of each particular case.

§ 67. The weight to be attached to evidence as to character, in fact, depends as much on the quality of character sought to be established as on the quality of the evidence produced on the opposite side. A character such as that of Mr. Wilberforce, for instance, if offered on part of a defendant charged with larceny, would cast reasonable doubt on any prosecution, no matter how strong its case might be. And then in addition, as is substantially argued by Talfourd, J.,¹ it is a *petitio principii* to say that evidence as to character is entitled to weight only in doubtful cases, when really it is to make the case doubtful that such evidence is offered. In some instances, in which guilt would otherwise be established beyond reasonable doubt, evidence of good character may justly produce an acquittal. In other cases it may be inoperative. But in all cases it is an item of proof to be considered by a jury.

§ 68. When A. is charged with killing B., it is no defence for A. to say, "I killed him because he was a bad man." Hence, when the defendant offers to prove, as a defence, that the deceased was a man of ferocious character, or an assassin, or a highway robber, or a garroter, this, by itself, is irrelevant. If the deceased's character was thus infamous and desperate, and the defendant had reason to fear violence from him, then the defendant's remedy was to apply to the law for protection. For him to take the law in his own hands and kill the deceased is murder; and hence, as it is no defence for him, when the case against

Character of party injured generally irrelevant. titled to greater weight than one witness who swears differently. *State v. Breckeuridge*, 33 La. Ann. 310.

¹ See preceding note.

him is one of deliberate killing not in self-defence, that the deceased was a bad man, evidence of such badness is irrelevant if offered by him on the trial.¹

§ 69. In homicide, and in other cases of violent assault, a danger which is apparently imminent is to be viewed, provided the person assailed honestly believes in its reality and imminency, as if it were actually real and imminent.² It makes no difference, so far as concerns the question immediately before us, whether we assume, as do some of the authorities, that the danger must have been apparent to "reasonable men," or whether we hold it must have been apparent to the defendant himself. Either way, the conclusion reached at the time of the conflict, as to the "apparency" of the danger, must be greatly affected by the assailant's character for ferocity, brutality, and vindictiveness, as well as by his special animosity to the assailed. There can be no question, in such a case, of the right to prove that the deceased was armed with gun or sword; why not that he was armed with enormous bodily strength and desperate

Otherwise in assault or homicide cases when self-defence is first proved.

¹ State v. Field, 14 Me. 248; Com. v. 309; Henderson v. People, 12 Tex. York, 9 Met. 110; Com. v. Wilson, 1 525.

Gray, 337; Com. v. Hilliard, 2 Gray, 294; Com. v. Mead, 12 Gray, 168; Shorter v. People, 2 Comst. 197; S. C., 4 Barb. 460; Eggler v. People, 3 N. Y. Supreme Court, 796; S. C., 56 N. Y. 642; Abbott v. People, 86 N. Y. 460; Com. v. Ferrigan, 44 Penn. St. 386; Com. v. Lenox, 3 Brewst. 249; State v. Thawley, 4 Harring. 562; Dock v. Com., 21 Grat. 909; Campbell v. People, 16 Ill. 17; State v. Tilly, 3 Ired. 424; State v. Chavis, 80 N. C. 353; Haynes v. State, 17 Ga. 465; Bowles v. State, 58 Ala. 335; Wesley v. State, 37 Miss. 327; State v. Jackson, 17 Mo. 544; State v. O'Brien, 10 La. An. 453; State v. Jackson, 12 La. An. 679; State v. Burns, 30 La. An. Part I. 679; State v. Vance, 32 La. An. 1177; State v. Jackson, 33 La. An. 1087; Wise v. State, 2 Kans. 419; State v. Riddle, 20 Kans. 711; People v. Murray, 10 Cal.

So the State cannot prove particular acts of violence of deceased as constituting general bad character. Pound v. State, 43 Ga. 88.

That deceased "had been engaged in several fights with other persons, in each of which he used a knife and cut his opponent," and that this had been communicated to prisoner, was held inadmissible as proof of specific facts, in a case where the defendant had previously put in evidence of the general quarrelsome character of the deceased. Thomas v. People, 67 N. Y. 218.

Nor can the prosecution put in evidence, in advance of proof of self-defence, the good character or peaceable intentions of the deceased. State v. Potter, 13 Kans. 414. See People v. Carlton, 57 Cal. 83.

² See Whart. on Hom. § 606.

rage?¹ Specific threats to the defendant can be put in evidence; why not a general ferocity of temper which vents itself on all by whom it is crossed, and which spares not life in its fury? Suppose a Thug should infest a community, and that the defendant should discover such an assailant in his chamber, would it be inadmissible, on the plea of *se defendendo*, to prove that he was a Thug? The great point to be made out on the plea of self-defence is that the defendant was pushed to the wall, or that he could only protect himself, his family, or his house, from felony, by taking the assailant's life. And the necessity of such extreme action can only be shown by proving that the assailant was so armed, and was guided by such violent purposes, as to make other and milder means of defence inadequate. The law excuses on this ground a homicide of one entering a house in the night-time far more readily than that of one entering in the day, because, it says, "entering a house in the night-time leads to an inference of a felonious intent." So, to prove this felonious intent, specific acts of guilt, pointing in the same direction, and prior attempts, may, under certain conditions be proved. The general principle, then, is this: not that it is lawful coolly to attack and kill a person of ferocious and blood-thirsty character, for it is as much murder in such manner to kill the most desperate of men as to kill the most inoffensive; but that, whenever it is shown that a person honestly and non-negligently believed himself attacked, it is admissible for him to put in evidence whatever could show the *bona fides* of his belief. He may prove that the person assailing him had with him burglars' instruments; or was armed with deadly weapons; or had been lurking in the neighborhood on other plans of violence. He is entitled to reason with himself in this way: "This man comes to my house masked, or with his face blacked; he is the same who has been prowling about my house, and is connected with other felonious plans; I have grounds to conclude that such is his object now." And if so, he is also entitled to say: "This man now attacking me is a notorious ruffian; he has no peaceable business with me; his character and relations forbid any other conclusion than that his present attack is felonious." And if he thus has reason to expect, and to defend

¹ That evidence as to strength is admissible see *Wellar v. People*, 30 Mich. Tex. Ap. 288; *Thomas v. State*, 11 16; and see *Whart. Crim. Law*, 8th Tex. Ap. 315.

himself against, a desperate conflict, of these facts he is entitled to avail himself on trial. He must first prove that he was attacked; and this ground being laid, it is legitimate for him to put in evidence whatever would show he had reason to believe such attack to be felonious.¹

¹ *Infra*, § 257; *State v. Lull*, 48 Vt. 581; *Com. v. Barnacle*, 134 Mass. 216; *Pfomer v. People*, 4 Parker C. R. 558; *Patterson v. People*, 46 Barb. 625; *Com. v. Seibert*, Whart. on Hom. § 610; *State v. Woodward*, 1 Houst. C. C. 455; *State v. Thomas*, id. 511; *Marts v. State*, 26 Oh. St. 162; *Upthegrove v. State*, 37 Oh. St. 662; *State v. Tackett*, 1 Hawks, 210; *State v. Smith*, 12 Rich. 430; *State v. Turpin*, 77 N. C. 473; *Monroe v. State*, 5 Ga. 85; *Hinch v. State*, 25 Ga. 699; *Abernethy v. Com.* 101 Penn. St. 322; *Pritchett v. State*, 22 Ala. 39; *Quesenberry v. State*, 3 Stew. & P. 315; *Dupree v. State*, 33 Ala. 380; *Franklin v. State*, 29 Ala. 14; *Biland v. State*, 52 Ala. 322; *State v. Hicks*, 27 Mo. 588; *State v. Keene*, 50 Mo. 359; *State v. Bryant*, 55 Mo. 75; *State v. Harris*, 59 Mo. 550; *State v. Elkins*, 63 Mo. 159; *Cotton v. State*, 31 Miss. 504; *Chase v. State*, 46 Miss. 705; *Spivey v. State*, 58 Miss. 858; *State v. Robertson*, 30 La. An. 340; *Payne v. Com.*, 1 Metc. (Ky.) 370; *Wright v. State*, 9 Yerg. 342; *Rippy v. State*, 2 Head, 217; *Harman v. State*, 3 Head, 243; *Little v. State*, 6 Baxt. 491; *De Forest v. State*, 21 Ind. 23; *Fahnestock v. State*, 23 Ind. 231; *Wise v. State*, 2 Kans. 419; *Pond v. People*, 3 Mich. 150; *State v. Neeley*, 20 Iowa, 108; *State v. Dumphrey*, 4 Minn. 438; *Green v. State*, 38 Ark. 304; *Campbell v. State*, 38 Ark. 498; *Pridgen v. State*, 81 Tex. 420; *Dorsey v. State*, 34 Tex. 651; *Horbach v. State*, 43 Tex. 242; *Stevens v. State*, 1 Tex. Ap. 591; *Hudson v. State*, 6 Tex. Ap. 565; *Lewallen v. State*, 6 Tex. Ap. 475; *People v.*

Murray, 10 Cal. 309; *People v. Edwards*, 41 Cal. 640, and cases cited *infra*.

In Vermont we have an interesting ruling supporting the conclusion of the text. The keeper of a prison was indicted for an assault on a prisoner. The evidence was that the latter, when encountered by the former, was armed with a hammer, and looked nervous and excited. It was held admissible for the keeper to put in evidence statements made to him by the sheriff, who brought in the prisoner, to the effect that the prisoner was dangerous and desperate. *State v. Lull*, 48 Vt. 581. See *Fraday v. State*, 8 Baxt. (Tenn.) 349. In *Brunet v. State*, 12 Tex. Ap. 521, where the defence proved that the deceased was a dangerous man, and the prosecution introduced evidence to dispute this, it was held admissible for the defence to put in evidence the record of the conviction of the deceased for manslaughter. See *infra*, § 602 a.

In *Brownell v. People*, 38 Mich. 735, *Campbell, C. J.*, said:—

“The defence rested upon the grounds, among others, that Brownell used a pistol to repel an assault which was not only violent in fact, but made by a powerful man of dangerous temper, who had made threats against him. Looking at the case in a common sense light, we cannot avoid seeing that any person would naturally be more in fear of a man of that sort than of a quiet or a weaker man, and would, in case of an attack from him, feel a greater need of extreme measures to protect himself and resist his adversary. Inasmuch as

§ 70. In England we have no authority direct to this particular point. Intimations, however, from eminent judges, would lead us to believe that evidence of the deceased's ferocity and vindictiveness would not be refused where there is a *prima facie* case of self-defence laid by the defendant. Thus, in a capital case, Garrow, B., told a jury: "But here the life of the prisoner was threatened, and *if he considered his life in actual danger*, he was justified in shooting the deceased as he had done; but if, *not considering* his own life in danger, he rashly shot this man, who was only a trespasser, he would be guilty of manslaughter.¹ And Lord Tenterden, also, in a capital case, told the jury to "take into consideration the previous habits and connection of the deceased and the prisoner, with respect to each other."² Mr. Starkie lays down premises from which the same conclusion may be legitimately drawn: "On a charge of homicide, it may be for the jury to say whether the act was done with a malicious intent to destroy another, or merely to alarm and terrify him, or resulted from mere unavoidable accident, independent of any intention to injure another, or even of carelessness or negligence; and according to that determination, the offence may amount to murder, or merely to manslaughter, or chance-medley. In order, however, to arrive at a just conclusion upon such questions, the jury ought to act upon those presumptions which are recognized by the law, as far as they are applicable, and *their own judgment and experience, as applied to all the circumstances and evidence.*"³

§ 71. In New York, in trials before Judge Platt⁴ and Judge Van Ness,⁵ evidence of the vindictive temper of the deceased was held admissible. In 1866 the question was brought before the Court of Appeals in a case where the point was elabo-

every one finds his excuse in facts as they honestly appear to him, such important facts as these cannot be disregarded.

"The witnesses who were examined, or offered for examination, and whose testimony was excluded as inadmissible, were personally familiar with both parties, and capable of forming opinions about their relative strength, tempers, and other personal qualities, not capable of any description except by

opinion. We think the testimony should have been received and not struck out. *Hurd v. People*, 25 Mich. 405."

¹ *R. v. Scully*, 1 C. & P. 319.

² *R. v. Lynch*, 5 C. & P. 324. See, also, *R. v. Fisher*, 8 C. & P. 182.

³ 1 Stark. Ev. 66.

⁴ *People v. Blake*, 1 City Hall Rec. 100.

⁵ *People v. Smith*, 2 City Hall Rec. 77, 81.

rately and ably argued.¹ The result reached was, that though evidence of the defendant's ferocity and vindictiveness would be admissible when a case of self-defence was laid, it was inadmissible without such a prerequisite.²

In a case which came before the Court of Appeals in 1874,³ the reporter tells us that "after general evidence had been given on behalf of the prisoner tending to show that the deceased was disposed to be sullen and violent in temper when angry, and that when excited she was ungovernable and passionate; questions were then asked tending to show particular instances of exhibitions of temper. These were excluded under objection. The ruling was affirmed in the Court of Appeals." No reasons, however, were given. But the exclusion may be properly sustained on the ground that the evidence offered went to particular facts and not to general character.⁴

§ 72. In New Jersey, evidence of hostile and vindictive temper on part of the deceased was received in an early case,⁵ Kirkpatrick, C. J., saying: "Inasmuch as the distinction New Jersey. between murder and manslaughter depends upon the impulse of the mind with which the act was committed, *every circumstance which goes to show the feelings of the parties towards each other* may be proper. That temper, which at one time might not be excited, might, under the excitement of other circumstances, be more easily roused, and, therefore, it may be received by the jury, to show the state of mind of the parties."

§ 73. In Pennsylvania, the practice has been, in cases in which a *prima facie* case of self-defence is made out, to admit evidence of any facts or circumstances likely Pennsylvania. to show the condition of the defendant's mind as to the necessity of self-defence. This was done by a late able jurist, Judge King, on the trial of the Kensington and Southwark rioters in 1844-45; though he at the same time correctly ruled that if the defendant *negligently* reached honest though erroneous conclusions as to the reality of the danger to which he was exposed,

¹ *People v. Lamb*, 2 Keyes, 364.

⁴ See *McKenna v. People*, 18 Hun,

² See, to same effect, *Pfomer v. People*, 4 Parker C. R. 558; *McKenna v.*

580; *Thomas v. People*, cited *supra*, § 69.

People, 18 Hun, 580.

⁵ *State v. Zellers*, 2 Halst. 230.

³ *Egglar v. People*, 56 N. Y. 642.

this, while it lowered the grade of the homicide, did not justify an acquittal.¹ And in an early case, evidence on part of the defence was admitted to show that the deceased was a hostile Indian.²

So Judge Conyngham, as distinguished for strong sense as he was for integrity and humanity, admitted in a homicide case, for the purpose of showing the honesty of the defendant's belief of impending danger, evidence of the ferocity and brutality of the deceased.³ And that evidence of the apparent imminency of the danger is admissible, whenever there is a *prima facie* case of self-defence, is deducible from the position rightly assumed by the courts of this State, that the defendant is to be judged by his own lights.⁴

It is true that subsequently the Supreme Court⁵ held that it was inadmissible for a defendant to prove generally the deceased's bad character, as a defence to an indictment for murder. But in this case self-defence was not pretended. And in 1884 it was expressly ruled that evidence of the deceased's strength and ferocity was relevant in all cases in which a case of self-defence was shown.⁶

§ 74. North Carolina was one of the first States to lead off in affirming the admissibility of this kind of proof. The question originally arose on an indictment against a

North Carolina.

¹ These cases were the products of riots which originated in collisions between Protestant Irish on the one side and Roman Catholic Irish on the other. A number of deaths ensued on both sides, and indictments were found against certain leading parties concerned in the homicides, some of the defendants being conspicuous as leaders of one faction, some as leaders of the other faction. I was concerned in prosecuting most of these cases, my associates being Mr. Kane, attorney-general, and afterwards judge of the United States District Court, and Mr. Kelley, afterwards judge, and for many years a leading member of Congress. Judge King presided at the trials of the first group of cases, but afterwards several indictments were removed by special *allocatur* to the Supreme Court, and were tried before

Judge Rogers at Nisi Prius. In all these cases evidence was held admissible to show not only the provocations under which the particular defendants acted, but the temper and character of the assailants.

² Penn. v. Robinson, Addison, 246.

³ Com. v. Seibert, Whart. on Hom. §§ 506-8. To the same effect is Com. v. Richmond, 6 Weekly Notes, 431.

⁴ In 1882 it was decided by the Supreme Court, that when duress was set up as a defence to a contract, it was admissible for the defendant (an aged woman) to prove that she had heard that the person making the threats was of a violent disposition. Jordan v. Elliott, 12 Weekly Notes, 56.

⁵ Com. v. Ferrigan, 44 Penn. St. 386.

⁶ Abernethy v. Com., 101 Penn. St. 322.

white man for the murder of a slave ; and it was ruled that in such an issue the defendant setting up self-defence could give in evidence that the deceased was turbulent and insolent to white persons.¹ Taylor, C. J., speaking for the Supreme Court, said : “ It does not appear, from any direct proof in the case, what was the immediate provocation under which the homicide was committed. The evidence relative to that is altogether circumstantial and presumptive, and its weight and effect required the most careful examination and deliberation of the jury. The conclusion they might arrive at was all-important to the prisoner, since the degree of the homicide depended on it ; and whether it was malicious, extenuated, or excusable, must have been determined by them from such lights as they could gather from the facts actually proved, and such inferences as they might deduce from them. It cannot be doubted that the temper and disposition of the deceased, and his usual deportment towards white persons, might have an important bearing on this inquiry, and according to the aspect in which it was presented to the jury, tend to direct their judgment as to the degree of provocation received by the prisoner. *If the general behavior of the deceased was marked with turbulence and insolence, it might, in connection with the threats, quarrels, and existing causes of resentment he had against the prisoner, increase the probability that the latter had acted under strong and legal provocation.* If, on the contrary, the behavior of the deceased was usually mild and respectful towards white persons, nothing could be added by it to the force of the other circumstances. They must still depend upon their own weight, and the probability be lessened that the prisoner had received a provocation sufficient in point of law to extenuate the homicide. The evidence, therefore, ought to have been received, and this will be the more apparent when the charge to the jury is considered.” It is true that this ruling was, in a subsequent case, declared to be exceptional and unauthoritative ;² but in a still later adjudication by the same court,³ while the general rule, that it is inadmissible for the defendant to put the deceased’s character in issue, is properly reiterated, the exception established in Tackett’s case is recognized as still in force, and as applicable to all cases of self-defence.

¹ State v. Tackett, 1 Hawks, 210.

² State v. Hogue, 6 Jones, 381.

³ Bottoms v. Kent, 3 Jones, 154.

§ 75. In South Carolina, Georgia, Alabama, Kentucky, Tennessee, and Mississippi, we have rulings to the same effect.¹ In these States the practice is to admit evidence of the deceased's character for ferocity, in all cases in which the defendant is shown to have been acting in self-defence.

§ 76. In Indiana the rule is thus expressed:² "As a general rule, it is the character of the living—the defendant on the trial for the commission of crime—and not of the person on whom the crime was committed that is in issue, and as to which, therefore, that evidence is admissible. But in a case like the present, where the question arises whether the accused acted, in the commission of a homicide, upon grounds that justified him in the deed, it would seem that the character of the deceased might be a circumstance to be taken into consideration. Especially might this be the case where the accused knew that character, and also knew, at the time, the individual by whom the attack upon him or his property was made." The court add: "Where, as in this case, these facts may not have been known, we do not see how the evidence could be entitled to much weight."³

§ 77. In Michigan, in a case tried in 1872,⁴ the defendant offered to prove that "the deceased was a man of high temper and quarrelsome disposition, and known by the defendant to be so at the time of the shooting." The court below refusing to admit this evidence, the ruling was reversed by the Supreme Court. "The evidence," said Christiancy, C. J., "was admissible, since the knowledge or belief of the prisoner, that the person

¹ *State v. Smith*, 12 Rich. 430; *ing which it illustrates.*" See, to the same effect, *Monroe v. State*, 5 Ga. 85; *Haynes v. State*, 17 Ga. 465; *Quesenberry v. State*, 3 St. & Port. 308; *Pritchett v. State*, 22 Ala. 39; *Franklin v. State*, 29 Ala. 14; *Dupree v. State*, 33 Ala. 380; *Fields v. State*, 47 Ala. 603, reported at large in *Whart. on Hom.* §§ 613 *et seq.*; *Kiland v. State*, 52 Ala. 325; *Roberts v. State*, 68 Ala. 156. In *Bowles v. State*, 58 Ala. 335, it was said that such evidence is "not receivable when there is nothing in the conduct of the deceased at the time of the kill-

² *Dukes v. State*, 11 Ind. 557.

³ *Aff. in Holler v. State*, 37 Ind. 57; *Patterson v. State*, 66 Ind. 185.

⁴ *Hurd v. People*, 25 Mich. 405; affirmed in *People v. Lilly*, 38 Mich. 270; *Brownell v. People*, 38 Mich. 732, quoted *supra*, § 69. And see *People v. Simpson*, 48 Mich. 474.

threatening him with an immediate personal attack is a man of high temper and quarrelsome disposition, is a most important circumstance, from which he is to estimate the probability and the character of the attack, and what course of conduct he has reason to expect from the assailant, as well as the means which, at the moment, he may deem necessary to guard himself from the threatened danger."

§ 78. In Minnesota the same distinction is taken: "The character of the deceased *per se*," said Flandrau, J.,¹ "can never be material in the trial of a party for killing him, Minnesota. because it is as great an offence to kill a bad as it is to kill a good man, or to kill a quarrelsome and brutal man as it is to kill a mild and inoffensive man. Therefore, if the killing is proven to have been with a felonious intent, the character of the deceased can in no manner affect the result."

§ 79. On a trial for stabbing in Iowa, in 1870,² the defendant offered to introduce evidence to show that McMillin, the Iowa. person stabbed, was a large, powerful, and muscular man, who, when under the influence of liquor, was quarrelsome, ugly, dangerous, and vindictive; that defendant knew these facts; and, in connection with this offer, he also proposed to prove that on the same day, and shortly before the commission of the assault, McMillin had threatened to take defendant's life, of which threat he had been informed only a few minutes previous to the assault. The judge trying the case refused to admit this evidence, and this ruling was reversed by the Supreme Court, on the ground that the character of the assailant was one of the circumstances from which the intent and motive of the assailed, when defending himself, could be determined.³

§ 80. In Missouri, in 1872, the law is thus tersely presented:⁴ "When the homicide is committed under such circumstances that it is doubtful whether the act was committed Missouri and Texas. maliciously, or from a well-grounded apprehension of danger, it is very proper that the jury should consider the fact that the deceased was turbulent, violent, and desperate, in determining whether the accused had reasonable cause to apprehend great personal injury to

¹ State v. Dumphrey, 4 Minn. 438.

² See Whart. on Hom. § 518.

³ State v. Collins, 32 Iowa, 36.

⁴ State v. Keene, 50 Mo. 357.

himself. If such evidence is ever legitimate, the facts in this case show that it was one calling for its introduction." And it was afterwards held that in a case of homicide, where it is doubtful whether the killing was from malice or from a well-grounded apprehension of danger, it is proper to show that the deceased had the reputation of being a violent or dangerous man.¹

The same distinction is taken in Texas.²

§ 81. In California, in 1858, the Supreme Court stated the rule as follows:—

California
and other
States.

"The other point made is the exclusion of evidence of the character of the deceased for turbulence, recklessness, and violence. The rule is well settled that the reputation of the deceased cannot be given in evidence, unless, at the least, the circumstances of the case raise a doubt in regard to the question whether the prisoner acted in self-defence. It is no excuse for a murder that the person murdered was a bad man; but it has been held that the reputation of the deceased may sometimes be given in proof, to show that the defendant was justified in believing himself in danger, when the circumstances of the contest are equivocal. But the record must show this state of case. This does not."³

In Delaware the same distinction is sustained.⁴

In Louisiana, although such testimony will be rejected when there is no case of self-defence shown, it will be admitted where due ground of self-defence is laid.⁵ And the same rule has been adopted in Wisconsin,⁶ Kansas,⁷ Nevada,⁸ Colorado,⁹ and Idaho.¹⁰

§ 82. Nor can the cases cited against this position be relied on to meet it on principle. Thus in a Maine case we find the following from Emery, J., when giving the opinion of the Supreme Court:—

Inconclu-
siveness of
cases cited
to the con-
trary.

"It would not be allowable to show, on the trial of an

¹ State v. Bryant, 55 Mo. 75. See State v. Testerman, 68 Mo. 408.

² Stevens v. State, 1 Tex. Ap. 591; Horbach v. State, 43 Tex. 254; Lewallen v. State, 6 Tex. Ap. 475; Hudson v. State, 6 Tex. Ap. 565. But this character of the deceased must be known to the defendant. Grissom v. State, 8 Tex. Ap. 386; Holmes v. State, 11 Tex. Ap. 223; Russell v. State, 11 Tex. Ap. 288.

³ People v. Murray, 10 Cal. 309; S. P., People v. Edwards, 41 Cal. 640. Compare People v. Butler, 8 Cal. 435.

⁴ See cases cited *supra*, § 68.

⁵ State v. Vance, 32 La. An. 1177; State v. Jackson, 33 La. An. 1087.

⁶ State v. Nett, 50 Wis. 524.

⁷ State v. Scott, 24 Kan. 68.

⁸ State v. Pearce, 15 Nev. 188.

⁹ Davidson v. People, 4 Col. 145.

¹⁰ People v. Stock, 1 Idaho, N. S. 218.

indictment, that the prisoner had a general predisposition to commit the same kind of offence as that charged against him. 1 Phil. Ev. 143. Although the deceased may have been a savage, and quarrelsome man when intoxicated, he still was entitled to the protection of the law. He was not, from any evidence, unlawfully in the house. *We look in vain, among the attending circumstances of the melancholy catastrophe, for a provocation or an excuse for the resort to the deadly weapon, which the defendant used to destroy the life of his victim.* And to allow the introduction of evidence of the character of the deceased, and his habits of drinking at other times, and their consequences, could have no legal efficacy in reducing the crime, of which the defendant stood charged, to justifiable or excusable homicide."¹

This is correct law, for A. cannot be allowed to attack and kill B. because B. is a cut-throat. But this does not touch the question whether, when B. attacks A., B.'s character as a cut-throat is not justly to be considered by A. in determining whether he is required to take extreme measures in self-defence. The same criticism is applicable to other cases sometimes cited to this point.²

§ 83. In Massachusetts we find decisions which it is more difficult to explain consistently with the line of authorities which have just been given. The first is a celebrated case,³ in which, it must be remembered, there was no evidence that the defendant was acting in self-defence. Mr. Dana, for the defendant, proposed to show "that the deceased was a man of notoriously quarrelsome and fighting habits, and boasted of his powers as a fighter." In supporting this offer, Mr. Dana said that the "vital question here is whether there was provocation or mutual combat." The chief justice said: "The general rule unquestionably is, that the general character of neither party can be shown in evidence on trials for homicide. The prisoner has the personal privilege of showing his good character; but unless he puts it in issue, it is not so. The government cannot prove either quarrelsome habits in the prisoner, or peaceable habits in the deceased. There is no limit if we go beyond the *res gestae*. The only excep-

In Massachusetts such evidence now admissible.

¹ State v. Field, 14 Me. 244.

State v. Chandler, 5 La. An. 489; State

² State v. Thawley, 4 Harring. 562;

v. Chopin, 10 La. An. 458.

State v. Hogue, 6 Jones (N. C.), 381;

³ Com. v. York, 7 Law Rep. 497; 9 Met. 93.

tion is rape. This is partly because the woman is a witness, and partly from policy and necessity, as the only protection of the accused. In the case from Carrington & Payne (*R. v. Smith*), we think the expression probably arose from boasts made by the deceased at the time, and proved as parts of the *res gestae*. The cases from Hawks and from Stewart & Porter stand alone, and are not of such authority as to require us to leave the established course of practice."

In a subsequent case¹ the line was drawn still more rigidly. A *prima facie* case of self-defence being made out by the defendant, the defendant's counsel offered to prove: "that the general character and habits of the deceased were those of a quarrelsome, fighting, vindictive, and brutal man of great strength, as a circumstance tending to show the nature of the provocation under which the defendant acted, and that he had reasonable cause to fear great bodily harm."² The court, however, rejected the testimony.

Four years afterwards the question was revived in a case in which the evidence was that after an altercation the deceased seized the defendant by the throat, the deceased's brother standing by with a shovel, and that the defendant, while choking under the deceased's grip, shot the deceased. The surgeon who made the *post-mortem* proved that the *rigor mortis* was peculiarly severe. The defence then proposed to ask the surgeon: "Was not Jeremiah A. Agin a very strong and muscular man? Did not the *rigor mortis*, being very marked, indicate that Agin was a remarkably powerful man?" But the judge excluded these questions. The defence then offered to prove that "Agin was an experienced and practised garroter." "The judge excluded this evidence; but allowed the defendant to prove how he was actually seized by the throat, and then to show by experts the anatomical structure of the parts, and the various effects of such seizure and compression on the individual's consciousness, strength, life, and system generally." This ruling was sustained by the Supreme Court.³

¹ *Com. v. Hilliard*, 2 Gray, 294 (1854). *State*, 17 Ala. 599; *Com. v. Seibert*, Wharton on Homicide, 227. For the

² For the defence were cited *Quesenberry v. State*, 3 St. & Port. 308; *State* Law Reporter, 507, 509.

v. Tackett, 1 Hawks, 210; *Oliver v. State*, 17 Ala. 599; *Com. v. Meade*, 12 Gray, 168.

But whatever we may think of the rulings in York's case and Hilliard's case, that in Mead's case cannot be sustained. The prosecution's evidence showed that the defendant was attacked by the deceased. The defendant offered to prove that the deceased was an experienced and practised garroter, leaving it to be inferred that the deceased's grip on the throat was that which garroters apply with such deadly effect. Had this been proved, the defendant would have been excusable in killing the deceased, or at the most, could only have been convicted of manslaughter. But the court refused to hear evidence to show that the deceased was a garroter, and consequently precluded the defendant from offering a legitimate defence. Very different was the course in Selfridge's case—a case in which, it will be recollected, the defendant, armed with a pistol, shot down at sight a young man of eighteen years, who was armed only with a walking cane. On the trial, the defendant was allowed to call a physician to prove that “in college, defendant was feeble in muscular strength, more than any man of his size in his class;” and was permitted to show that he expected “to be attacked by some bully;” while it was argued that the deceased was a young man in the prime of youthful vigor. Did Judge Parker, who charged the jury, exclude these points from their consideration? So far from doing so, he told the jury that the defendant was excused if the danger was *apparent*, and what was *apparent* he defined in the following remarkable words: “Whether the firing of the pistol was before or after a blow struck by the deceased, there is a point of more importance for you to settle, and *about which you must make up your mind from all the circumstances proved in the case*; such as the rapidity and violence of the attack, the nature of the weapon with which it was made, the place where the catastrophe happened, *the muscular debility or vigor of the defendant*, and his power to resist or fly.” The jury were also told that the defendant had a right to defend himself from the wrong “*apparently* intended by the deceased.” But how “*apparently*?” The only reply is, that all those circumstances which *appeared* to the defendant, from which he might conclude himself in danger, constitute such apparency. And to this result the Supreme Court of Massachusetts returned in 1883, holding that when self-defence is set up, the defendant may put in evi-

dence the deceased's superior strength and capacity to do harm, overruling the prior conflicting decisions.¹

¹ Com. v. Barnacle, 134 Mass. 216. The opinion appears to have been unanimous, and was given by Morton, C. J. "It is well settled," he said, "that if a man is attacked he has the right to defend himself. If the attack is of such a character and made under such circumstances as to create a reasonable apprehension of great bodily harm, and he acts under such apprehension, and in the reasonable belief that no other means will effectually prevent the harm, he has the right to kill the assailant. In such cases, therefore, the questions whether there was reasonable cause to apprehend great bodily harm, and whether the defendant acted under such apprehensions are material issues. Commonwealth v. Woodward, 102 Mass. 155; Commonwealth v. O'Malley, 131 ib. 423. It necessarily follows that in the case before us, the question whether the defendant acted under a reasonable apprehension of great bodily harm to himself from the attack of Thomas, was a material issue. Any evidence which tends to prove this issue is competent. The jury could not intelligently pass upon this issue without being informed as to the character and circumstances of the attack. It seems to us clear that the fact that the assailant was a larger and more powerful man than the defendant, has a bearing upon this issue. The test is whether the fact is according to the general experience of mankind capable of affording a reasonable presumption or inference as to the issue in dispute. The question whether a man has reason to apprehend danger from an attack must depend in some measure upon the size and strength of the assailant. If the assailant is a child or

a weak and effeminate man, much inferior in strength to the party assaulted, and unarmed, common experience teaches us that there is no cause to apprehend serious danger from the assault. On the other hand, if the assailant is a large and powerful man, whom the assaulted party could not successfully resist by his unaided strength, this fact would naturally create in his mind an apprehension of danger, which might justify him in using a deadly weapon for self-defence. Certainly, it must be competent to show that he is armed by nature with a superior size and strength, which makes his attack irresistible and dangerous. We are of opinion that the fact which the defendant offered to prove, that the said Thomas was a larger and more powerful man than the defendant, was competent, and should have been admitted.

"The Commonwealth," he added, "relies upon the cases of Commonwealth v. Hilliard, 2 Gray, 294; Commonwealth v. Mead, 12 Gray, 167; and Commonwealth v. York, 7 Law Reporter, 497, 507. In Commonwealth v. Hilliard, the question we have discussed does not appear to have been raised. The defendant there offered to show the general character of the deceased as a fighting, brutal man, of great strength; and the decision was that the evidence was too remote, the court saying that 'the provocation under which the defendant acted must be judged of by the *res gestae*; and the evidence must be confined to the facts and circumstances attending the assault by the deceased upon the defendant.' It does not decide that the defendant could not put in, as part of the *res gestae*, the fact that the deceased

§ 84. Taking the authorities as a whole, therefore, we may hold that it is admissible for the defendant, having first established that he was assailed by the deceased, and in apparent danger, to prove that the deceased was a person of ferocity, brutality, vindictiveness, and of excessive strength; such evidence being offered for the purpose of showing either (1) that the defendant was acting in terror, and hence incapable of that specific malice necessary to constitute murder in the first degree; or (2) that he was in such apparent extremity as to make out a case of self-defence; or (3) that the deceased's purpose in encountering the defendant was deadly. It is also admissible for the defendant, in order to excuse a violent repulsion of an assault, to prove that he was so overmatched in strength that he had, when attacked, no other means of escaping from death or great bodily harm. But such evidence can never be received for the purpose of justifying an attack by the defendant on the deceased.

Summary
of law.

was larger and more powerful than himself. So, in *Commonwealth v. York*, the defence being that the homicide was committed under provocation and in mutual combat, it was ruled at the trial that upon these issues evidence of the general character of the deceased as a quarrelsome man and as prize-fighter, was not admissible. The question before us was not raised or considered. In *Commonwealth v. Mead*, the court held that evidence tending to prove the great muscular strength of the deceased was incompetent. That case has not, we think, been followed by other courts, and has been much questioned by the profession. So far as it conflicts with our decision in the case before us, we feel constrained to overrule it." See, also, *Com. v. Andrews*, Pamph. L. 1869.

CHAPTER III.

VARIANCE.

I. AGENCY BY WHICH WRONG IS INFLICTED.

Agency by which wrong is inflicted must be substantially proved, § 91.

Material variance is fatal, § 92.

Unknown instruments may be so described, § 93.

II. NAMES OF PERSONS.

Such names must be proved as averred, § 94.

Enough if indictment gives name in popular use, § 95.

Sufficient if name be *idem sonans*, § 96.

Variance between "known" and "unknown" may be fatal, § 97.

Alias dictus allows alternative proof, § 98.

Middle name when distinctive must be proved, § 99.

Variance between "Junior" and "Senior," § 100.

Variance as to description is fatal, § 101.

Proof of acts by agent will sustain averment of acts by principal, § 102.

Corporation name must be proved, though charter need not be produced, § 102a.

III. TIME AND PLACE.

Time proved may be any day prior to finding, § 103.

Exception as to records and written documents, § 103a.

As to continuous offences, § 103b.

Offences of other dates than that proved excluded, § 104.

Offence shut out by statute of limitations cannot be proved, § 105.

Time, when essence of offence, must be proved, § 106.

Place must be proved within jurisdiction of court, § 107.

Proof may be inferential, § 108.

When place is descriptive variance is fatal, § 109.

Venue in homicides, § 110.

Venue in larceny, conspiracy, and treason, § 111.

Venue as to extra-territorial principal, § 112.

Venue in cases of illegal letters and challenges, § 113.

IV. WRITTEN INSTRUMENTS AND RECORDS.

When "tenor" is set out, variance is fatal, § 114.

Accuracy required as to records, § 115.

When legal effect is given, sufficient if proof substantially conforms, § 116.

General designation to be accurate, § 116a.

When variance is doubtful, case is for jury, § 117.

Lost or unobtainable documents may be proved by parol, § 118.

Loss must be satisfactorily shown, § 119.

Inspection may be ordered, § 120.

V. WORDS SPOKEN.

Words spoken to be substantially proved, § 120a.

VI. GOODS, NUMBERS, AND SUMS.

Articles described must be substantially proved, § 121.

Coin must be specifically proved, § 122.

Proof must come up to some one article charged, § 123.

Animals must be substantially proved as described, § 124.

Variance in number immaterial, § 125.

Variance as to value immaterial, unless value be descriptive, § 126.

Collective value does not sustain specific, § 127.

VII. NEGATIVE AVERMENTS.

Burden on defendant to prove matter peculiarly in his own knowledge, § 128.

VIII. DIVISIBLE AVERMENTS.

Defendant may be convicted of part of offence charged, § 129.

May be convicted of minor offence, § 130.

Any proved assignment will be sufficient, § 131.

One of several articles in larceny is enough, § 132.

And so of several objects in conspiracy, § 133.

And so of divisible predicates, § 134.

And so of cumulative intents, § 135.

Defendants may be severally convicted, § 136.

Divisibility extended by statute, § 137.

IX. SURPLUSAGE.

Unnecessary words can be rejected, § 138.

Effect of *videlicet*, § 141.

Aggravation and inducement may be discharged, § 142.

Otherwise when allegation is essential, § 143.

Differentia between major and minor offence, § 144.

Allegations of number and quantity may be distributively proved, § 145.

Descriptive averments must be proved, § 146.

Otherwise as to formal language, § 147.

"Feloniouly" may be so rejected, § 148.

X. INTENT.

No variance as to intent if party charged contemplated result as a contingency, § 149.

Otherwise when specific intent is averred and conflicting intent is proved, § 150.

§ 90. RECENT statutes have done much to modify the common law rulings to the effect that wherever there is a variance in substance between the indictment and the proof, the defendant must be acquitted. As, however, these statutes in few States are the same, and as, even where they exist, the old rulings may be of value as showing how far the statutes operate, it is proposed, in the present chapter, to treat the subject of variance, as it exists at common law, under the following titles:—

Variance
at common
law.

I. AGENCY BY WHICH WRONG IS INFLICTED.

§ 91. As a general rule (excluding cases to be noticed where documents are set forth), it is sufficient if the evidence of the instrument by which the wrong is inflicted corresponds in general character and operation with the averments in the indictment.¹ Of this rule an illustration is

Agency of
wrong
must be
substanti-
ally proved.

¹ R. v. Mackally, 9 Co. 67a; R. v. Warmar, 2 C. & K. 195; 1 Den. C. C. Thompson, 1 Mood. C. C. 139; R. v. 183; R. v. Grounsell, 7 C. & P. 788;

found in a case tried at Nisi Prius in Philadelphia, by Gibson, C. J. The first count in the indictment charged that the defendant, devising and intending to raise and create riots, etc., with the usual averments, "unlawfully, wickedly, and maliciously incited, encouraged, and endeavored to provoke and instigate divers good citizens of the Commonwealth, whose names are to said inquest unknown," etc., "to assemble and gather together and disturb the peace of the Commonwealth, and to injure and annoy said citizens," etc., "and for that purpose, he, the said defendant, then and there erecting and fixing a certain figure, resembling a man, but commonly called a Paddy, as and for the effigy of St. Patrick, and by these means," etc., "did collect together a large number of citizens, who behaved riotously for a long space of time," etc. The remaining counts were for attempt to produce riot generally, without specifying the means. It appeared from the evidence that sometime between dusk and eleven o'clock, on the 16th of March, a stuffed Paddy, with the accompaniment of a rum bottle and a string of potatoes, was suspended to a tree near the junction of Second Street and German-town Road, in the district of Kensington, a neighborhood then inhabited principally by emigrants from Ireland. The figure remained in this position until the next morning, when it was removed, to prevent a disturbance which seemed likely to ensue. The defendant, an innkeeper, residing in that district, was proved by several witnesses to have been in his house during the whole of the evening on which the Paddy was erected; and a great deal of conflicting evidence was produced, which made his agency in the affair very questionable. The averment in the indictment that the figure was intended as an effigy of St. Patrick, and was meant and well calculated to excite the angry feelings of the immediate population, was

R. v. Waters, 7 C. & P. 250; State v. Dame, 11 N. H. 271; Com. v. Macloon, 101 Mass. 1; State v. Purify, 86 N. C. 469. See Whart. Crim. Law, § 519. 68. In Com. v. Fenno, 125 Mass. 387, "Brass knucks" has been held to be sustained by proof of a weapon which is made of lead. Patterson v. State, 3 Lea, 575. In State v. Blau, 69 Mo. 317, it was held that it was no objection to an indictment against two with different weapons that it does not state what were the acts of each defendant.

But proof of striking with a pistol will

fully supported. It was proved also beyond contest that the defendant was concerned in the exhibition, on the 18th of March, of a female figure, "commonly called a Shelah," but with several features, besides that of sex, distinguishing it from a Paddy. Some evidence was offered to show, also, that while the exhibition of a *Paddy* was resented as an insult upon the Catholic portion of the Irish, a *Shelah* may have been displayed as a retaliatory emblem, peculiarly irritating to Irish Protestants. A tumult ensued, the insult being spiritedly resented, and the neighborhood was thrown into confusion thereby for several succeeding weeks. The defendant, it was conceded, was connected with exhibiting the Shelah, though his instrumentality in the Paddy was controverted. The court having instructed the jury that the indictment charged an indictable offence, after a short absence they came back with the inquiry whether the allegation in the indictment that a Paddy had been exhibited was supported by evidence of the exhibition of a Shelah. The court answered in effect, that if the characteristics and object of the Shelah were different from those of the Paddy, the variance was fatal; but that the question of the identity or dissimilarity of the two was for the jury. A verdict of acquittal was subsequently rendered.¹

¹ *Com. v. Haines*, 6 Penn. Law J. 239-241.

As to pleading of personal chattels see Whart. Crim. Pl. & Pr. § 208.

That "fifteen ball pool" is not "billiards," see *Squier v. State*, 66 Ind. 317, 604; *Sumner v. State*, 74 Ind. 52. *Infra*, § 121.

As to pleading instrument of death see Whart. Crim. Law, 8th ed. § 519.

Proof of striking with a pistol will not sustain an averment of cutting with a knife. *Phillips v. State*, 68 Ala. 469; see *Walker v. State*, 58 Ala. 393.

In a case in Massachusetts in 1879, upon an indictment, under the statute, charging the defendant with conveying in mortgage incumbered real estate without disclosing the incumbrance, where the allegation is that the grantee "then and there did pay to said Wil-

liams for said conveyance a valuable consideration, to wit, the sum of one hundred and forty-eight dollars and ninety-eight cents," and it appears that a suit had been brought by the grantee upon which the defendant was arrested, and that the mortgage in question and a note secured thereby were given to pay the debt sued on and the costs of suit; and upon giving said note and mortgage the defendant was discharged from arrest; it was held that the variance was fatal. *Com. v. Williams*, 127 Mass. 282.

Among other illustrations of the doctrine in the text may be mentioned the following:—

Where an indictment for a conspiracy alleged that the defendants, on the 5th January, 1850, conspired to defraud the F. Insurance Company, by remov-

§ 92. "If an offence may be committed in either of various modes, the party charged is entitled to have that mode stated which is proved on the trial; and when one mode is stated and proof of the commission of the offence by a different mode is offered, such evidence is incompetent by reason of variance."¹ And where a statute prescribes that a wound with a particular kind of an instrument shall be punished in a particular way, then the kind of instrument becomes material. "A blow given with the handle of a knife would not be an assault with a knife or a sharp instrument within the statute, any more than would an attempt to discharge a loaded gun, the touch-hole of which was plugged, be an offence under the English statute making it criminal to attempt to discharge a loaded gun at another."² It is otherwise, however, when the wound is produced by an instrument of the same class. Thus an indictment for murder charged that the death of the deceased was caused by a mortal wound on the head, inflicted with a swingle, but it was proved that the death was caused by a blow on the head by a piece of wood, and that the external skin was not broken, but that there was extravasation of

ing and secreting the goods belonging to one of the defendants, and insured by said company, and then pretending that they had been destroyed by fire, and the evidence was that the policy was issued on the 2d of January, 1850; that the goods were removed on the 3d; that the shop from which they were removed was destroyed by fire on the 7th; and that the defendants had no knowledge of any insurance of the goods by the F. Insurance Company until after the fire; it was held that this evidence did not support the allegation in the indictment. *Com. v. Kellogg*, 7 Cush. 473. And an indictment charging the defendant with embezzling money received from contributors, to be paid to an association, is not sustained by proof of a specific trust to pay over the money to the treasurer of the association. *Com. v. O'Keefe*, 121 Mass. 59.

On the other hand, where an indictment charged that the defendant fed a large number of hogs with "slop, fermented grain, the offals and entrails of beasts, and other filth," by means whereof a nuisance, etc., was created, and the evidence showed that the hogs were fed exclusively on slop; Sergeant, J., held that there was no variance. *Com. v. Vansickle*, Brightly R. 69; 7 Penn. L. J. 82.

¹ *Com. v. Richardson*, 126 Mass. 34. See *State v. Gainus*, 86 N. C. 632.

² *Allen, J., Filkins v. People*, 69 N. Y. 104. See *State v. Townsend*, 1 Houst. C. C. 337; *State v. Taylor*, id. 436. An allegation in an indictment that a pistol was loaded with gunpowder and leaden bullets must be substantially proved. *Porter v. State*, 57 Miss. 300; see, also, 3 Whart. & St. Med. Jur., §§ 266 *et seq.*

blood pressing on the brain, and a collection of blood between the scalp and the brain. The surgeon stated this to be a contused wound, with effusion of blood. It was held by the fifteen judges that the evidence supported the indictment.¹ But an indictment charging an exhibition of pictures of "naked girls" is not supported by girls naked above the waist.²

§ 93. Where an instrument of offence is unknown, it may be so stated, provided the pleader gives as close a description as is consistent with the nature of the case.³ "Unknown" instrument may be so described.

II. NAMES OF PERSONS.

§ 94. While an error in the name of the defendant can only be taken advantage of by abatement,⁴ an error in the names of the prosecutor, or of third parties, when the name is material, is at common law fatal.⁵ Thus, if a burglary

Such names must be proved as averred.

¹ *R. v. Warman*, 2 C. & K. 195.
In *People v. Cavanagh*, 62 How. Pr. 187, the jury were allowed to say whether a horseshoe was "a sharp, dangerous weapon." In *Morgan v. State*, 61 Ind. 447, it was held that an averment of a "Smith and Weston revolver" was not sustained by proof of a "Smith and Wesson revolver." Where an indictment charged two methods of killing, namely, strangulation and burning, an instruction that it was immaterial from which mode death resulted, was held proper. *Jones v. State*, 65 Ga. 621. A charge of "open, gross lewdness and lascivious behavior" is sustained by proof of an indecent exposure of person without necessity in the house of another to a girl of eleven years. *Com. v. Wardell*, 128 Miss. 82. That a variance between "poker" and "stud-poker," in the name of an unlawful game, is not material, see *Flynn v. State*, 34 Ark. 441.

² *Com. v. Dejardin*, 126 Mass. 46. See *infra*, § 143.

Of the failure of justice arising from

the want of due care in pleading the fatal weapon, a conspicuous case in England affords an appropriate illustration. *R. v. Bird*, 15 Jur. 193; 5 Cox C. C. 11; 2 Den. C. C. 94; 2 Eng. L. & Eq. 448. See Whart. Crim. Law, 8th ed. §§ 519-20; *Com. v. Dejardin*, 126 Mass. 46; *State v. Gainus*, 86 N. C. 632.

³ See Whart. Crim. Law, 8th ed. § 520; *Com. v. Webster*, 5 Cush. 295; *State v. Williams*, 7 Jones, N. C. 446; *Edmonds v. State*, 34 Ark. 720. And see *Cox v. People*, 80 N. Y. 500, where the defendant was alleged to have killed the deceased "in some way and manner, and by the use of some means and instruments" unknown, and the proof was the deceased died of fright caused by the defendant's violence, a verdict of guilty was sustained under the statute. As to lost instruments see *infra*, § 118.

⁴ Whart. Crim. Pl. & Pr. § 96.

⁵ 1 East P. C. 514; 2 Leach, 774; 1 Ch. C. L. 217; *R. v. Norton*, R. & R. 509; *R. v. Berriman*, 5 C. & P. 101; *R. v. Wilson*, 1 Den. C. C. 284; 2 Cox

be alleged to have been committed in the dwelling-house of J. G., and the fact is that it is the dwelling-house of J. S., the defendant must be acquitted for the variance;¹ and if a larceny be alleged to have been committed in the house of J. G., and it turn out in evidence to be the house of J. S., the defendant must be acquitted of the stealing in the dwelling-house, and can be found guilty of the simple larceny merely. Ownership of goods must be stated with the same exactness.² And an indictment averring a sale to M. G. is not sustained by proof of a sale to a woman whose name at the sale was M. G., but who before the indictment was found had acquired a new surname by marriage.³ A draft, also, signed Jos. Johnson, is not admissible under a count stating it to be signed Joseph Johnson, president.⁴ And, generally, variance between the indictment and evidence, in the name of the party injured, will be fatal, and the defendant must be acquitted.⁵

How the ownership of property is to be averred and proved has been more fully considered in another work.⁶

§ 95. An indictment will not be bad which gives a popular name as distinguished from a proper name; and it will be enough to sustain an averment of a particular name that the party was usually or popularly known by such name, which name he accepted.⁷ Thus, though the prosecutrix's

Enough if indictment gives name in popular use.

C. C. 426; *State v. Bean*, 19 Vt. 530; *As to immateriality of averment, see Com. v. Gillespie*, 7 S. & R. 469; *State infra*, § 140.

v. Bell, 65 N. C. 313; *State v. Scurry*, 3 Rich. 68; *State v. Trapp*, 14 Rich. 203. See Whart. Crim. Pl. & Pr. §§ 109 *et seq.* In Missouri, under Stat. 1089, § 22, the judge of first instance passes upon materiality of the discrepancy. This is not reviewable above, and testimony from the grand jurors is inadmissible to show whom they meant. *State v. Wammack*, 70 Mo. 410.

¹ *R. v. White*, 1 Leach, 286; *State v. Rushing*, 2 N. & McCord, 560. See, however, *Com. v. Price*, 8 Leigh, 757.

² Whart. Crim. Law, 8th ed. §§ 934, 979; *State v. Ellison*, 68 N. H. 325.

³ *Com. v. Brown*, 2 Gray, 358; *contra*, *R. v. Turner*, 1 Leach, 536.

⁴ *U. S. v. Keen*, 1 McLean, 429.

⁵ *U. S. v. Howard*, 3 Sumner, 12; *State v. Owens*, 10 Rich. 169; *Timms v. State*, 4 Cold. 138; Whart. Crim. Pl. & Pr. § 167.

⁶ Whart. Crim. Law, 8th ed. § 932.

⁷ *R. v. Norton*, R. & R. 510; *R. v. Berriman*, 5 C. & P. 601; *Anon.* 6 C. & P. 408; *U. S. v. Miles*, 2 Utah, 9; S. C., 103 U. S. 304; *State v. Bundy*, 64 Me. 507; *State v. Peterson*, 70 Me. 216; *Com. v. Trainor*, 123 Mass. 414; *Taylor v. Com.*, 20 Grat. 825; *State v. Bell*, 65 N. C. 313; *Jones v. State*, 65 Ga. 147.

true name was Susannah, it was held that an indictment calling her Susan, that being her popular name, was good.¹ So where an instrument was signed T. Tupper, and it was averred that the prisoner made it with the intention to defraud Tristram Tupper, the evidence being that Tristram was the name by which the party was known; it was held that there was no variance, and that the count was well framed.²

"In an indictment a boy was called D., and he stated that his right name was D., but that most persons who knew him called him P., and that his mother had married two husbands, the first named P. and the second D., and that he was told by his mother that he was the son of the latter, and that she used always to call him D. Williams, J., after consulting Alderson, B., held that the evidence that the boy's mother had always called him D. must be taken to be conclusive as to his name, and that therefore he was rightly described in the indictment. *R. v. Williams*, 7 C. & P. 298." *Roscoe's Crim. Ev.* 8th ed. 84.

In *Com. v. Moore*, 130 Mass. 45, the indictment alleged that the defendant broke and entered the building of the Warren Institution for Savings, "with intent then and therein to commit the crime of larceny, and the property, goods, and chattels of the said corporation, in said building then being found, then and there in said building feloniously to steal, take, and carry away," and the proof was of an intent to steal goods belonging to the United States in a part of the building leased and occupied for a post-office, which goods were in the exclusive custody and possession of the United States, and of which the Warren Institution for Savings had no property, general or special, no custody or possession: It was held that the variance between the indictment and the proof was fatal. See *Com. v. Shaw*, 7 Met. 52.

"On an indictment for the murder

of a bastard child, described in the indictment as 'George Lakeman Clark,' it appeared he had been christened 'George Lakeman,' being the name of his reputed father; that he was called George Lakeman, and not by any other name known to the witnesses; and that the mother called him George Lakeman. There was no evidence that he had obtained or was called by his mother's name of Clark. The judges held that as this child had not obtained his mother's name by reputation, he was improperly called Clark in the indictment, and as there was nothing but the name to identify him in the indictment, the conviction could not be supported. *R. v. Clark*, Russ. & Ry. 358." *Roscoe's Crim. Ev.* 8th ed. p. 86. The English rule, as already illustrated, is that the grand jury is to give the names of the parties as they were at the time of the finding of the bill. *R. v. Turner*, 1 Leach, 536. *Roscoe's Crim. Ev.* 8th ed. p. 86. But *contra* on last point, *Com. v. Brown*, 2 Gray, 358. *Supra*, § 94.

¹ *State v. Johnson*, 67 N. C. 58. See *R. v. Norton*, R. & R. 509; *R. v. Berri-man*, 5 C. & P. 601; *Anon.* 6 C. & P. 408; *State v. Gardiner*, Wright (Ohio), 392; *State v. Bell*, 65 N. C. 613.

As to pleading of middle names and initials see *Whart. Crim. Pl. & Pr.* § § 101 *et seq.* *Infra*, § 99.

As to "junior" and "senior" see *ibid.* § 108.

² *State v. Jones*, 1 McMull. 236. "Peter Finish" is a variance for "John

The name of a corporation must be accurately given.¹

Where an indictment for murder undertakes to identify the deceased by his race, the State should make some proof of the descriptive matter.²

§ 96. If the name proved be *idem sonans* with that in the indictment, and different in spelling only,³ the variance will be immaterial. Thus, "Blankenship" for "Blackenship,"⁴ "Havely" for "Haverly,"⁵ "Segrave" for "Seagrave,"⁶ "M'Nicole" for "M'Nicoll,"⁷ "Benedetto" for "Beneditto,"⁸ "Whyneard" for "Winyard," pronounced "Winnyard,"⁹ "Charles W. Jeffries" for "C. W. Jeffries,"¹⁰ "Juli Antoine" for "Jules Antoine,"¹¹ "Keen" for "Keene,"¹² "Deadema" for "Diedema,"¹³ "Autron" for "Autrum" or "Autrim,"¹⁴ "Marves" for

Sufficient
if name be
idem
sonans.

Peter Finish." State v. English, 67 Mo. 127.

An indictment charged the killing of De Oliver. The person killed was DeWitt Oliver. Held, no variance, the point not being raised until after verdict. Scott v. State, 7 Lea, 232.

On an indictment charging the stealing of the horse of Stephen Harris, the evidence proved that the man whose horse had been stolen was named Harrison. The witness stated that his name of baptism was Harrison, though his neighbors sometimes called him Harris; it was held that the owner's name was sufficiently described. State v. France, 1 Tenn. 434. On a trial for felony, the only evidence of the prosecutor's Christian name was a statement by a witness that he had seen the prosecutor sign his name to the charge against the prisoners, and to his deposition before the magistrates; that he knew from that the prosecutor's name was Thomas B., but that except from having seen him make his signature, he had no knowledge of his Christian name. It was held that this was admissible and sufficient evidence of the Christian name of the prosecutor. R. v. Toole, 40 Eng. L. & Eq. 583; Dears. & B. 194. But proof that the

accused shot some person of the name of "Rathbun" will not sustain an averment of shooting "William A. Rathbun." Hardin v. State, 26 Tex. 113. See *infra*, § 99.

¹ Whart. Crim. Pl. & Pr. § 110; see Norton v. State, 74 Ind. 337.

² Reed v. State, 16 Ark. 499. *Infra*, § 101.

³ Williams v. Ogle, 2 Str. 883; R. v. Wilson, 2 C. & K. 527; 1 Den. C. C. 284; 2 Cox C. C. 426; State v. Bean, 19 Vt. 530; White v. State, 69 Ind. 273; State v. Leak, 80 N. C. 403; Point v. State, 37 Ala. 178; Walker v. State, 13 Tex. Ap. 618; Wooldridge v. State, 13 Tex. Ap. 443; Whart. Crim. Pl. & Pr. § 119.

⁴ State v. Blankenship, 21 Mo. 504.

⁵ Ibid. 498, *sed quare*.

⁶ R. v. Wilson, 2 C. & K. 527; 1 Den. C. C. 284.

⁷ Ahitbol v. Benedetto, 2 Taunt. 401.

⁸ R. v. Foster, R. & R. 412.

⁹ State v. Bibb, 68 Mo. 286; but see Com. v. Kearns, 1 Va. Cas. 109. *Infra*, § 99.

¹⁰ Point v. State, 1 Ala. (Sel. Cas.) 54; S. C., 37 Ala. 148.

¹¹ Com. v. Riley, Thach. C. C. 67.

¹² State v. Patterson, 2 Ired. 346.

¹³ State v. Scurry, 3 Rich. 68.

"Mars,"¹ "Michael" for "Michaels,"² "Gigger" for "Jiger,"³ "Edmindson" for "Edmundson,"⁴ "Coburn" for "Colburn,"⁵ "Connolly" for "Conly,"⁶ "McLaughlin" for "McGlofin,"⁷ "Anny" for "Anne,"⁸ "Susan" for "Susannah,"⁹ "Mary Etta" for "Marietta,"¹⁰ "Boudet" for "Boredet,"¹¹ "Whiteman" for "Whitman,"¹² "Read" for "Reed,"¹³ "Chin Chan" for "Chin Chang,"¹⁴ "Fourai" for "Forrest,"¹⁵ "Cuffy" for "Cuff,"¹⁶ "Little" for "Lytle,"¹⁷ "Meyer" for "Mayer,"¹⁸ "Sofia" for "Sophira,"¹⁹ "Hutson" for "Hudson,"²⁰ "Droun" for "Drown,"²¹ "Thonpson" for "Thompson,"²² "Danner" for "Dannaher,"²³ "Tobin Preyer" for "Tobin Prior,"²⁴ form no variance. A special verdict, finding the name to be Rich'd, when in fact it was Richard, is not fatally defective.²⁵ But it has been decided that "M'Cann" and "M'Carn,"²⁶ "Shakespeare" and "Shakepeare,"²⁷ "Chambles" and "Chambless,"²⁸ "Sedbetter" and "Ledbetter,"²⁹ "Dougal McInnis" and "Dougal McGinnis,"³⁰ "Tabart" and "Tarbart,"³¹ "Burrall" and "Burrill,"³² "Shutliff" and "Shirtliff,"³³ "Prison" and "Brisson,"³⁴ "Donnel" and "Donald,"³⁵ "Melvin" and "Melville,"³⁶ "Comyns" and "Cummins,"³⁷ "Franks" and "Frank,"³⁸ "Abie" and "Avie,"³⁹ "Amann" and "Ammen,"⁴⁰ "Ratharine"

¹ Com. v. Stone, 103 Mass. 421.

² State v. Houser, Busbee, 410.

³ Com. v. Jennings, 121 Mass. 47.

⁴ Edmundson v. State, 17 Ala. 179.

⁵ Colburn v. Bancroft, 23 Pick. 575.

⁶ Fletcher v. Conly, 2 Greene (Iowa),

²¹ Com. v. Woods, 10 Gray, 477.

²² State v. Wheeler, 35 Vt. 261.

²³ Graham v. People, 58 Ill. 160.

²⁴ Page v. State, 61 Ala. 16.

²⁵ Huffman v. Com., 6 Rand. (Va.)

685.

88.

⁷ McLaughlin v. State, 52 Ind. 647.

⁸ State v. Upton, 1 Dev. 513.

⁹ State v. Johnson, 67 N. C. 55.

¹⁰ Good v. State, 2 Tex. Ap. 520; but see State v. Peterson, 70 Me. 216.

¹¹ Aaron v. State, 37 Ala. 106.

¹² Henry v. State, 7 Tex. Ap. 388.

¹³ State v. Potts, 4 Halst. 26.

¹⁴ Wells v. State, 4 Tex. Ap. 20.

¹⁵ State v. Timmens, 4 Minn. 331, *sed quare*.

¹⁶ State v. Farr, 12 Rich. 24.

¹⁷ Lytle v. People, 47 Ill. 422.

¹⁸ Ayers v. State, 88 Ind. 275.

¹⁹ Owen v. State, 7 Tex. Ap. 329.

²⁰ State v. Hntson, 15 Mo. 512; see Chapman v. State, 18 Ga. 736.

²⁶ R. v. Tannett, R. & R. 351.

²⁷ R. v. Shakespeare, 10 East, 83.

²⁸ Ward v. State, 28 Ala. 53.

²⁹ Zellers v. State, 7 Ind. 659. See

White v. State, 69 Ind. 273.

³⁰ Barnes v. People, 18 Ill. 52.

³¹ Bingham v. Dickie, 5 Taunt. 814.

³² Com. v. Gillespie, 7 S. & R. 469.

³³ 1 Chitty, 216.

³⁴ Addison, 141.

³⁵ Donnel v. U. S., 1 Morris, 141.

See McDonald v. People, 47 Ill. 533.

³⁶ State v. Curran, 18 Mo. 320.

³⁷ Cruikshank v. Comyns, 24 Ill. 602.

³⁸ Parchman v. State, 2 Tex. Ap. 228.

³⁹ Burgamy v. State, 4 Tex. Ap. 572.

⁴⁰ Amann v. State, 76 Ill. 288.

and "Catharine,"¹ "Sensenderfer" and "Sensenderf,"² "Della Weaver" and "Dellia Weaver,"³ "Zachariah" and "Zacary,"⁴ "Helen" and "Ellen,"⁵ are not the same in sound.⁶ "McCoskey" is a variance from either "McKaskey," or "McKlaskey," or "McKloskey."⁷

What is *idem sonans* is for the jury on an issue of fact,⁸ though it is otherwise on demurrer.⁹ What the name in the indictment is, when a question of fact, is for the jury.¹⁰

In another work it will be seen that the name of the defendant should be specifically given,¹¹ that the omission of the surname is fatal,¹² that mistake in this respect may be met by plea in abatement,¹³ that middle names are to be given when essential,¹⁴ that initials are requisite when used by the party,¹⁵ that an unknown party may be proximately described,¹⁶ that at common law addition is necessary,¹⁷ that a wrong addition is to be met by plea in abatement,¹⁸ that "junior" is to be used when the party is known as such. As to third parties, it will be seen that the name only need be given,¹⁹ that corporate title must be special,²⁰ that an immaterial misnomer may be rejected,²¹ that it is sufficient if description is substantially correct,²² that the name may be given by initials,²³ but that a material variance is fatal.²⁴

§ 97. When a third person is described as "a person to the grand jurors unknown," and it turns out that he was known to the

¹ Swails v. State, 7 Blackf. 324.

² Com. v. Bowers, 3 Brewst. 350.

³ Vance v. State, 65 Ind. 460.

⁴ Haley v. State, 63 Ala. 83.

⁵ Thomas v. Deane, 57 Iowa, 58.

⁶ See further Whart. Cr. Pl. & Pr. § 119. Compare Moynahan v. People, 3 Col. 367.

That giving an initial, in the setting forth of a Christian name, when tenor is attempted, is fatal, see Com. v. Kearns, 1 Va. Cas. 109; Murphy v. State, 6 Tex. Ap. 554; though compare State v. Bibb, 68 Mo. 286.

⁷ Black v. State, 57 Ind. 109.

⁸ R. v. Davis, 2 Den. C. C. 231; Com. v. Donovan, 13 Allen, 571; Girous v. State, 29 Ind. 93; Lawrence v. State, 59 Ala. 61; Cotton v. State, 4 Tex.

260. See People v. St. Clair, 55 Cal. 524.

⁹ State v. Havely, 21 Mo. 498.

¹⁰ *Infra*, § 117.

¹¹ Whart. Cr. Pl. & Pr. § 96.

¹² Ibid. § 97.

¹³ Ibid. § 98.

¹⁴ Ibid. § 101.

¹⁵ Ibid. § 102.

¹⁶ Ibid. § 104.

¹⁷ Ibid. § 105.

¹⁸ Ibid. § 106.

¹⁹ Ibid. § 109.

²⁰ Ibid. § 110.

²¹ Ibid. § 114.

²² Ibid. § 115.

²³ Ibid. § 117.

²⁴ Ibid. § 116.

grand jurors, the variance is fatal.¹ It is otherwise when the name does not become known until after indictment found;² and the burden is on the defendant to show that the grand jury, at the particular time of finding, knew the name.³ Knowledge of the name transpiring in another case before the same grand jury does not imply knowledge in the particular case in which the allegation of unknown is made.⁴

Variance between "known" and "unknown" may be fatal.

¹ 2 East P. C. 561, 787; 3 Camp. 265, note; 2 Hawk. c. 25, s. 71; 2 Leach, 578; R. v. Robinson, 1 Holt, 595; R. v. Stroud, 2 Mood. C. C. 270; R. v. Bliss, 8 C. & P. 773; Com. v. Tomson, 2 Cush. 551; Com. v. Hill, 11 Cush. 137; State v. Wilson, 30 Conn. 500; White v. People, 32 N. Y. 465; 55 Barb. 606; Blodget v. State, 3 Ind. 403; Moore v. State, 65 Ind. 213; State v. McIntire, 59 Iowa, 264; Barkman v. State, 13 Ark. 703; Reed v. State, 16 Ark. 499; Jorasco v. State, 6 Tex. Ap. 283; Whart. Cr. Pl. & Pr. §§ 111-13. But, where the deceased was called a "white woman whose name is to the grand jurors unknown, but whom said grand jurors do call Bessie Rothschild, alias Diamond Bessie," the defendant was not allowed to show that before the homicide the foreman of the grand jury had seen a woman who, he was told, was "a fast woman called Diamond Bessie," and that he afterwards heard she was killed. Rothschild v. State, 7 Tex. Ap. 519.

² R. v. Campbell, 1 C. & K. 82; R. v. Smith, 1 Mood. C. C. 402; Com. v. Hendrie, 2 Gray, 503; Com. v. Hill, 11 Cush. 137; State v. Haddock, 2 Hayw. 162; White v. People, 32 N. Y. 485; Cheek v. State, 38 Ala. 227; Hays v. State, 13 Mo. 246; State v. Bryant, 14 Mo. 340; Reed v. State, 16 Ark. 499. See Whart. Cr. Pl. & Pr. § 113. As to owners in larceny see Whart. Crim. Law, 8th ed. § 949.

³ R. v. Bush, R. & R. 372; Com. v. Tomson, 2 Cush. 551; Com. v. Hill,

11 Cush. 137; Com. v. Gallagher, 126 Mass. 54; Blodget v. State, 3 Ind. 403. In conspiracy it would seem sufficient if any co-conspirators were unknown. Whart. Crim. Law, 8th ed. § 1393.

In Massachusetts it is held that the allegation is sufficient, though the grand jury might have found out the name by examining the witnesses called before them. Com. v. Stoddard, 9 Allen, 380. *Alier*, in Indiana. Blodget v. State, 3 Ind. 403.

An indictment for larceny of "United States treasury notes or national bank bills, the number and denomination of which were to the grand jury unknown" will not be held fatally defective though it appear that by the exercise of reasonable diligence the grand jury could have informed themselves of the details. DuVall v. State, 63 Ala. 12.

⁴ R. v. Bush, R. & R. 372.

On an indictment for adultery containing two counts, in one of which the offence is charged to have been committed with E. B., and in the other with a woman whose name was not known, evidence being introduced tending to show that the person of the woman was known, and that her name was E. B., it was held that if the jury doubted, upon the evidence, whether the true name of the woman was E. B., they might find the defendant guilty on the second count. Com. v. Tomson, 2 Cush. 551.

When the allegation of the indict-

A "person unknown" must be individuated as a specific person, though his name may not be ascertainable.¹

§ 98. When the name either of the defendant or of a third party is laid with an *alias dictus* (e. g., Richard Witson, otherwise called Richard Layer), proof of either name will be enough.²

Alias dictus
allows al-
ternative
proof.

ment is that a third person was unknown, it is enough if it appear in proof that such third person was unknown when indictment was found, though he became known afterwards. *Com. v. Hendrie*, 2 Gray, 503; *White v. People*, 32 N. Y. 465; *Cheek v. State*, 38 Ala. 227. See *Com. v. Blood*, 4 Gray, 31. But a complaint for unlawfully selling intoxicating liquor to a person unknown, on which the defendant is convicted before a justice of the peace, or police court, on proof of a sale to one person, is not supported, on the trial on appeal, by proof of a sale to a different person. *Zellers v. State*, 7 Ind. 659.

"Where the property was laid in one count as belonging to certain persons named, and in another as belonging to persons unknown, and the prosecutor failed to provide the Christian names of the persons mentioned in the first count; it was held by *Richards, C. B.*, that he could not resort to the second count; and the prisoner was acquitted. *R. v. Robinson*, Holt N. P. C. 595. An indictment against the prisoner, as accessory before the fact to a larceny, charged that a certain person to the jurors unknown, feloniously stole, etc., and that the prisoner incited the said person unknown to commit the said felony. The grand jury had found the bill upon the evidence of one Charles Iles, who confessed that he had stolen the property, and it was proposed to call him to establish the guilt of the prisoner, but *Le Blanc, J.*, interposed and

directed an acquittal. He said he considered the indictment wrong, in stating that the property had been stolen by a person unknown, and asked how the witness, who was the principal felon, could be alleged to be unknown to the jurors when they had him before them, and his name was written on the back of the bill. *R. v. Walker*, 3 Campb. 264. See, also, *R. v. Blick*, 4 C. & P. 377. But where an indictment stated that a certain person to the jurors unknown burglariously entered the house of H. W., and stole a silver cream jug, etc., which the prisoner feloniously received, and it appears that amongst the records of indictments returned by the same grand jury there was one charging Henry Moreton as principal in the burglary, and the prisoner as accessory in receiving the cream jug; that H. W.'s house had been entered only once, and that she had lost only one cream jug, and that she had preferred two indictments; it was held by the judges, that the prisoner was properly convicted, the finding of the grand jury on the bill, imputing the principal felony to H. M., being no objection to the other indictment. *R. v. Bush*, Russ. & R'y, 372. See, also, *R. v. Casper*, Moo. C. C. 101." *Roscoe's Cr. Ev.* 87.

¹ *State v. Trice*, 88 N. C. 627; see *Moore v. State*, 65 Ind. 460.

² *State v. Graham*, 15 Rich. 310. See 1 *Ld. Raym.* 562; *Willes*, 554; *State v. Peterson*, 70 Me. 216; *Kennedy v. People*, 39 N. Y. 245; *State v.*

§ 99. Much dispute exists as to whether a middle name is part of a name, and there are rulings that its omission is no variance.¹ But where a man is popularly known by his middle name, it would seem that he should be described by such in the indictment.² On the other hand, where he is commonly known by his first name, omission of the middle name is not fatal;³ but the omission of the first name, giving only the middle name, would be error.⁴ If a middle name be given, it should be proved as laid.⁵ But the real question is, what did the defendant call himself, and permit himself to be called? By this name he is to be indicted.⁶ If he calls himself by initials, and signs his name by initials, by initials he may be described in an indictment.⁷ But if he be described by a full name and the witness call him by his last name only, it is a variance.⁸

Middle names when distinctive must be proved.

§ 100. When the term "junior" is so attached to a person's name that he is known by it distinctively, it has been held that it is a fatal variance should the indictment describe him without the "junior."⁹ But the

Variance between "junior" and "senior."

Gardiner, Wright (Ohio), 392; Evans v. State, 62 Ala. 6; Haley v. State, 63 Ala. 89; Owen v. State, 7 Tex. App. 329; Hunter v. State, 8 Tex. App. 75. And see U. S. v. Bowen, 3 MacArthur, 64. In U. S. v. Miles, 103 U. S. 304, the name was laid as Caroline Owens, and the proof was that her name was Caroline Owen Maile afterward known as Owen. Held no variance.

¹ Wh. Cr. Pl. & Pr. § 101; People v. Cook, 14 Barb. 259; State v. Williams, 20 Iowa, 98; Miller v. State, 69 Ind. 284; People v. Ferris, 56 Cal. 742; State v. Manning, 14 Tex. 402. See West v. State, 48 Ind. 483. As to whether an initial can be a name see Wh. Cr. Pl. & Pr. §§ 101-2.

² Com. v. Perkins, 1 Pick. 388; Com. v. Blood, 4 Gray, 31.

³ Miller v. People, 39 Ill. 457; Miller v. State, 69 Ind. 284; People v. Lockwood, 6 Cal. 205.

⁴ State v. Hughes, 1 Swan, 266;

State v. Martin, 10 Mo. 391. See Hardin v. State, 26 Tex. 113; Wh. Cr. Pl. & Pr. § 101. But see State v. Peterson, 70 Me. 216; where an indictment charging the assault to have been on "Etta" Peterson was sustained, though the proof showed her full name to be "Mary Etta;" and see *supra*, § 95.

⁵ Price v. State, 19 Ohio, 423; State v. Hughes, 1 Swan, 266; State v. English, 67 Mo. 136; but see Delphino v. State, 11 Tex. App. 30.

⁶ Wh. Cr. Pl. & Pr. § 101.

⁷ Tweedy v. Jarvis, 27 Conn. 62; Vandermark v. People, 47 Ill. 122; State v. Bell, 65 N. C. 313; State v. Anderson, 3 Rich. 172; State v. Black, 31 Tex. 560; Wh. Cr. Pl. & Pr. § 402. That initials may be treated as surplusage, see Choen v. State, 52 Ind. 347.

⁸ Penrod v. People, 89 Ill. 150.

⁹ State v. Vittum, 9 N. H. 519. See Singleton v. Johnson, 9 M. & W. 67.

better opinion is that "junior" is not part of a name, unless made so by the party himself, and adopted by the community.¹

§ 101. A false description of a party may prove a variance.

Variance
as to de-
scription
fatal.

Thus, where a woman (the wife of an alleged bigamous party) was averred to be a "widow," when the proof was that she was a single woman, this proof was held not to sustain the indictment.² The sex of a child, also, on whom an offence is committed, must be proved as laid.³ It is otherwise when the false description is as to the defendant's name, in which case the defect must be met by plea in abatement.⁴

§ 102. Whenever the legal effect of an agent's acts is the same

Proof of
acts by an
agent will
sustain
avermment
of acts by
principal.

as it would be if the principal acted in person—in other words, whenever the agent is the extension of the principal—evidence that a particular thing was done by the agent operating for the principal will sustain an averment of acts by the principal.⁵ Hence, misdemeanors committed by an agent under the principal's direction may be averred to have been committed by the principal;⁶ and a homicide alleged to be committed by A. is sustained by proof of a killing by B. under A.'s directions and immediate control.⁷ To the same effect are cases where it is held that an indictment averring false pretences made to, or money obtained from, a principal, is sup-

¹ *R. v. Peace*, 3 B. & Ald. 579; *Hodgson's Case*, 1 Lew. C. C. 236; *State v. Grant*, 22 Me. 171; *State v. Weare*, 38 N. H. 314; *Allen v. Taylor*, 26 Vt. 599; *Com. v. Perkins*, 1 Pick. 388; *People v. Cook*, 14 Barb. 259; *Thompson v. Lee*, 12 Ill. 314; *McKay v. State*, 8 Tex. 376; *San Francisco v. Randall*, 54 Cal. 408. See *Whart. Crim. Pl. & Pr.* § 108. In *Com. v. Parmenter*, 101 Mass. 211, it was held that W. R. Jr. might be indicted as W. R. "the second of that name."

² *R. v. Deeley*, 1 Mood. C. C. 303; 4 C. & P. 579. See *Reed v. State*, 16 Ark. 499, applying same rule to false description of race. See, however, *U. S. v. Howard*, 3 Sumner, 12; *Com. v. Hunt*, 4 Pick. 252. *Infra*, § 146.

³ *Wallace v. State*, 10 Tex. App. 255.

As to description of prosecutor in rape, see *Whart. Cr. Law*, 8th ed. § 572.

⁴ *Com. v. Lewis*, 1 Met. 151; *Whart. Crim. Pl. & Pr.* § 106. *Infra*, § 146.

⁵ *Infra*, § 112; *Whart. Crim. Law*, 8th ed. §§ 221, 522; *R. v. Gutch*, M. & M. 437; *State v. Neal*, 7 Foster, 131; *Com. v. Nichols*, 10 Met. 259; *Com. v. Bagley*, 7 Pick. 270; *Com. v. Call*, 21 Pick. 515; *Com. v. Chapman*, 11 Cush. 422; *Com. v. Park*, 1 Gray, 553; *Com. v. Gillespie*, 7 S. & R. 489; *Stoughton v. State*, 2 Oh. St. 562; *State v. Mathis*, 1 Hill (S. C.), 37; *Brister v. State*, 26 Ala. 107; *Britain v. State*, 3 Humph. 203. That an agent's declarations are imputable to a principal, see *infra*, § 695.

⁶ *Ibid.*

⁷ *Whart. Crim. Law*, 8th ed. § 522.

ported by evidence that the pretences were made to, or money obtained from, an agent.¹ And where the indictment charges A. as principal and B. as abetting, it is no variance if the evidence exhibits B. as principal and A. as abetting.² On the same reasoning, an averment of an intent to defraud A. B. is sustained by proof of an intent to defraud a firm of which A. B. is a member.³

§ 102 *a*. The name of a corporation must be correctly given and proved as laid.⁴ It has been held that proof of the general recognition of the existence of the corporation, in connection with its assumption of corporate duties, is *prima facie* proof of incorporation.⁵ And in most jurisdictions the court takes judicial notice of the charter.⁶

Corporation name must be proved though charter need not be produced.

III. TIME AND PLACE.

§ 103. The time of the commission of an offence laid in the indictment is ordinarily not material, and does not confine the proofs within the limits of that period; the indictment will be satisfied by proof of the offence on any day anterior to the finding.⁷

Time proved may be any day prior to finding.

¹ *Ibid.*; *State v. Curran*, 18 Mo. 320.

² *Fost.* 551; 1 *East P. C.* 350; *R. v. Mackally*, 9 *Coke*, 453; *Plowden*, 983; *R. v. Culkins*, 5 *C. & P.* 521; *Com. v. Chapman*, 11 *Cush.* 422; *State v. Mairs*, *Coxe*, 453; *State v. Fley*, 2 *Rice's Dig.* 100; *State v. Jenkins*, 14 *Rich.* 215; *Whart. Crim. Law*, 8th ed. §§ 218, 522.

³ *State v. Hastings*, 53 *N. H.* 452; *People v. Curling*, 1 *Johns.* 320; *Stoughton v. State*, 2 *Ohio St.* 562.

⁴ *U. S. v. Hinman*, 1 *Bald.* 292.

⁵ *Infra*, § 164 *a*; *Calkins v. State*, 18 *Ohio St.* 336; *State v. Thompson*, 23 *Kan.* 838.

⁶ *Whart. on Ev.* §§ 294, 314; *Whart. Crim. Law*, 8th ed. § 716.

⁷ *Whart. Crim. Pl. & Pr.* § 120; 1 *Ch. C. L.* 557; *R. v. Aylett*, 1 *T. R.* 63; *R. v. Holland*, 5 *T. R.* 607; *R. v. Haynes*, 4 *M. & S.* 214; *R. v. Brown*, *M. & M.* 160; *U. S. v. McCormick*, 4

Cranch C. C. 104; *Johnson v. U. S.*, 3 *McLean*, 89; *U. S. v. Riley*, 5 *Blatch.* 204; *State v. Hanson*, 39 *Me.* 337; *State v. Shaw*, 58 *N. H.* 73; *State v. Havey*, 58 *N. H.* 377; *State v. Munger*, 15 *Vt.* 291; *Com. v. Kelly*, 10 *Cush.* 69; *Com. v. Dillane*, 1 *Gray*, 483; *Com. v. Carroll*, 15 *Gray*, 409; *Com. v. Campbell*, 103 *Mass.* 436; *Com. v. Dacey*, 107 *Mass.* 206; *State v. Munson*, 40 *Conn.* 475; *People v. Van Santvoord*, 9 *Cow.* 660; *Jacobs v. Com.*, 5 *S. & R.* 316; *Pancake v. State*, 81 *Ind.* 93; *State v. Bell*, 49 *Iowa*, 440; *State v. Woodman*, 3 *Hawks*, 384; *State v. Newsom*, 2 *Jones (N. C.)*, 173; *State v. Branham*, 13 *S. C.* 389; *Medlock v. State*, 18 *Ark.* 363; *Emporia v. Volmar*, 12 *Kans.* 622; *People v. Littlefield*, 5 *Cal.* 355; *Kincaird v. State*, 8 *Tex. Ap.* 465.

Under the Tennessee code, an indictment charging an offence committed

§ 103 a. Several exceptions, however, are to be noticed. Wherever deeds, bills of exchange, bank notes, or promissory notes of any kind whatever, are set forth, it is essential that the *date*, if stated, should correspond with the evidence.¹ Where, also, any time stated in an indictment is to be proved by a matter of record, a variance will be fatal.² Thus, in an indictment for perjury, the day on which the perjury was committed must be truly laid.³

Exception as to records and written documents.

§ 103 b. As is elsewhere shown,⁴ it is the practice, when a continuous offence is averred, to lay it with what is called a *continuando*; that is to say, it is averred that the offence was committed on a certain day, and on divers other days between such day and another day specified. When this is done it has been held that the averments of time are material. "We take the rule to be well settled, in criminal cases, that when a continuing offence is alleged to have been on a certain day, and on divers days and times between that and another day specified, the proof must be confined to acts done within the time."⁵

As to continuous offences.

the blank day of blank in a certain year, will be supported by proof of any day in that year. *State v. Parker*, 5 Lea, 568.

An indictment charging the infliction of a wound on a certain day, and that the deceased did then and there instantly die, is supported by showing that death ensued in twelve hours. *State v. Ward*, 74 Ala. 253. But see *Wh. Cr. Pl. & Pr.* § 132.

Mr. Amos (Great Oyer, etc., 247) animadvert with great sharpness on that "prudery" which makes the law strain at the variance of a letter in a proper name, and yet swallows what is a great deal more material, a variance in a date. To this the only answer is, that the "prudishness," bad as it is, would be much worse, if a man was to be acquitted, if the days of the month, or even the month of the year—the most volatile of all items of recollection—escaped the witness's

memory. It is said, however, that while under an indictment for the single commission of a crime, time is not a material allegation, the prosecution must select some one commission of the alleged crime, before evidence is produced, which then becomes the offence charged and the only one to be tried. *People v. Jenness*, 5 Mich. 305.

¹ *Whart. Crim. Pl. & Pr.* § 136.

² *Whart. Crim. Pl. & Pr.* § 135;

Archbold C. P. 9th ed. 90; *Green v. Rennett*, 1 T. R. 656; *Pope v. Foster*, 4 T. R. 590; *Woodford v. Ashley*, 11 East, 508; *Rastall v. Stratton*, 1 H. Bl. 49; 2 Saund. 291; *U. S. v. McNeal*, 1 Gall. 387.

³ *U. S. v. McNeal*, 1 Gall. 387; *U. S. v. Bowman*, 2 Wash. C. C. 328; *Com. v. Monahan*, 9 Gray, 116. *Infra*, § 115.

⁴ *Wh. Cr. Pl. & Pr.* § 115.

⁵ *Shaw, C. J., Com. v. Briggs*, 11 Metc. 574.

§ 104. Where a specific offence is charged, the indictment cannot be sustained by proof of a second offence even on the same day. This results from the general principles that evidence of offences collateral to that in the indictment cannot be received, and that the issue should be single.¹

Offences of other dates than that proved excluded.

And should it happen that the evidence discloses several successive offences, any one of which could sustain a conviction, the prosecution (unless the charge is for a continuous offence) must elect the offence which it will pursue; and when this is done, proof of the other offences will be excluded, under the limitations above expressed.²

§ 105. An offence cannot be put in evidence which is sheltered from prosecution by the statute of limitations, even though the indictment should aver the offence to be within the period allowed by law.³

Offence shut out by statute of limitations cannot be proved.

§ 106. When it is of the essence of an offence that it should have been committed in a particular time of the day (*e. g.*, in burglary), the allegation to this effect in the indictment should be proved as laid; though it is no variance if the day proved be not the day laid if the averment of the time of day be sustained.⁴ Whether the allegation as to the time of the day is sustained is for the jury.⁵ The same

Time, when the essence of an offence, must be proved. "Hour."

¹ *Com. v. Dean*, 109 Mass. 349. See *Com. v. Briggs*, 11 Met. 573; *Com. v. Elwell*, 1 Gray, 463; *Com. v. Adams*, 4 Gray, 27.

² *Supra*, §§ 331 *et seq.* *Baker v. People*, 105 Ill. 452. See, generally, as to election in such cases, *Whart. Cr. Pl. & Pr.* §§ 293 *et seq.*

In a Massachusetts case, in which there were five counts for larceny, but the evidence did not fix any particular occasion of larceny, the judge instructed the jury that "if they found from the evidence, including the confession of the defendant, that he had, on five different occasions, within the period covered by the several counts, stolen articles described in the several counts of the indictment respectively, they would be authorized to render a verdict of

guilty, and not otherwise." It was held, that whether there were five distinct larcenies proved was a question of fact for the jury, and was properly submitted to them. *Com. v. Sego*, 125 Mass. 210.

³ *R. v. Phillips*, R. & R. 369; *R. v. Brown*, M. & M. 160; *U. S. v. Watkins*, 3 Cranch C. C. 441; *U. S. v. White*, 3 Cranch C. C. 73; *State v. Hobbs*, 39 Me. 212; *State v. Robinson*, 9 Foster, 274; *State v. J. P.*, 1 Tyler, 283; *Com. v. Ruffner*, 28 Penn. St. 259; *Hatwood v. State*, 18 Ind. 492; *State v. McGrath*, 19 Mo. 678. As to averments proper in such cases see *Wh. Cr. Pl. & Pr.* §§ 137, 318.

⁴ *Whart. Crim. Law*, 8th ed. § 806; *People v. Burgess*, 35 Cal. 115.

⁵ *State v. Headen*, 35 Conn. 515;

distinction is applicable to cases where the gist of the offence is that it was committed on *Sunday*. In such case the offence must be proved to have been committed on Sunday. But the proof of any Sunday, before the finding of the bill and within the statute of limitations, is sufficient,¹ and if this proof be made, a variance as to the day of the month is immaterial.²

In *murder*, the death must be proved to have taken place within a year and a day from the time at which the stroke is proved to have been given.³

If dates be on their face inconsistent and repugnant, this, when the dates are essential, vitiates the indictment.⁴

Time is in all cases to be inferentially shown.⁵

§ 107. We have discussed, in another volume, the important question whether it is necessary, to give jurisdiction of an offence, that the party charged at the time of committing it should have been within the jurisdiction of the court.⁶ It is here sufficient to say, generally, that while the place of the offence must be shown to be within the jurisdiction, there is no necessity to prove that the facts given in evidence occurred in the parish or place therein alleged; it is sufficient to prove that they occurred within the county or other extent of the court's jurisdiction.⁷ If this be not shown the defendant must be acquitted.⁸

§ 108. It is not necessary that witnesses should be produced to testify that the offence was committed in the place charged.

People v. Schryver, 42 N. Y. 1; *Waters v. State*, 53 Ga. 567; *People v. Burgess*, 35 Cal. 115.

¹ *R. v. Trehearne*, 1 Mood. C. C. 298; *Com. v. Harrison*, 11 Gray, 308; *State v. Brunker*, 46 Conn. 327; *People v. Ball*, 42 Barb. 324; *State v. Drake*, 64 N. C. 589; *McGowan v. Com.*, 2 Metc. (Ky.); 3; *State v. Bakridge*, 1 Swan, 413; *Wh. Cr. Pl. & Pr.* § 12; *Frazier v. State*, 5 Mo. 536.

² *Hoover v. State*, 56 Md. 584.

³ 2 Hawk. c. 23, s. 90; *Archb. P. C.* 9th ed. 90, a; *Whart. Crim. Law*, 8th ed. §§ 312, 537.

⁴ *Wh. Cr. Pl. & Pr.* § 134.

⁵ *Supra*, § 11; *Greenwood v. State*, 54 Ind. 250.

⁶ *Whart. Crim. Law*, 8th ed. § 278, note.

⁷ 2 Hawk. c. 25, s. 84; 2 Russ. on Crimes, 799; *Padgett v. State*, 68 Ind. 46; *Franklin v. State*, 5 Baxt. 613.

⁸ *People v. Barrett*, 1 Johns. 66; *Larkin v. People*, 61 Barb. 226; *State v. Jones*, 4 Halst. 357; *Stacey v. State*, 58 Ind. 514; *State v. Hartnett*, 75 Mo. 251; *State v. Burgess*, 75 Mo. 541; *People v. Bevans*, 52 Cal. 470; *McCombs v. State*, 66 Ga. 581; *Tidwell v. State*, 70 Ala. 33; *State v. Burns*, 48 Mo. 438; *Williamson v. State*, 13 Tex. Ap. 514.

It is enough if the proof be inferential.¹ Thus the finding of a human body, with marks upon it of injuries sufficient to cause death, in a river in the heart of a county, in such a situation and condition as to show that it must have been

Proof may
be inferen-
tial.

thrown there by the hand of man and not borne there by the force of the stream or current, is enough to warrant the jury in finding that the homicide was committed in that county.² Again, on a trial for forgery, if an instrument on its face purports to be made in Charleston, S. C., and it is proved that the prisoner at its date was there, and had the same in his possession, this is sufficient evidence to show that it was made there.³ But where a forged bill of exchange was found upon J. S., who resided in Wiltshire, and had resided there about a year under a false name, but the bill bore a date more than two years prior to its being found upon him, and at a time when he lived in Somersetshire; on an indictment against him for forgery of the bill in Wiltshire, this was ruled not to be sufficient evidence of the commission of the offence in that county.⁴ And where a deed charged to be forged, and purporting to be made in the county of Harris, represented the grantor to be a resident of Galveston, and the grantee (the indicted forger), of the county of Milan, and there was no evidence of the residence of the latter elsewhere, the court held that the evidence given was not sufficient to authorize the jury to find that the forgery was committed in Anderson County, where the venue was laid.⁵

In an English case decided in 1878, the evidence was that it was the duty of the defendant, a commercial traveller, to remit daily to his employers, who resided in London, the moneys which he collected, without reduction. The defendant, on the 1st and 2d of March, 1878, collected at Newark two sums of money which he did not remit or account for till the first week in April, when one of his employers went to Grantham where the defendant resided, saw him,

¹ *Com. v. Costley*, 118 Mass. 3; *State v. Calvin*, Charlton, 152; *Moody v. State*, 7 Blackf. 424; *Cluck v. State*, 40 Ind. 263; *State v. Dent*, 6 Rich. N. S. 383; *Beavers v. State*, 58 Ind. 530; *Burst v. State*, 89 Ind. 133; *State v. McGinnis*, 74 Mo. 245; but see *Bell v. State*, 1 Tex. Ap. 81; *Moore v. State*, 22 Tex. Ap. 351; *Dumas v. State*, 62 Ga. 584; *State v. West*, 69 Mo. 401.

² *Com. v. Costley*, 118 Mass. 2.

³ *State v. Jones*, 1 McMull. 236.

⁴ *R. v. Crocker*, 2 New Rep. 87. See *R. & R.* 99, n.

⁵ *Henderson v. State*, 14 Tex. 503.

and taxed him with receiving moneys and not accounting to them for them. The defendant then and there handed to his employer a list of moneys he had collected and not accounted for, including the above two sums. There was no evidence that the defendant returned to Grantham on either of the days, or at what time of the respective days he received the two sums of money. It was held, on a case reserved, that there was no evidence of any embezzlement within the borough of Grantham.¹

§ 109. Supposing a minor locality is superfluously averred, if there be no such minor locality as that stated it is immaterial,² and details, unnecessary to the description of the offence, may be rejected as surplusage;³ and *a fortiori* is this the case when the description is divisible.⁴ Where, however, the place is stated as matter of local description and not as venue, it becomes necessary to prove it as laid.⁵ Thus, for instance, on an indictment for stealing in the dwelling-house, etc., for burglary, for forcible entry, or the like, if there be a material variance between the indictment and evidence in the name of the parish or place where the house is situate, or in any other description given of it, the defendant must be acquitted.⁶ In an indictment, also, for not repairing a highway, the situation of the highway is material.⁷ In an action, also, for a nuisance in erecting a weir, if it be described in the declaration to be at H., and be proved to be at a lower part of the same water called T., the error is material,⁸ and this rule is generally applicable to indictments for nuisances.⁹ And in an indictment for arson, where the tenement was averred to be in the sixth ward of the city of New

¹ R. v. Treadgold, 39 L. T. (N. S.) 291.

² R. v. Woodward, 1 Mood. C. C. 323.

³ Wh. Cr. Pl. & Pr. § 145; 2 Hale, 179, 244, 245; 1 East P. C. 125; Com. v. Gillon, 2 Allen, 502; Heikes v. Com., 26 Penn. St. 531; Carlisle v. State, 32 Ind. 55.

⁴ State v. Hill, 13 R. I. 314.

⁵ R. v. Cranage, Salk. 385; 2 Stark. Ev. 1571; R. v. Owen, 1 Mood. C. C. 118; O'Brien v. State, 10 Tex. Ap. 544; see Chapman v. People, 39 Mich. 357.

State v. Cotton, 4 Foster, 143; Moore v. State, 12 Oh. St. 389; State v. Crogan, 8 Iowa, 523; Chute v. State, 19 Minn. 271; Grimme v. Com., 5 B. Mon. 263; *infra*, § 146; Whart. Cr. Pl. & Pr. § 145.

⁶ Archb. C. P. 9th ed. 91; Wilson v. Gilbert, 2 B. & P. 281; R. v. Ridley, R. & B. 516; State v. Cotton, 4 Foster, 143; Grimme v. Com., 5 B. Mon. 263.

⁷ 2 Stark. C. P. 693.

⁸ Shaw v. Wrigley, 2 East, 500.

⁹ Wertz v. State, 42 Ind. 166.

York, whereas it was in the fifth, the indictment was held bad.¹ But where an indictment for larceny charged that the offence was committed in a vessel in the *first* ward in the city of New York, and it appeared that the vessel was lying in the river at a wharf of the *third* ward, it was held not to be a material variance, the local description not being of the essence of the offence.²

In another volume it will be shown that it is enough to lay the venue within the jurisdiction of the court;³ that when the act is by an agent the principal is to be charged as ^{Pleading,} ~~etc., etc.~~ doing it in the place of commission;⁴ that when a county ^{place.} is divided the trial is to be in the court of the *locus delicti*;⁵ that when a county includes several jurisdictions the jurisdiction must be specified,⁶ that "county aforesaid" is generally enough,⁷ that when changed by legislation, must be followed,⁸ and that omission of the venue is fatal.⁹

§ 110. At common law, an indictment for murder cannot be sustained where the blow was extra-territorial, though the death was intra-territorial.¹⁰ After some fluctuation of opinion, it may be now considered settled that a statute is constitutional which confers jurisdiction on the sovereign of the place of death.¹¹ Venue in homicide.

§ 111. In conspiracy, an indictment averring the offence to have been in a particular county or State may be sustained by proof of an overt act in such county or State.¹² In conspiracy and larceny. In larceny, at common law, the county where the stolen goods are brought has jurisdiction, if the goods were stolen in the

¹ *People v. Slater*, 5 Hill (N. Y.), Wash. C. C. 463; *U. S. v. Armstrong*, 2 Curtis C. C. 446; *State v. Carter*, 3 401. Dutch. 500.

² *People v. Honeyman*, 3 Denio, 121.

³ Whart. Cr. Pl. & Pr. § 139.

⁴ *Ibid.* § 140.

⁵ *Ibid.* § 141.

⁶ *Ibid.* § 142.

⁷ *Ibid.* § 146.

⁸ *Ibid.* § 147.

⁹ *Ibid.* § 150.

¹⁰ See Co. Lit. 74 b; 1 Hale, 426, 500; 2 Hale, 20, 163; *R. v. Lewis*, Md. 521; Whart. Crim. Law, 8th ed. Dears. & B. 102; 7 Cox C. C. 277; *U. S. v. McGill*, 4 Dall. 427; S. C., 1 lected.

¹¹ *Com. v. Macloon*, 101 Mass. 1; *Tyler v. People*, 8 Mich. 326. See *State v. Wyckoff*, 2 Vroom, 68; *Riley v. State*, 9 Humph. 646; Whart. Crim. Law, 8th ed. § 292.

¹² *R. v. Ferguson*, 2 Stark. (N. P.) 489; *Com. v. Corlies*, 3 Brewst. 575;

8 Phil. R. 450; *Bloomer v. State*, 48

same country, though not when the goods were stolen in another country.¹ As between the several States of the American Union, the State where the thief brings the property has been held to have jurisdiction at common law;² though this has been disputed in several States.³ It has even been held in Maine and Vermont that an indictment may be sustained in the State where the goods were brought, though they were stolen in Canada.⁴

In treason, the defendants may be indicted in any county where an overt act was committed.⁵

§ 112. We have already seen that an averment that an act was committed by a principal may be sustained by proof that the act was committed by an agent.⁶ From this it follows that a principal who extra-territorially directs an offence is liable intra-territorially for the acts of his agent in its commission.⁷ A co-conspirator, also, as we have just seen, is liable in the place of the overt act, though absent at the time.⁸

¹ Whart. Crim. Law, 8th ed. §§ 291, 930; Butler's Case, 13 Co. 55; 3 Inst. 113; R. v. Peel, 9 Cox C. C. 220; Com. v. Uprichard, 3 Gray, 434. jurisdiction has been affirmed in *Simmons v. Com.*, *supra*; *Beal v. State*, *supra*; and *Simpson v. State*, 4 Humph. 461.

² *State v. Underwood*, 49 Me. 181; *State v. Bartlett*, 11 Vt. 650; *Com. v. Andrews*, 2 Mass. 14; *Com. v. Holder*, 9 Gray, 7; *State v. Ellis*, 3 Conn. 186; *Cummings v. State*, 1 Har. & J. 340; *Hamilton v. State*, 11 Ohio, 435; *Myers v. People*, 26 Ill. 173; *People v. Williams*, 24 Mich. 156; *State v. Bennett*, 14 Iowa, 479; *Ferrill v. Com.*, 1 Duvall, 153; *Watson v. State*, 36 Miss. 593; *State v. Newman*, 9 Nev. 48.

³ *People v. Gardner*, 2 Johns. 477; *State v. Le Blanche*, 2 Vroom, 82; *Simmons v. Com.*, 5 Binn. 619; *Beal v. State*, 15 Ind. 378; *State v. Brown*, 1 Hayw. 100; *State v. Rennels*, 14 La. An. 278; *People v. Loughridge*, 1 Neb. 11. See Whart. Crim. Law, 8th ed. §§ 291, 930. The constitutionality of statutes conferring the

⁴ *State v. Underwood*, 49 Me. 181; *State v. Bartlett*, 11 Vt. 650; though see *contra*, *Com. v. Uprichard*, 3 Gray, 434.

⁵ Whart. Crim. Law, 8th ed. § 1810.

⁶ *Supra*, § 102.

⁷ Whart. Crim. Law, 8th ed. §§ 248, 279; R. v. Jones, 4 Cox C. C. 198, cited *infra*, § 113; R. v. Garrett, 6 Cox C. C. 260; S. C., Dears. 232; R. v. Johnson, 7 East, 65; *Com. v. Smith*, 11 Allen, 243; *State v. Grady*, 34 Conn. 119; *People v. Adams*, 3 Denio, 190; 1 Comst. 173. See *State v. Wyckoff*, 2 Vroom, 65; *Com. v. Gillespie*, 7 S. & R. 469; *Bloomer v. State*, 48 Md. 521; and discussion in Whart. Crim. Law, 8th ed. §§ 279, 280, and notes thereto.

⁸ *Supra*, § 111. For authorities see Whart. Crim. Law, 8th ed. § 1397.

§ 113. Where threatening letters, or libels, or forged instruments are written in one county, and sent by mail into another, and there received by the person to whom addressed, it has been ruled that an indictment therefor should be found in the latter county,¹ though an indictment lies also in the county where the letter was mailed.²

Venue in case of illegal letters and challenges.

When the prisoner, in a begging letter, which contained false pretences, and was addressed to the prosecutor, who resided in Middlesex, requested him to put a letter, containing a post-office order for money, in a post-office in Middlesex, to be forwarded to the prisoner's address in Kent, it was held that the venue was rightly laid in Middlesex, as the prisoner, by directing the money order to be sent by post, constituted the postmaster in Middlesex his agent to receive it there for him; and that consequently there was a receipt of the money order by the prisoner.³

A challenge to fight a duel in another State is as indictable as a challenge to fight a duel in the State where the challenge is sent.⁴

A letter containing an offer to bribe a public officer is as indictable in the place where it is mailed⁵ as it is in the place where it is received and opened.

IV. WRITTEN INSTRUMENTS AND RECORDS.

§ 114. When an indictment undertakes to set forth, as in forgery or libel, a document according to its "tenor," or "as follows," then any variance as to the words of the document, unless such variance be mere fault of spelling, is

When "tenor" is set out variance is fatal.

¹ *R. v. Girdwood*, 1 Leach, 142; *Com. v. Blanding*, 3 Pick. 304; *People v. Griffin*, 2 Barb. 427; *People v. Rathbun*, 21 Wend. 533; *Whart. Crim. Law*, 8th ed. § 1620.

² *Whart. Crim. Law*, 8th ed. §§ 288, 1620; *R. v. Burdett*, 4 B. & A. 95; *Perkins's Case*, 2 Lew. 150; 2 East P. C. 420; *R. v. Jones*, 4 Cox C. C. 198; 1 Den. C. C. 551; *U. S. v. Worrall*, 2 Dall. 388; *Whart. St. Tr.* 189. As to libel see *Dana's Case*, 7 Ben. 1, where it was not contested that the place of reception had jurisdiction, though the

case was decided on other grounds. As to proof of publication of libel in a particular place see *Whart. Crim. Law*, 8th ed. § 1620.

³ *R. v. Jones*, 4 Cox C. C. 198; 1 Den. C. C. 551; 1 Eng. L. & Eq. 533. See *Whart. Crim. Law*, 8th ed. §§ 288, 1774.

⁴ *State v. Farrier*, 1 Hawks, 487; *State v. Taylor*, 1 Const. R. 107; 3 Brev. 243. See *R. v. Williams*, 2 Camp. 506; *Ivey v. State*, 12 Ala. 276; *Whart. Crim. Law*, 8th ed. § 1774.

⁵ *U. S. v. Worrall*, 2 Dall. 388.

fatal.¹ But it is otherwise as to the variance of a letter, amounting only to misspelling.² Nor is it necessary that the vignettes and figures of a note should be copied in the indictment,³ though if set forth a variance may be fatal.⁴

A contraction of a word to an initial letter is a material variance.⁵

A variance in a translation, so that the translation does not give the sense of the original, is fatal.⁶

Parts of a document which are extraneous to that on which the prosecution rests need not be set out in the indictment.⁷

¹ Whart. Cr. Pl. & Pr. §§ 168, 173; Whart. Crim. Law, 8th ed. § 737; 1 Leach, 78; 2 Leach, 660, 661; 2 East P. C. 976; U. S. v. Keen, 1 McLean, 429; State v. Bonney, 34 Me. 383; State v. Witham, 47 Me. 165; State v. Bean, 19 Vt. 530; Com. v. Wright, 1 Cush. 66; Com. v. Ray, 3 Gray, 441; State v. Farrand, 3 Halst. 336; Dana v. State, 2 Oh. St. 91; Youndt v. State, 64 Ind. 443; State v. Bibb, 68 Mo. 286; People v. Marion, 28 Mich. 255; State v. Pease, 74 Ind. 263; Dyer v. State, 85 Ind. 525; Haslip v. State, 10 Neb. 590; State v. Townsend, 86 N. C. 676; State v. Owen, 73 Mo. 440; Jacobs v. State, 61 Ala. 448. See Rodgers, *Ex parte*, 10 Tex. Ap. 655; Huddleston v. State, 11 Tex. Ap. 22. That even erasures must be noted see Rooker v. State, 65 Ind. 86.

² Whart. Cr. Pl. & Pr. § 173; 1 Leach, 192; Dougl. 193, 194; R. v. Drake, Salk. 660; R. v. Wilson, 2 C. & K. 527; 1 Den. C. C. 284; 2 Cox C. C. 426; U. S. v. Hinman, 1 Bald. 292; U. S. v. Burroughs, 3 McL. 405; State v. Bean, 19 Vt. 530; Com. v. Riley, Thach. C. C. 67; Com. v. Parmenter, 5 Pick. 279; People v. Warner, 5 Wend. 271; State v. Weaver, 13 Ired. 491; People v. Cummings, 57 Cal. 88. But if, as in Potter v. State, 9 Tex. Ap. 55, the misspelling amount to obscurity, a variance is fatal. As to clerical errors, see Wh. Cr. Pl. & Pr. §§ 273-5.

³ State v. Carr, 5 N. H. 367; Com. v. Bailey, 1 Mass. 62; Com. v. Taylor, 5 Cush. 605; People v. Franklin, 3 Johns. Cas. 299; Com. v. Searle, 2 Binn. 332; Buckland v. Com., 8 Leigh, 732; Griffin v. State, 14 Oh. St. 55; Langdale v. People, 100 Ill. 263; Whart. Crim. Law, 8th ed. § 731.

⁴ Griffin v. State, 14 Oh. St. 55. See Buckland v. Com., 8 Leigh, 732.

⁵ R. v. Barton, 1 Mood. C. C. 141; R. v. Inder, 2 C. & K. 635; Com. v. Kearns, 1 Va. Cas. 109.

⁶ Whart. Crim. Law, 8th ed. § 729; R. v. Goldstein, R. & R. 473. As to translations from Chinese, see People v. Ah Woo., 28 Cal. 208.

⁷ R. v. Testick, 1 East, 181 n.; Com. v. Ward, 2 Mass. 397; Com. v. Adams, 7 Met. 50; Com. v. Perkins, 7 Grat. 654; Simmons v. State, 7 Ham. 116; Wh. Cr. Pl. & Pr. § 180. That matters of mere surplusage need not be set out see, also, Whart. Crim. Law, 8th ed. § 733.

It has been held a variance where the instrument alleged to be forged was set out as an acquittance, or discharge for forty-eight dollars, and the paper on its face showed an order for forty-eight dollars, but contained on its back a further order for one dollar. State v. Handy, 20 Me. 81. And an indictment describing a note as payable to Henry C. Dorsey, on December 11, is not sustained by proof of a note payable to Henry Pinkham, and due

§ 114 a. The pleading of documents is discussed at large in another work, where it is shown that when the words of a document are material they should be set forth;¹ that in such case the indictment should purport to set forth the words;² that "purport" means "effect," and "tenor" means "contents";³ that "manner and form," "purport and effect," and "substance" do not imply verbal accuracy;⁴ that quotation marks are not sufficient to indicate tenor;⁵ that a document lost or in defendant's hands need not be set forth;⁶ that this rule is not affected by the prosecutor's negligence;⁷ that the production of a document alleged to be destroyed is a fatal variance;⁸ that extraneous parts of a document need not be set forth;⁹ that a foreign or insensible document must be explained by averments;¹⁰ and that statutory designations of documents must be followed.¹¹ "Receipt," it will be seen, includes all admissions of payment;¹² "Acquittance," a

the 7th and 10th of December. *State v. Snell*, 9 R. I. 112.

Where an indictment charged that an alleged counterfeit bill was a note purporting to be a note of the P. & M. Bank of South Carolina, which was the name given by the charter, but the tenor of the note as set forth was "the President, Directors, & Co," as in the note, it was held that the statement in the note was a mere designation of the persons composing the corporation, who made themselves liable for the payment of the note, and that there was no variance or repugnancy between the tenor and purport. *State v. Calvin*, Charlton, 151. But an indictment for forging a writing, describing the same as purporting to be signed by the president and directors of a bank, and setting out the forged writing verbatim, but upon the face of it not appearing to have been by order of the president and directors, is bad. *State v. Shawley*, 5 Hayw. 256.

On an indictment for forging a railroad ticket, expressed on its face to be "good for this day only," a description of the ticket, as signifying

to the holder that it must be used continuously and without stopping at intermediate stations, after once entering the cars, is a fatal variance. *Com. v. Ray*, 3 Gray, 441.

Where a forged paper was passed by a prisoner, bearing date in 1828, and immediately after, with the knowledge of the holder, the prisoner altered the date to 1827, and the indictment set forth its tenor and described it as dated in 1827, it was held that the paper was proper evidence to go to the jury in support of the indictment, notwithstanding the proof that it bore date in 1828 when passed. *Huffman v. Com.*, 6 Rand. (Va.) 685.

¹ Wh. Cr. Pl. & Pr. § 167.

² Whart. Cr. Pl. & Pr. § 168.

³ Ibid. § 169.

⁴ Ibid. § 170.

⁵ Ibid. § 175.

⁶ Ibid. § 176.

⁷ Ibid. § 178.

⁸ Ibid. § 179.

⁹ Ibid. § 180.

¹⁰ Ibid. § 181.

¹¹ Ibid. § 182. *Infra*, § 116 a.

¹² Ibid. § 185.

discharge from duty;¹ "Treasury Notes" may be stated as such;² "Money" may be treated as convertible with currency;³ "Obligations" and "Undertakings" are unilateral engagements;⁴ and "Property" is whatever may be appropriated.⁵ Other definitions of statutory designations will be given hereafter.⁶ It will be also seen that though the designation is sufficient, yet if the indictment purports to give words, a variance may be fatal.⁷

It should be added that the rigor of the common law has been modified in most jurisdictions by statutes which permit amendments of the indictment to be made, in cases of variance, at the discretion of the court.⁸ Such statutes have in several instances been held constitutional.⁹

§ 115. In respect to records great care is necessary, as any variance will, at common law, be fatal.¹⁰ Thus, at common law, if the whole record to which perjury is incidental is not accurately set forth, there must be an acquittal.¹¹

§ 116. Whenever the object is merely to give the legal character of the document, as in indictments for larceny and receiving stolen goods, it is only necessary to describe the document by its general designation, without setting out its words. In such cases there will be no variance if the legal effect of the document be accurately given.¹²

¹ Ibid. § 186.

² Ibid. § 189 a.

³ Ibid. § 190.

⁴ Ibid. §§ 198, 199.

⁵ Ibid. § 201.

⁶ *Infra*, § 116 a.

⁷ Ibid. § 183.

⁸ Ibid. § 90.

⁹ Ibid. §§ 90-1.

¹⁰ Pope v. Foster, 4 T. R. 590; Woodford v. Ashley, 11 East, 508; 2 Saund. 291 b; U. S. v. Bowman, 2 Wash. C. C. 328; U. S. v. McNeal, 1 Gallison, 387; Com. v. Monahan, 9 Gray, 116.

¹¹ See fully Whart. Crim. Law, 8th ed. § 1314.

¹² Whart. Cr. Pl. & Pr. §§ 182 et seq.; Starkie's C. P. 217; Craven's

Case, 2 East P. C. 601; U. S. v. Keen, 1 McLean, 429; U. S. v. Burroughs, 3 McLean, 405; Com. v. Richards, 1 Mass. 337; Com. v. Sawtelle, 1 Cush. 142; Com. v. Cahill, 12 Allen, 540; People v. Holbrook, 13 Johns. 10; People v. Wiley, 3 Hill, 194; People v. Jones, 5 Lansing, 340; Com. v. Boyer, 1 Binn. 201; Stewart v. Com. 4 S. & R. 194; State v. Ront, 3 Hawks, 618; Merrill v. State, 45 Miss. 651; Flynn v. State, 34 Ark. 441; Roth v. State, 10 Tex. Ap. 27. If, however, the indictment undertakes to set forth the document, instead of giving its general effect, then the document must be set forth correctly, and at common law a variance is fatal. *Supra*, § 114; Whart. Cr. Pl. & Pr. § 182; U. S. v.

§ 116 a. The general designation of a document in cases of larceny, embezzlement, false pretences, and the like, when this designation is the only mode of identification, must be proved as laid.

General designation must be accurate.

A "deed," for instance, must be sustained by the production of a document under seal, of *prima facie* validity for the transfer of legal rights.¹ Under "undertaking" may be put in evidence a guarantee,² and an I O U.³

Under "money" may be put in evidence whatever is a legal tender.⁴

In what way legal tenders and national currency in the United States are to be described depends upon local statutes, and is elsewhere discussed.⁵

Under "goods and chattels" may be introduced whatever is the subject of common law larceny.⁶

"A warrant" for the payment of money includes any writing on which a *prima facie* case could be made out for the delivery of goods or money.⁷ An "order" implies, in addition, some sort of *prima facie* mandatory power;⁸ a request includes mere invitation.⁹

Under the term "personal goods" may be proved money and bank notes,¹⁰ but not, it seems, under the title "goods and chattels."¹¹

"A bank note of the value," etc., may be sustained in Massachusetts by proof of the note of any bank authorized by the laws

Keen, 1 McLean, 429. As to practice in Texas, see *Statum v. State*, 9 Tex. Ap. 273.

¹ *R. v. Fauntleroy*, 1 C. & P. 421; 1 Mood. C. C. 52; *R. v. Lyon*, R. & R. 255. See *R. v. Morton*, 12 Cox C. C. 456; *L. R. 2 C. C. 22*.

² *R. v. Joyce*, 10 Cox C. C. 100; *L. & C. 576*; *R. v. Reed*, 2 Mood, C. C. 62.

³ *R. v. Chambers*, *L. R. 1 C. C. 341*.

⁴ *R. v. West*, 7 Cox C. C. 183; *Dears. & B. 109*; *R. v. Godfrey*, *Dears. & B. 428*.

⁵ Whart. Cr. Pl. & Pr. § 189 a. See *U. S. v. Bennett*, 17 Blatch. 357; *Kinsman v. State*, 77 Ind. 132; Wil-

Hams v. People, 101 Ill. 482; *State v. Anderson*, 25 Minn. 66; *Watson v. State*, 64 Ga. 591; *Statum v. State*, 9 Tex. Ap. 273; *Roth v. State*, 10 Tex. Ap. 29.

⁶ Whart. Cr. Pl. & Pr. § 191, *q. v.* as to how far "bank-notes" and "tickets" are goods and chattels. That cheques are not "money" see *Lancaster v. State*, 9 Tex. Ap. 393. And see *supra*, § 94.

⁷ Whart. Cr. Pl. & Pr. § 193.

⁸ *Ibid.* § 194.

⁹ *Ibid.* § 195.

¹⁰ *U. S. v. Moulton*, 5 Mason, 537.

¹¹ *State v. Calvin*, 2 Zab. 207. But see *Garfield v. State*, 74 Ind. 60.

of the Commonwealth.¹ In most States, however, the practice is to specify the bank, which specification must be proved.²

"Bond" is not sustained by proof of a document not under seal.³

"Bill of exchange" is not sustained when the paper is so defective as not to amount to a negotiable bill.⁴

"Promissory note" may be sustained by proof of a due bill,⁵ and of a bank note, when the statute does not specially classify such securities;⁶ nor is it necessary that such a note should be locally negotiable.⁷ Even an imperfect instrument, if susceptible of being put in suit, may be offered under the name of a "promissory note."⁸

It should, however, be observed that the distinctions above noticed are conditioned upon the terms of the statutes under which they may arise. If a statute, for instance, should make it larceny to steal all "undertakings" for the payment of money, then bonds and notes could be put in evidence under the general designation of "undertaking." If the statute, however, should say "undertakings, bonds, or notes," then the distinction between undertakings, bonds, and notes must be maintained in the indictment.

§ 117. The usual practice is, where a variance is plain, not to allow the instrument to go in evidence; but if the forged writing is

¹ *Com. v. Richards*, 1 Mass. 337; *Larned v. Com.* 12 Met. 240; *Com. v. Sawtelle*, 11 Cush. 142; *Com. v. Cahill*, 12 Allen, 540; *Eastman v. Com.*, 4 Gray, 416; *Com. v. Grimes*, 10 Gray, 470.

² *R. v. Jones*, Dougl. 300; 1 Leach, 79; *R. v. Reading*, 2 Leach, 590; 2 East P. C. 952; *Salisbury v. State*, 6 Conn. 101; *People v. Holbrook*, 13 Johns, 10; *People v. Wiley*, 3 Hill, 194; *People v. Jackson*, 8 Barb. 637; *Spangler v. Com.*, 3 Binn. 533; *Grummond v. State*, Wilcox, 510; *State v. Rout*, 3 Hawks, 618. See *Starkie's C. P.* 217; *Whart. Cr. Pl. & Pr.* § 189. That an undue specification may lead to a variance see *R. v. Craven*, R. & R. 14.

When the indictment averred the

note to be issued by "the Bank of N.," and the note on its face appeared to have been issued by the "President and Directors of The Bank of N.," the variance was held to be fatal. *State v. Williamson*, 3 Murph. 216.

³ *Salisbury v. State*, 6 Conn. 101.

⁴ *R. v. Curry*, 2 Mood. C. C. 218; *R. v. Mopsey*, 11 Cox C. C. 143; *People v. Howell*, 4 Johns. 296, and other cases cited *Whart. Cr. Pl. & Pr.* § 187.

⁵ *People v. Finch*, 5 Johns. 237.

⁶ See cases cited *Whart. Cr. Pl. & Pr.* § 188; *Com. v. Butts*, 124 Mass. 449; *Com. v. Gallagher*, 126 Mass. 54; *Com. v. Griffiths*, 126 Mass. 252.

⁷ *Story on Bills*, § 90; *Sibley v. Phelps*, 6 Cush. 172; *People v. Bradley*, 4 Parker C. R. 245.

⁸ *Com. v. Dallinger*, 118 Mass. 439.

uncertain, and susceptible of being read as agreeing with the words stated in the indictment, the jury are to pass on the question of fact.¹ An undecipherable inscription need not be averred or proved.²

When variance is doubtful, case is for jury.

§ 118. Where the document on which the case rests is destroyed, lost, or in the possession of the defendant before bill found, it will be sufficient to set forth the substance and effect of the document, averring at the same time, as an excuse for its non-publication, its loss, destruction, or detention, as the case may be. In such case it will be admissible on trial to give parol evidence of the document, and such evidence, if there be no substantial variance, will sustain the indictment.³ In England, where the document is in the defendant's

Lost or unobtainable documents may be proved by parol.

¹ *Turpin v. State*, 19 Oh. St. 540. But see *Oneil v. State*, 48 Ga. 66.

On a trial for passing a counterfeit bank note, the defendant moved to exclude the note from going to the jury, on the ground that the name of one of the firm of engravers, set out in the description of the note in the indictment, did not appear on the note produced; the attorney for the Commonwealth proved that when he drew the indictment he had been able to make out the name on the note from his knowledge that one of the firm of engravers bore that name, though he could not say he would have been able to do so without the knowledge of the fact, but that the word had since become indistinct, he supposed, by handling the note; the court below thereupon overruled the motion to exclude, and permitted evidence to be given of the note thus produced. It was held by the court of errors that the action of the court below was right. *Buckland v. Com.*, 8 Leigh, 732; and see *U. S. v. Mason*, 12 Blatch. 497.

In *Com. v. Gateley*, 126 Mass. 52, the indictment charged D. with the embezzlement of treasury notes and national bank bills. The evidence

showed that D. was intrusted by his employer with a bank cheque payable to bearer, for the purpose of paying a note, without any direction whether to pay the note with the cheque or to draw the money on the cheque and then pay the note; that generally notes were paid with cheques, but the practice was not uniform; that while the cheque was in D.'s possession he made up his mind to take his employer's funds in his possession and use them; and drew the money on the cheque. It was ruled that the question of variance was for the jury.

It has been ruled in Alabama that a demurrer to an indictment for forgery, on account of a variance between the instrument described therein and that offered in evidence at the trial, cannot be considered by the court, unless oyer of the instrument is craved. *Butler v. State*, 22 Ala. 42. But the proper course is not to demur, but to take advantage of the variance under the plea of not guilty.

² *U. S. v. Mason*, 12 Blatch. 497.

³ *Infra*, §§ 199-212; *Whart. Cr. Pl. & Pr.* § 176; *R. v. Haworth*, 4 C. & P. 254; *R. v. Hunter*, 4 C. & P. 128; *R. v. Vernon*, 12 Cox C. C. 153; *R. v.*

hands, the practice is to give notice to the defendant to produce the writing at the assize, so that it may be brought before the grand jury. Such notice, however, as will hereafter be seen, is not considered necessary wherever the indictment in itself is a notice.¹ Thus, on a trial of an indictment for stealing a bank bill, where the bill is in the defendant's possession, it is not necessary to account for the non-production, the fact of the indictment being found being sufficient notice to the defendant to produce.² And though an indictment for passing counterfeit money purport to set forth the counterfeit note according to its tenor, and contain no averment of its loss or destruction, the production of the note, it has been held, may be dispensed with, upon proof that the same has been mutilated and destroyed by the defendant, and other evidence of its contents may be admitted,³ though the more correct course is to aver such mutilation or destruction, if it took place before the finding of the indictment. And as an accomplice is presumed to destroy letters implicating him in guilt, it is not necessary, it has been said, to prove diligent search for such letters, in order, on general proof of their loss, to give parol evidence of their contents.⁴ But should a document, alleged to have been destroyed, turn up on the trial, the variance is fatal.⁵

Colucci, 3 F. & F. 103; *Bucher v. Jarrett*, 3 B. & P. 145; *U. S. v. Britton*, 2 Mason, 464; *People v. Kingsley*, 2 Cow. 522; *People v. Badgley*, 16 Wend. 53; *State v. Parker*, 1 Chipman, 298; *State v. Potts*, 4 Halst. 26; *Com. v. Messenger*, 1 Binn. 274; *Pendleton v. Com.*, 4 Leigh, 694; *State v. Davis*, 69 N. C. 313; *Thompson v. State*, 30 Ala. 28. Service of notice to produce on an attorney who had served a notice on behalf of the prisoner, as to an application to bail him upon the charge, is sufficient. *R. v. Boucher*, 1 F. & F. 486 — *Martin*. An indictment alleged that the prisoner, being in the employ of the post-office, stole a post-letter, to wit, a post-letter directed and addressed as follows, that is to say (setting out the address), which contained property. At the trial, a witness having deposed that he

employed a man to post a letter containing the property in question, it was held that he might be asked how that letter was addressed, though no notice to produce the letter had been given. *R. v. Clube*, 3 Jur. N. S. 698 — *Pollock*. See *infra*, §§ 216-8.

An obscene picture need not be copied in the indictment, though if the effect of the picture be generally misdescribed, this will be a fatal variance. *Com. v. Dejardin*, 126 Mass. 46. As to obscene documents generally, see *Whart. Crim. Pl. & Pr.* § 177.

¹ *Infra*, § 216, and cases in note, *supra*.

² *People v. Holbrook*, 13 Johns. 90; *Com. v. Messenger*, 1 Binn. 274.

³ *State v. Potts*, 4 Halst. 26.

⁴ *U. S. v. Doeblen*, 1 Bald. 519.

⁵ *Smith v. State*, 33 Ind. 159.

§ 119. Where it is claimed that a document is lost, the proof of the loss must be satisfactory and full, to enable parol evidence to be given of its contents.¹ *Negligence by prosecutor* in leading to loss does not necessarily exclude secondary evidence.²

Loss must be satisfactorily shown.

§ 120. When public justice requires, the court may make before the trial an order on the prosecution to produce papers for the defendant's inspection.³

Inspection may be ordered.

V. WORDS SPOKEN.

§ 120 a. When the indictment avers words spoken, it is enough if there is a substantial accordance between the words as laid and the words as proved.⁴ But any variance of sense will be fatal.⁵ Any portion of the words laid, complete in itself, and constituting an indictable offence, will sustain the indictment.⁶

Words spoken to be substantially proved.

¹ *Infra*, § 206.

² *Infra*, § 201; *State v. Taunt*, 16 Minn. 109.

³ *R. v. Colucci*, 3 F. & F. 103. *Infra*, § 566.

⁴ That this is soon an indictment for false pretences, see Whart. Cr. Law, 8th ed. § 1214; *R. v. Speed*, 46 L. T., N. S. 174; *Com. v. Pierce*, 130 Mass. 31; *Webster v. People*, 1 N. Y. Cr. Rep. 120 a; *Marwilsky v. State*, 9 Tex. Ap. 377; *Litman v. State*, 9 Tex. Ap. 461. So also in perjury, Whart. Crim. Law, 8th ed. § 1313.

⁵ *Fost.* 194; *R. v. Layer*, 8 Mod. 33; Whart. Cr. Pl. & Pr. § 203; *People v. Warner*, 5 Wend. 271; *State v. Bradley*, 1 Hayw. 403; *State v. Coffey*, N. C. Term R. 272; *State v. Ammons*, 3 Murph. 123; *State v. Ah Sam*, 7 Or. 477.

An indictment for sedition alleged "that the defendant, amongst other words and matter, uttered the words and matter following," and then set out several sentences as though they had been uttered continuously. The evidence showed that they had not

been so uttered, but that the sentences had been selected from different parts of the speech, other matter intervening between them. It was held that there was no variance, and that if any portions of the speech omitted varied or controlled the sense of those set out, the onus was upon the defendant to show it. *R. v. Crowe*, 3 Cox C. C. 123.

The words set out in an indictment for sedition were these: "If the Queen neglects to recognize the people, then the people must neglect to recognize the Queen." It was proved that the word "forget" was used in both instances, and not "neglect." This was ruled a fatal variance as far as that sentence was concerned, and that the passage must be struck out. *R. v. Fussell*, 3 Cox C. C. 291. And see, generally, *Sumner v. State*, 74 Ind. 52.

As to pleading see Whart. Crim. Pl. & Pr. § 203. As to words in perjury see Whart. Crim. Law, 8th ed. §§ 1297 *et seq.*, 1313.

⁶ *Com. v. Kneeland*, 20 Pick. 206. See *supra*, § 119.

VI. GOODS, NUMBERS, AND SUMS.

§ 121. The description of articles of personal property, as given in the indictment, must be substantially proved, so that

Articles described must be substantially proved.

(1) Award of restitution may, if proper, be given;
 (2) The defendant may be protected from further proceedings on the same charge; (3) Sentence may be duly graded; and (4) The offence may be individuated in a court of error.¹ And this will be the case even when the goods are described in the indictment with unnecessary particularity, unless the unnecessary part of the description can be rejected as surplusage.² But it has been held that "thirty yards of cloth" and "one coat" sufficiently describe "one piece of cassimere" and "one blue pilot coat," which it was proved the defendant stole;³ and "fifty pounds of flour, of the value of six cents," may be sustained by proof of a bag of flour which cost five dollars, although there was no proof of its weight.⁴ On the other hand, an averment of stealing a ploughshare has been held not to be sustained by proof of stealing a plough,⁵ and an averment of "buckskin gloves" has been held not sustained by proof of "sheepskin gloves."⁶ And in a case decided in Massachusetts in 1876, where the indictment charged the defendant with the larceny of a number of bottles of whiskey and brandy, it was ruled that this was not sustained by proof that the defendant drew the liquor from casks into bottles he took with him for the purpose.⁷ A charge, also, of having in possession "one pint of milk, to which milk water has been added," is not sustained by proof of a mixture of pure milk with water.⁸

¹ Arch. C. P. 66; Com. v. James, 1 Pick. 376; People v. Jackson, 8 Barb. 637; Com. v. Wentz, 1 Ashm. 269; State v. Horan, Phill. (N. C.) 571; MacQueen v. State, 82 Ind. 72; State v. Sansom, 3 Brev. 5. Thus proof of two boots for the right foot will not sustain an averment of "a pair of boots." State v. Harris, 3 Harring 559; Whart. Cr. Pl. & Pr. § 208. For instances of variance, see *infra*, §§ 124-46. See Sumner v. State, 74 Ind. 52.

² R. v. Edwards, R. & R. 497. As to surplusage, see *infra*, § 138. As to what descriptions are surplusage, see *infra*, § 146.

³ Com. v. Campbell, 103 Mass. 436. That it is not a variance to prove more goods of the same kind stolen than alleged, see State v. Martin, 82 N. C. 672.

⁴ State v. Harris, 64 N. C. 127.

⁵ State v. Cockfield, 15 Rich. 316.

⁶ McGee v. State, 4 Tex. Ap. 625.

⁷ Com. v. Gavin, 121 Mass. 54.

⁸ Com. v. Luscomb, 130 Mass. 42.

Questions of variance as to goods are ordinarily for the jury.¹

As will be elsewhere seen, personal chattels, when the subjects of an offence, must be adequately described in the indictment;² and the certainty must be such as to individuate the offence.³ Dead animals must be averred to be such;⁴ when only certain articles of a class are the subjects of the offence, those articles must be specified,⁵ and minerals must be averred to be detached from realty.⁶

§ 122. Coin must be specifically described, though it is for the jury to determine whether the proof comes up to the description.⁷ The variance between "money" as

Coin must be specifically proved.

¹ *State v. Campbell*, 76 N. C. 261. In *Com. v. Brailey*, 134 Mass. 527, an indictment under the Gen. Sts. C. 161, § 2, which prescribes a penalty for wilfully and maliciously burning in the night time the manufactory of another, being with the property therein contained of the value of one thousand dollars, alleged that the defendant, at a time and place named, in the night time, "feloniously and wilfully did burn a certain manufactory, used for the manufacture of fish poles, the same being, with the property therein contained, of the value of one thousand dollars, of the property of one P." It appeared at the trial that the building burned was the property of P., and was of the value of four hundred dollars; that the personal property contained in the building belonged to one B., excepting property of small amount in value, which belonged to the defendant; and that the property belonging to B. was of the value of one thousand dollars. It was held by the Supreme Court that this was not a fatal variance. See *State v. Downs*, 59 N. H. 320.

² *Whart. Crim. Pl. & Pr.* § 206.

³ *Ibid.* § 208.

⁴ *Ibid.* § 209.

⁵ *Ibid.* § 210.

⁶ *Ibid.* § 211.

⁷ As to the pleading of coin and

bullion see *Whart. Cr. Pl. & Pr.* § 218. As to what descriptions are surplusage see *infra*, § 146; and see *Whart. Crim. Law*, 8th ed. § 944; *Wilson v. State*, 66 Ga. 591; *Cf. U. S. v. Bennett*, 17 Blatch. 357; *Williams v. People*, 101 Ill. 382; *State v. Anderson*, 25 Minn. 66; *Watson v. State*, 64 Ga. 61; *Statum v. State*, 9 Tex. Ap. 273.

Where a person was indicted for uttering counterfeit coin, intended to resemble and pass for a "groat," and all the witnesses, except the inspector of coin at the mint, called it a four-penny piece, but the inspector called it a groat, and said he believed that it had had that name from the earliest period, and added that the original groat of Edward III.'s reign was larger and heavier than the coin in question; and that in the queen's proclamation these coins were called both groats and four-penny pieces, but the proclamation was not produced, and the inscription on the coin itself was "four pence;" it was held that if the jury, from their own knowledge of the English language, without considering any evidence at all, were of opinion that a groat and four-penny piece were the same, the prisoner was rightly indicted, and might be convicted. *R. v. Connell*, 1 C. & K. 190; see *Watson v. State*, 64 Ga. 61.

averred in an indictment for false pretences, and a "certificate of deposit," is fatal.¹

§ 123. When several articles are charged, the proof must apply to one or more of the articles. Hence an indictment charging a stealing of a number of things is not supported except by proof of some one or more of the specific things so charged.² Therefore an indictment charging a stealing of seventy pieces of the current coin of the realm called sovereigns, of the value of £70; 149 pieces, etc., called half-sovereigns, etc.; 500 pieces, etc., called crowns, etc., is not supported by proof of a stealing of a sum of money consisting of some one or other of the coins mentioned in the indictment, without proof of some one or more of the specific coins charged to have been stolen.³

When the indictment charges the stealing of certain particular coin, there can be no conviction for stealing other coin.⁴ Thus where a note is given to a party to change, he cannot, on an indictment for stealing the note, be convicted on proof of stealing the change.⁵ And where the defendant obtained a sovereign from the prosecutor, in payment of a supposed debt of a shilling, and the prosecutor never intended to part with the sovereign until she received the nineteen shillings change; it was held that an indict-

¹ Com. v. Howe, 132 Mass. 246.

² See *infra*, §§ 125, 132, 145.

³ R. v. Bond, 1 Den. C. C. 517.
See Whart. Cr. Pl. & Pr. § 207.

⁴ Archbold's C. P. (ed. 1862), 190; Whart. Crim. Law, 8th ed. § 944; Whart. Cr. Pl. & Pr. § 219; R. v. Jones, 1 Cox C. C. 105; R. v. West, Dears. & B. 109; 7 Cox C. C. 183. See, on general principles of construction, R. v. Amos, 2 Den. C. C. 65; 1 Eng. L. & Eq. 592; T. & M. 465.

P. bought a horse, and was entitled to the return of 10s. chap money out of the purchase-money, and afterwards, on the same day, met the seller, D., and others together in company, and asked the seller for the 10s., but he said he had no change, and offered a

sovereign to P., who could not change it. P. asked whether any one present could give change. D. said he could, but would not give it to the seller of the horse, but would give it to P., and produced two half-sovereigns. P. then offered a sovereign of his own with one hand to D., and held out the other hand for the change. D. took the sovereign and put one half-sovereign only into P.'s hand, and slipped the other into the hand of the seller who refused to give it to the prosecutor and ran off with it. It was ruled that the indictment rightly charged D. with stealing a sovereign. R. v. Twist, 12 Cox C. C. 509; 1 Green's C. C. 44.

⁵ Whart. Crim. Law, 8th ed. §§ 944, 962, 965.

ment charging the larceny of nineteen shillings was bad, as the case, if made out, was that of larceny of a sovereign.¹

§ 124. To attempt to describe an animal exactly would be futile.

Cattle, for instance, is a generic term, and dogs present numberless varieties in shape, size, color, habit, and aptitude; and yet it is sufficient, at common law, from the fact that exhaustiveness of description must stop somewhere, to describe cattle by the general term "cattle," or a dog by simply the general term "dog."² Whether sex must be stated, or degree of maturity, depends upon the statute under which the prosecution is had.³ Where the statute uses the term "dog," or "horse," or "sheep," then these terms are regarded as general, under which it is not necessary for the indictment to specify sex or age. On the other hand, where the statute makes a distinction between "horses" and "mares," or between "sheep" and "lambs," then proof of a mare would not sustain an indictment for stealing a horse, nor proof of a lamb an indictment for stealing a sheep.⁴ It must be remembered, however, that although it may

Animals must be substantially proved as described.

¹ R. v. Bird, 12 Cox C. C. 257; 27 L. T. (N. S.) 800; R. v. Gumble, 27 L. T. (N. S.) 692; 12 Cox C. C. 248; L. R. 2 C. C. 1. "The word *shilling* (Blackburn, J., 12 Cox C. C. 259) must be taken as descriptive of the thing stolen, and must be proved." Archbold's C. P. (ed. 1862) 90; R. v. Deeley, 1 Mood. C. C. 303; R. v. Owen, 1 Mood. C. C. 118; R. v. Craven, R. & R. 14; R. v. West, D. & B. 109; R. v. Bond, 1 Den. C. C. 517; R. v. Jones, 1 Cox C. C. 105.

² People v. Littlefield, 5 Cal. 355. See R. v. Gallears, 2 C. & K. 981; 1 Den. C. C. 501; R. v. Beany, R. & R. 416; R. v. Welland, R. & R. 494; R. v. Chard, R. & R. 488; State v. King, 31 La. Ann. 179.

³ See People v. Pico, 62 Cal. 50.

⁴ Under statutes making it a felony to steal any ox, cow, or heifer, where the indictment charges the defendant with stealing a cow, proof of its being

a heifer will not suffice; for the statute having mentioned both cow and heifer proved that the words were not considered by the legislature as synonymous. R. v. Cooke, 2 East P. C. 617; Leach, 123. See Parker v. State, 39 Ala. 465; State v. Plunket, 2 Stew. 11; Turley v. State, 3 Humph. 323; Duval v. State, 8 Tex. Ap. 370. For statutory designations, see Whart. Cr. Pl. & Pr. § 237.

At common law an indictment for stealing a sheep is supported by proof of the stealing of any sex or variety of that animal, for the term is *nomen generalissimum*. McCully's Case, 2 Lew. C. C. 272; R. v. Spicer, 1 Den. C. C. 82; 1 C. & K. 699. See Whart. Cr. Pl. & Pr. §§ 209, 237. And an indictment for stealing a sheep will be supported by proof of stealing a lamb. State v. Tootle, 2 Harring. 541. See R. v. Spicer, 1 C. & K. 699. A branded animal need not be described as such;

be unnecessary to specify color, sex, or degree of maturity, yet such specification, if ventured, must be proved as laid.¹ Nor can the term "live" be rejected as surplusage. Thus where the prisoner was indicted for stealing four live tame turkeys, and it appeared that he stole them alive in the county of Cambridge, killed them there, and carried them into Hertfordshire, where he was tried, the judges held that the word "live" in the description could not be

but if the brand be described a variance is fatal. *Allen v. State*, 8 Tex. Ap. 360.

On an indictment for stealing a horse, proof that it was a gelding is a fatal variance, the statute making a distinction between horses and geldings. *Hooker v. State*, 4 Ohio, 350; *Turley v. State*, 3 Humph. 323; *State v. Buckles*, 26 Kan. 237; *Brisco v. State*, 4 Tex. Ap. 219. See *Whart. Cr. Pl. & Pr.* § 237; *Banks v. State*, 28 Tex. 644; *Valesco v. State*, 9 Tex. Ap. 76; *Marshall v. State*, 31 Tex. 471; *Gholstan v. State*, 33 Tex. 342; *Persons v. State*, 3 Tex. Ap. 240. Under a statute prohibiting the stealing of horses, the term *horses* is construed as including *mares*; *State v. Dunnivant*, 3 Brev. 9; *Marshall v. State*, 31 Tex. 471; but see, *contra*, *Bank v. State*, 28 Tex. 644; though in South Carolina it was somewhat inconsistently ruled that under the statute against *hog* stealing, an indictment for stealing a *pig* could not be sustained. *State v. M'Lain*, 2 Brev. 443. *Per contra*, *Washington v. State*, 58 Ala. 355. See *R. v. Loom*, 1 Mood. C. C. 160; *R. v. Puddifoot*, 1 Mood. 247; *R. v. Beany*, R. & R. 416; *R. v. Welland*, R. & R. 494. In England, however, it has been said that when the name of the grown animal is given as a *nomen generalissimum*, then the young animal is included under this general term. *R. v. Welland*, R. & R. 494.

On the other hand, where, under an indictment under the 9 Geo. 1, c. 22, for killing "certain cattle, to wit,

one *mare*," the evidence was that the animal was a colt, but of which sex did not appear; the prisoner being convicted, the judges, on a case reserved, were of opinion that the words, "a certain mare," though under a *videlicet*, were not surplusage, and that the animal proved to have been killed being a *colt* generally, without specifying its sex, was not sufficient to support a charge of killing a *mare*. *R. v. Chalkley*, R. & R. 258.

In *People v. Pico*, 62 Cal. 50, under a statute of larceny of "horse or mare," an indictment for larceny of a horse was held sustained by proof of larceny of a mare. The court said: "Although the courts of some of the States have held, under a statute similar to that of this State (section 487, subdivision 3, Penal Code), where both words 'horse' and 'mare' are used, the proof must agree with the indictment as to the sex of the animal, yet as at common law the word 'horse' was used in its generic sense, and was held to include all animals of the horse species, whether male or female, we are of opinion that the Legislature of this State, in using the word 'mare,' did not intend to modify or change the common-law rule."

In Texas it has been held that proof of a theft of a *beef-steer* will not support an indictment for stealing a *steer*. *Cameron v. State*, 9 Tex. Ap. 332.

¹ 1 Green. Ev. § 65; *Rosc. Cr. Ev.* 102; *Turner v. State*, 3 Heisk. 452.

rejected as surplusage, and that as the prisoner had not the turkeys in a live state in Hertfordshire, the charge as laid was not proved, and that the conviction was wrong. And Holroyd, J., observed, that an indictment for stealing a dead animal should state that it was dead; for upon a general statement that a party stole the animal it is to be intended that he stole it alive.¹ It is otherwise, however, where the animal has the same name living or dead.²

§ 125. A variance in the number of the goods, if the number stated does not constitute the essence of the offence, is immaterial. The proof of any one of several articles duly pleaded will sustain a verdict.³ At the same time, as we have seen, where a series of special coins or notes are averred, and the jury find the defendant guilty of stealing *some* of the coins or notes averred, but declare that they are not able to specify which, the conviction cannot be sustained.⁴

Variance
in number
imma-
terial.

Where an indictment charged the defendant with stealing five certificates of shares of stock of the number 7056, and the proof showed there was but one such certificate, and not a series of five, as alleged, there was a fatal variance.⁵

§ 126. It is unnecessary to prove the value laid in the indictment unless the precise sum forms the essence of the offence, or is stated as a matter of description.⁶ Thus, on an indictment for extortion, or taking a greater brokerage than is allowed by the act of Parliament, it is not neces-

Variance as
to value
imma-
terial, unless
value be
descriptive.

¹ *R. v. Edwards*, R. & R. 497.

⁶ *Com. v. Morrill*, 8 Cush. 571; *Com.*

² *R. v. Puckering*, 1 Mood. C. C. 242; *State v. Donovan*, 1 Houst. C. C. 43. See *Com. v. Beaman*, 8 Gray, 497; *Whart. Crim. Law*, 8th ed. § 876; *Whart. Cr. Pl. & Pr.* § 209.

v. McKenney, 9 Gray, 114; *Com. v. Burke*, 12 Allen, 182; *Com. v. Gallagher*, 126 Mass. 54; *State v. Harris*, 64 N. C. 127; *Whart. Crim. Law*, 8th ed. § 951.

³ See *infra*, § 132; *supra*, § 123; *Burn's Justice*, 29th ed. by Ch. & Bears, title *Evidence*; *State v. Cameron*, 40 Vt. 555; *Com. v. Williams*, 2 Cush. 583; *Com. v. O'Connell*, 12 Allen, 451; *Lorton v. State*, 7 Mo. 55.

⁴ *R. v. Bond*, 4 Cox C. C. 231; 1 Den. C. C. 517.

⁵ *People v. Coon*, 45 Cal. 672. See *Moore v. State*, 65 Ind. 218. As to variance in sums, see *Com. v. Williams*, 127 Mass. 285.

The provision of the N. Y. statute (2 R. S. 679, § 66), declaring, that "if the property stolen consists of any . . . draft, . . . the money due thereon or secured thereby and remaining unsatisfied, or which in any contingency might be collected thereon, . . . shall be deemed the value," does not make part of the description of the offence, but simply furnishes a mode of proving it. *Phelps v. People*, 72 N. Y. 334.

sary to prove the taking of the precise sum laid.¹ But if the value of the property is essential to constitute an offence, it must be proved to have been sufficient for that purpose. Value may be inferred from the general testimony, without precise proof.² Some value must be thus inferable.³ The value of legal tenders need not be proved.⁴

§ 127. On an indictment charging collectively the larceny of several different articles of varied values, with only a gross value assigned, no conviction should be had on evidence of stealing only a part.⁵ Nor can a conviction for stealing a part of the articles charged be sustained unless to such part a sufficient value is assigned directly or inferentially.⁶ On the other hand, it has been said that where several articles, all of one kind, are described, their value may be alleged in the aggregate, and the defendant may be convicted of stealing a part of less value than the whole, if there is anything on the record to attach to the articles on which the conviction was had a value sufficient to sustain the conviction.⁷

Collective
value does
not sustain
specific.

VII. NEGATIVE AVERMENTS.

§ 128. Where, in a statute, an exception or proviso qualifies the description of the offence, the general rule is that the indictment should negative the exception or proviso.⁸ In such cases, when the subject of the exception is peculiarly within the defendant's knowledge, and the negative cannot be proved by the prosecutor, the burden of proving

Burden on
defendant
to prove
matter pec-
uliarly in
his own
knowledge.

¹ *R. v. Gilham*, 6 T. R. 265; *Grimwood v. Baritt*, *ibid.* 462; *Pope v. Foster*, 4 T. R. 590.

² *Whart. on Ev.* § 1290; *Remsen v. People*, 57 Barb. 324; *Com. v. Logan*, 3 Brewst. 341; *Pratt v. State*, 35 Oh. St. 514.

³ *People v. Griffin*, 38 How. (N. Y.) Pr. 475; *State v. Krieger*, 68 Mo. 98.

⁴ *Whart. Cr. Pl. & Pr.* § 216; *Duvall v. State*, 63 Ala. 12.

⁵ *Hope v. Com.*, 9 Met. 134; *Com. v. Cahill*, 12 Allen, 540; *Com. v. Lavery*, 101 Mass. 207; *Rhodus v. Com.*, 2 Duv. 159; *State v. Longbottoms*, 11

Humph. 39; *State v. Murphy*, 6 Ala. 845; *Sheppard v. State*, 42 Ala. 531. See *O'Connell v. Com.*, 7 Met. 460;

Whart. Cr. Pl. & Pr. § 213; *Whart. Crim. Law*, 8th ed. § 952.

⁶ *Hamblett v. State*, 18 N. H. 384; *State v. Goodrich*, 46 N. H. 186; *Com. v. Smith*, 1 Mass. 245; *Collins v. People*, 39 Ill. 223; *Low v. People*, 2 Park. C. R. 37.

⁷ *Com. v. O'Connell*, 12 Allen, 451; though see *Hamblett v. State*, 18 N. H. 384.

⁸ 2 Hale, 171; 2 Hawk. c. 25, s. 112; 1 Chitty on Plead. 357; *State v. Gur-*

the affirmative may be on the defendant, as a matter of defence.¹ But another distinction is to be kept in mind. It may be that the negative to be established is something which virtually imputes certain positive conditions to the defendant, as on indictments for false pretences, where the charge of untruth is equivalent to a charge of falsity, in which case the burden of proving the negative is on the prosecution;² and on an indictment for perjury, where to charge a defendant with swearing to a fact, not knowing it to be true, is equivalent to a charge of rash and false swearing, in which case the defendant's want of knowledge must also be shown by the prosecution. On the other hand, where the negative involves no criminality on the part of the defendant, then the burden may be on him to prove the affirmative. Thus the burden of proving the defendant to be a "traveller," under the statutes prohibiting wearing of concealed weapons, is on the defence.³

VIII. DIVISIBLE AVERMENTS.

§ 129. It is sufficient to prove so much of the indictment as shows the defendant to have been guilty of the substantive crime therein stated, though not to the full extent charged on him.⁴ Divisibility of this class, as we shall presently see, may relate either to the subject, the object, or the predicate. When several defendants are charged, a verdict may be had as to any one of them, provided enough be left to constitute the offence. When several articles are alleged to have been stolen,⁵ one can be separated from the other, and a verdict had for any one.⁶ The same divisibility applies to

Defendant may be convicted of part of offence charged.

ney, 37 Me. 149; *State v. Boyington*, 56 Me. 512; *State v. Barker*, 18 Vt. 195; *State v. Miller*, 24 Conn. 522. The authorities will be found collected in Whart. Cr. Pl. & Pr. §§ 238 *et seq.*

¹ See *infra*, § 341; *State v. McGlynn*, 34 N. H. 422.

² See Whart. Crim. Law, 8th ed. § 1165.

³ *Wiley v. State*, 52 Ind. 516. As to proof of license, see more fully *infra*, § 343.

⁴ *Infra*, § 144; *R. v. Hunt*, 2 Camp. 583; *O'Connell v. R.*, 11 Cl. & Fin. 155; *R. v. Labouchere*, 14 Cox C. C.

419; 1 Greenleaf on Ev. § 65; 1 Russ. on Crimes, 790; *Com. v. Hunt*, 4 Pick. 252; *Larned v. Com.*, 12 Met. 240; *Murphy v. State*, 28 Miss. 638. See *State v. Lessing*, 16 Minn. 75; *State v. Robey*, 8 Nev. 312.

For a full discussion of this topic in relation to *autrefois acquit*, see *infra*, §§ 584 *et seq.* As to *differentia* between major and minor, see *infra*, § 144. As to the pleading of duplicity, see Whart. Cr. Pl. & Pr. §§ 243 *et seq.*

⁵ *Infra*, § 136; *supra*, §§ 123, 125.

⁶ *Infra*, §§ 132, 145.

the averments of the mode of doing the unlawful thing, provided there be enough left to constitute the offence.¹ The offence, however, of which the defendant is convicted, must at common law be of the same class as that with which he is charged.² For instance, on an indictment for simple larceny there cannot be a conviction of receiving stolen goods.³

§ 180. Where, as will be also hereafter seen, a minor offence is included in a greater, the defendant may be acquitted of the latter, and convicted of the former.⁴ The defendant, for instance, may be convicted of an assault on an indictment for assaulting an officer when in execution of his duty, and thereby obstructing public justice,⁵ and on an indictment for an assault with a felonious intent.⁶ On an indictment for entering and breaking a dwelling-house in the daytime and stealing therein, one may be found guilty of stealing in the dwelling-house in the daytime, or only of stealing.⁷ And in all cases of aggravated larceny the defendant may be convicted of the simple larceny.⁸

§ 181. Where, as in cases of perjury and of subornation of perjury, several distinct assignments of perjury are laid, the indictment will be sustained if any one of these be proved, if that, by itself, be sufficient to constitute the offence.⁹ So if on an indictment for obtaining goods on false pretences any one of the false pretences be shown, that one, being itself within the statute, and appearing to have been opera-

¹ *Infra*, §§ 430 *et seq.*

² Whart. Cr. Pl. & Pr. § 461; R. v. Evans, 3 Stark, C. P. 35; R. v. Westbeer, 1 Leach, 12; 2 Str. 1133; State v. Shoemaker, 7 Mo. 177. *Infra*, §§ 134, 580.

³ Ross v. State, 1 Blackf. 391; Com. v. Haskins, 128 Mass. 60.

⁴ See *infra*, §§ 143, 144, 578 *et seq.*, 584; R. v. Compton, 3 C. & P. 418; Roscoe's Crim. Ev. p. 82; R. v. Macally, 9 Rep. 67 b; R. v. Swan, Foster, 104.

⁵ Dick. Sess. 351; Com. v. Kirby, 2 Cush. 577; Larned v. Com., 12 Met. 240.

⁶ See cases *infra*, §§ 143, 584; R. v. Williams, 1 Mood. C. C. 107.

⁷ Com. v. Hope, 22 Pick. 1; Larned v. Com., 12 Met. 240; Whart. Cr. Pl. & Pr. §§ 243 *et seq.*

⁸ R. v. Beany, R. & R. 416. *Infra*, §§ 584-5.

⁹ R. v. Rhodes, 4 Ld. Raym. 886; R. v. Ady, 7 C. & P. 140; 2 Camp. 138, 139; Cro. C. C. 7th ed. 622; State v. Hascall, 6 N. H. 358; State v. Mills, 17 Me. 211; Com. v. Johns, 6 Gray, 274; Williams v. Com., 91 Penn. St. 493. See De Bernie v. State, 19 Ala. 23; Page v. State, 59 Miss. 475; Whart. Crim. Law, 8th ed. § 1316.

tive in inducing the prosecutor to part with his property, will be sufficient to support a conviction.¹ Even proof of part of a pretence is sufficient, when it was through such part that the goods were obtained.² On indictments for libel and blasphemy it is necessary to prove only one of the assignments;³ on an indictment for treason the overt acts may, on the same principle, be divided.

§ 132. As is elsewhere noticed, where there are several articles included in indictments for stealing, or for wrongfully obtaining money or goods, proof as to one is enough,⁴ supposing that such article has a specific valuation.⁵ Upon an indictment for extortion, alleging that the defendant extorted twenty shillings, it is sufficient to prove that he extorted one shilling.⁷ An indictment for embezzling two bank notes of equal value is supported by proof of the embezzlement of one note only.⁸ On an indictment for stealing over \$100, one may be convicted for stealing less than \$100.⁹ And on an indictment for having in possession more than ten pieces of counterfeit coin, the defendant may be found guilty of having less than ten.¹⁰ And, as will be presently seen, other allegations as to the extent of the property which was the object of the offence are divisible.

§ 133. Overt acts in conspiracy may be divisible. Thus upon an indictment for conspiring to prevent workmen from continuing

¹ *Ibid.*; *R. v. Hill*, R. & R. 190; *ton v. State*, 7 Mo. 55; *People v. People v. Haynes*, 11 Wend. 557; *Wiley*, 3 Hill (N. Y.), 194.

People v. Blanchard, 90 N. Y. 314; ⁶ *Whart. Crim. Law*, 8th ed. §§ 951 *et seq.*; *supra*, §§ 123, 126.

Webster v. People, 92 N. Y. 422; ⁷ *R. v. Burdett*, 1 Ld. Raym. 149. See *R. v. Carson*, R. & R. 303.

⁸ *R. v. Hill*, R. & R. 190. ⁹ 1 Greenleaf on Ev. § 65; *R. v. Carson*, R. & R. 303; *Furneaux's Case*, R. & R. 335; *Tyer's Case*, R. & R. 402.

¹⁰ *R. v. Labouchere*, 14 Cox C. C. 419; *Com. v. Kneeland*, 20 Pick. 206.

⁴ *Foster C. L.* 194; *Whart. Crim. Law*, 8th ed. § 1806. ⁵ *Com. v. Griffin*, 21 Pick. 523; *Com. v. O'Connell*, 12 Allen, 451. But some part of the notes or coin charged must be specifically proved. *Supra*, § 122.

⁶ *Infra*, § 145; *Whart. Cr. Pl. & Pr.* §§ 252, 470; *Whart. Crim. Law*, 8th ed. § 948; *State v. Cameron*, 40 Vt. 555; *Com. v. Eastman*, 2 Gray, 76; *Com. v. Williams*, 2 Cush. 583; *Lor-*

And so of
divisible
objects in
conspiracy.

to work, it is sufficient to prove a conspiracy to prevent one workman from working.¹

And so of
divisible
predicates.

§ 134. Where an indictment contains divisible averments in the the shape of predicates, as that the defendant "forged and caused to be forged," proof of either averment will be sufficient.² And so a defendant may be convicted of printing and publishing a libel upon an indictment which charges him with composing, printing, and publishing.³ Proof of killing by one of several instruments averred, also will sustain an indictment for homicide,⁴ and so of killing by inflicting one of several wounds.⁵

And so of
cumulative
intent.

§ 135. On the same reasoning, where two intentions are cumulatively ascribed to one act,⁶ as that an assault was committed upon a female, with intent to abuse and carnally know her, proof of either of these intentions will be sufficient. So on an indictment charging the defendant with having published a libel of and concerning certain magistrates, with intent to defame those magistrates, and also with a malicious intent to bring the administration of justice into contempt, Bayley, J., informed the jury that if they were of opinion that the defendant had published the libel with *either* of those intentions they ought to find him guilty.⁷

Defendants
may be
severally
convicted.

§ 136. Where two are charged with a joint and single offence, *e. g.*, larceny, either may be found guilty; but they cannot be found guilty of separate parts of the charge; and if so found guilty separately a pardon must be obtained, or a *nolle prosequi* entered as to the one who

¹ *R. v. Bykerdyke*, 1 M. & Rob. 179. *Casey v. People*, 72 N. Y. 393; *State v. Supra*, § 131; Whart. Cr. Pl. & Pr. § McDonald, 67 Mo. 13.

² *R. v. Middlehurst*, 1 Burr. 400; *Hoskins v. State*, 11 Ga. 92 *Infra*, §§ 138 *et seq.*; Whart. Crim. Law, 8th ed. § 727. As to verdict, see Whart. Cr. Pl. & Pr. § 742.

³ *R. v. Hunt*, 2 Camp. 585; *R. v. Williams*, *ibid.* 646; *State v. Locklear*, Busbee, 205; *Com. v. Morgan*, 107 Mass. 199; Whart. Cr. Pl. & Pr. § 742; Whart. Crim. Law, 8th ed. § 1663.

⁴ *Beavers v. State*, 58 Ind. 530. See

⁵ Whart. Crim. Law, 8th ed. § 535.

⁶ *Infra*, § 740; Whart. Crim. Law, 8th ed. §§ 108, 119; *R. v. Dawson*, 1 Eng. L. & Eq. 589; 3 Stark. 62; *R. v. Hanson*, 1 C. & M. 334; *R. v. Cox*, R. & R. 362; *R. v. Davis*, 1 C. & P. 306; *R. v. Batt*, 6 C. & P. 329; *State v. Moore*, 12 N. H. 42; *Com. v. McPike*, 3 Cush. 181; *People v. Curling*, 1 Johns. 320; *State v. Dineen*, 10 Minn. 407; *State v. Cooker*, 3 Harring. 554; *Phillips v. State*, 36 Ark. 282. As to surplusage, see *infra*, §§ 138 *et seq.*

⁷ *R. v. Evans*, 3 Stark. (N. P.) 35.

stands second upon the indictment, before judgment can be given against the other.¹ But where several are indicted for burglary and larceny, one may be found guilty of the burglary and larceny, and the others of the larceny only.² Where, however, the act is not joint, the English practice is to give judgment against the party who is proved to have committed the first felony and acquit the others.³

§ 137. By statutes now of almost universal adoption, the common law rule in this respect has been largely extended. Thus, for instance, in Massachusetts, by force of statute, it is now held that on an indictment for rape, the prisoner may be convicted of incest, or assault and battery;⁴ and on an indictment for manslaughter, the defendant may be convicted of assault and battery.⁵ But it was held in a prior case, that on an indictment for murder there cannot at common law be a conviction of an assault with intent to murder.⁶ By statutes, in most jurisdictions, there may be now convictions of an attempt on indictments for the consummated offence.⁷

Divisibility
extended
by statute.

IX. SURPLUSAGE.

§ 138. All unnecessary words may, on trial or arrest of judgment, be rejected as surplusage, if the indictment would be good upon striking them out.⁸ Even an indictment on its face made defective by insensible or repugnant

Unnecessary words
can be rejected.

¹ *R. v. Hemstead*, R. & R. 344; Com. Dig. Pleader, c. 28, 29, F. 12; 4 O'Connell v. R., 11 Cl. & Fin. 155; Co. 412; Mod. 327; *R. v. Jennings*, Com. v. Wood, 12 Mass. 313; Com. v. Dears. & B. 447; U. S. v. Howard, 3 Cook, 6 S. & R. 577; Whart. Cr. Pl. & Sumner, 12; *State v. Noble*, 3 Shep. Pr. §§ 312, 755. 476; *State v. Palmer*, 35 Me. 9; *State*

² *R. v. Butterworth*, R. & R. 520. *Infra*, §§ 584-5.

³ *R. v. Dovey*, 2 Den. C. C. 86; 2 Eng. L. & Eq. 532.

⁴ Com. v. Goodhue, 2 Met. 193; Com. v. Drum, 19 Pick. 479. See *infra*, §§ 584-5.

⁵ Com. v. Drum, 19 Pick. 479. See *infra*, §§ 584-5.

⁶ Com. v. Roby, 12 Pick. 496.

⁷ See Whart. Cr. Pl. & Pr. § 742.

⁸ *Supra*, § 128; Leach, 536; *R. v. Radley*, 2 C. & K. 974; 1 Den. C. C. 450; 2 Russ. on Cr. 786; 1 T. R. 322;

Com. Dig. Pleader, c. 28, 29, F. 12; 4 Co. 412; Mod. 327; *R. v. Jennings*, Com. v. Wood, 12 Mass. 313; Com. v. Dears. & B. 447; U. S. v. Howard, 3 Sumner, 12; *State v. Noble*, 3 Shep. 476; *State v. Palmer*, 35 Me. 9; *State v. Bailey*, 11 Foster, 521; *State v. Nichols*, 58 N. H. 41; *State v. Varrell*, 58 N. H. 148; *State v. Dewey*, 55 Vt. 550; Com. v. Arnold, 4 Pick. 251; Com. v. Dyer, 128 Mass. 70; *State v. Corrigan*, 24 Conn. 286; *People v. Lohman*, 2 Barb. 216; *People v. Casey*, 72 N. Y. 393; *Crichton v. People*, 6 Parker C. R. 363; *Phelps v. People*, 72 N. Y. 334, 372; *Jillard v. Com.*, 26 Penn. St. 170; *State v. Cozens*, 6 Ired. 82; *State v. Coppenberg*, 2 Strobb. 273; *State v. Brown*, 8 Humph. 89; *State v. Wilder*, 7 Blackf. 582; *Feigel v. State*,

allegations may, by thus discharging phrases which destroy or pervert its meaning, in this way be made good; the noxious surplusage being discharged upon motion in arrest of judgment.¹ Thus where an indictment alleged that the defendant, Francis Morris, the said goods above mentioned, so as aforesaid feloniously stolen, taken, and carried away, feloniously did receive and have, he, the said Thomas Morris, then and there well knowing the said goods and chattels to have been feloniously stolen, taken, carried away; the twelve judges held, that the words, "he, the said Thomas Morris," might be struck out as surplusage, and that the indictment was sensible and good without them.² And again, where it was charged that the defendant made an assault on "Henry B.," and "him, the said William B., did beat," etc., "and other wrongs to the said William B. did," etc., "to the damage of the said William B.," the indictment was held good on arrest of judgment.³

§ 139. There can, it is well said, be no use in requiring proof of allegations which are impertinent; the identity of those allegations which are essential to the claim or charge, with the proof, is all that is material. Thus if it were alleged that A., being armed with a bludgeon, and disguised with a visor, feloniously stole, took, and carried away the watch of B., the allegations that A. was armed and disguised, being altogether foreign to a charge of larceny, could be wholly rejected, and would require no proof on the trial. So where an indictment for an assault and battery, with an intent to kill, stated that the defendant did bite or cut off the ear of the prosecutor, etc., it was held, that this being merely a circumstance collateral and impertinent, it could be stricken out.⁴ And where an indictment for producing an abortion

85 Ind. 580; *State v. Pancake*, 74 *supra*, §§ 129 *et seq.*; and see fully Ind. 15; *State v. Smouse*, 50 Iowa, Whart. Cr. Pl. & Pr. §§ 162-3, 195, 209; *Butler v. State*, 34 Ark. 480; 243 *et seq.*

State v. Erickson, 45 Wis. 86; *State v. Elliott*, 14 Tex. 423; *Pickett v. U. S.*, 1 Idaho, N. S. 523. And though a statute requires an offence to be stated "without prolixity or repetition," surplusage may be rejected if the offence is sufficiently charged. *State v. Belleville*, 7 Baxt. 548. See, as to "Variance," *supra*, §§ 91 *et seq.*; and as to duplicity,

¹ *R. v. Redman*, 1 Leach, 477.

² *R. v. Morris*, 1 Leach C. C. 109.

See, for other misnomers rejected as surplusage, *Com. v. Hunt*, 4 Pick. 252; *U. S. v. Howard*, 3 Sumner, 12.

³ *R. v. Crespin*, 11 Q. B. 914; *State v. Burt*, 25 Vt. 373; *Kennedy v. State*, 62 Ind. 136.

⁴ *Scott v. Com.*, 6 S. & R. 224. To

alleges that the person operated on subsequently died, this can be discharged as aggravation.¹

§ 140. The averment of ownership may be stricken out when immaterial.² Where in an indictment under the Act of Congress of 1825, c. 276, §§ 5, 22, the ownership of the vessel was alleged to be in William Nye and others, instead of Willard Nye and others, it was held that an allegation of the particular ownership was unnecessary and immaterial, and that the misnomer above mentioned was of no consequence; it being sufficient to allege that the owners were citizens of the United States.³ And where an indictment alleged a robbery to have been committed in the dwelling-house of A. B., it was held that a variance as to the owner's name was immaterial, as it was not essential to the crime of robbery that it should have been committed in a dwelling-house.⁴

So of ownership when ownership is immaterial.

§ 141. The object of a *videlicet* is to point out, in connection with a clause immediately preceding, a specification, which, if material, goes to sustain the indictment generally, and if immaterial, may be rejected as surplusage.⁵ The effect of the introduction of the *videlicet* is to relieve the pleader from the necessity of proving a non-essential descriptive averment.⁶ But it has been said in New York, "that when the indictment does not stop with the general charge, but proceeds under a *videlicet* to explain or render more certain by description, the description becomes a material part of the charge. It is the office of a *videlicet* to restrain or limit the generality of the preceding words, and in some instances to explain them. If what precedes be matter of direct averment, and material, then what is stated under the *videlicet* will be deemed material and traversable. . . . And if traversable they must be proved."⁷

the same effect, see *Com. v. Randall*, 4 Gray, 36; *Ld. Churchill v. Hunt*, 2 B. & A. 685; *McCarney v. People*, 83 N. Y. 408.

¹ *Com. v. Adams*, 127 Mass. 15. See *Lohman v. People*, 1 Comst. 379.

² *Stevens v. Com.*, 4 Leigh, 683; *Rivers v. State*, 10 Tex. Ap. 177.

³ *U. S. v. Howard*, 3 Sumner, 12; *State v. Cassey*, 1 Rich. 91.

⁴ *Pye's Case*, 1 East P. C. 785.

⁵ See Whart. Cr. Pl. & Pr. §§ 122, 158 a; 1 Stark. C. P. 251; *R. v. Scott*, D. & B. 47; *Ryalls v. R.*, 11 Q. B. 781, 797; *Com. v. Hart*, 10 Gray, 468; *People v. Jackson*, 3 Denio, 101.

⁶ 1 Greenl. Ev. § 60; 1 Ch. Pl. 317; *State v. Heck*, 23 Minn. 551.

⁷ *People v. Jackson*, 3 Denio, 101. See *Crichton v. People*, 6 Parker C. R. 363; but see *Ryalls v. R.*, 11 Q. B. 781.

§ 142. The same principle extends to cases where the evidence fails to prove circumstances not altogether impertinent, but which merely affect the magnitude or extent of the claim or charge; and here, although circumstances are alleged, which, if proved, would have been of legal importance, yet, although the evidence failed to establish the whole of what is alleged, the principle adverted to still operates to give effect to what is proved, to the extent to which it is proved.¹ "The principles," remarks Mr. Starkie, "which require the cause of action or ground of offence to be stated, are satisfied: the adversary is not taken by surprise, for no fact is admitted in evidence which is not alleged against him; and the court is enabled to pronounce on the legal effect of the part which is established as true, by the verdict of the jury, and the record shows the real nature and extent of the right or liability established."² Thus, where an indictment in one count charges a rescue, and also an assault and battery, and the defendant is convicted generally, if the averments as to the rescue are uncertain or bad, these may be rejected as superfluous and immaterial, and the court may proceed to pass judgment upon the verdict, as for an assault and battery.³ It has also been held that in an indictment charging an innholder with suffering persons "to play at cards and other unlawful games," the words "unlawful games," may be rejected as surplusage.⁴ And in conformity with the view above stated, a carrier of the mail may be convicted of an offence punishable generally under the law, though not as carrier; and if he is charged in the indictment as carrier, the word "carrier" will be considered as an irrelevant description of his person, and as surplusage.⁵

¹ If in negating a statutory exception, the language used negative more than is required, this is no objection when the sole effect is to put the prosecution to stricter proof. *Beasley v. People*, 89 Ill. 571.

Where in one count A. is charged as principal with the murder of E., and B., C., and D. are charged with being accessories, the conclusion of the count, charging B., C., and D. with the murder, is not essential, and may be re-

jected as surplusage. *Hawley v. Com.*, 75 Va. 847.

² *Starkie on Ev.* 1550, 1565; *U. S. v. Howard*, 3 Sumn. 12; *McCulley v. State*, 62 Ind. 428; *Cameron v. State*, 8 Eng. (Ark.) 712. And see *supra*, §§ 127-32.

³ *State v. Morrison*, 2 Ired. 9; *State v. Burt*, 25 Vt. 373; *Com. v. Randall*, 4 Gray, 36.

⁴ *Com. v. Bolkom*, 2 Pick. 281. See *Com. v. Arnold*, 4 Pick. 251.

⁵ *U. S. v. Burroughs*, 3 McLean, 405.

It has been ruled that if an indictment alleges facts which constitute a misdemeanor, it will be good for that offence, although it state other facts which go to constitute a felony, provided all the facts alleged fall short of the charge of felony, in consequence of some other facts essential to that charge, *e. g.*, the intent of the party accused, not being averred. Thus, when by statute it is a misdemeanor to administer drugs, etc., to a pregnant female, with intent to produce miscarriage; and by statute it is manslaughter to use the same means with intent to destroy the child in case the death of such child be thereby produced; and an indictment charged all the facts necessary to constitute the crime of manslaughter, except the intent with which the acts were done, and in conclusion, it characterized the crime as manslaughter, but the only intent charged was an intent to produce a miscarriage; it was held that the indictment was defective for the felony, but good for the misdemeanor, and that the accused was properly convicted of the latter offence.¹

§ 143. Essential allegations, however, cannot be rejected as surplusage. Thus where, in an indictment for obtaining money by false pretences, the false pretence stated was that the defendant said that he had paid a sum of money into the bank, and the proof was that he said a sum of money had been paid into the bank, without saying by whom; the defendant was acquitted for the variance, Lord Ellenborough holding that there was a difference in substance between the two assertions.² It is otherwise, however, when the legal meaning of the acts is the same. Thus, in an indictment for murder, an allegation that the death was produced with a knife will be supported by proof that it was produced by a dagger, sword, staff, or the like, or any instrument capable of the same effect.³ Where a declaration under the bribery act alleged that the bribe was to induce White to vote for Mr. Lockyer and Lord Egmont, it was held to be sufficient to prove that the bribe was to give his vote for Lockyer.⁴ And where

Otherwise
when allegation goes
to essence.

¹ *Lohman v. People*, 1 Comst. 379. *Clark*, 3 Foster (N. H.), 429; *Mosely v. State*, 9 Tex. Ap. 137.

² *R. v. Plestow*, 1 Camp. 494. See *R. v. Macalley*, 9 Co. 67 a; *Gilb. Com. v. Pierce*, 130 Mass. 31; *Com. v. Ev. 231*; *Archbold P. C.* 9th ed. 382. *Luscomb*, 130 Mass. 42; (*supra*, § 121); *Supra*, § 91.

State v. Purify, 86 N. C. 681; *State v. Combe v. Pitt*, 3 Burr. 1586.

the indictment charged the defendant with a nuisance in erecting a dam, by reason of which the animal and vegetable substances brought down the stream were collected and accumulated, and became offensive, etc., but the evidence showed that the nuisance was caused, not by the means described, but from the alternate rise and fall of water in the pond, or from the action of the sun on the vegetable matter on its margin; it was held there was no variance, the result and original cause being the same.¹

§ 144. The same principle may also be used to explain the cases elsewhere referred to,² in which a man charged with a greater offence may be convicted of one of lesser degree contained in it.³ Thus, if A. be charged with feloniously killing B. of malice prepense, and all but the fact of malice prepense be proved, A. may be convicted of manslaughter, for the indictment contains all the allegations essential to that charge.⁴ Another illustration is that of assaults upon officers, assaults with battery, or assaults with felonious intent, where, as has been seen, all but the assault may be rejected as surplusage, and the defendant convicted of that alone.⁵ And so of indictments for adultery, in which, when fornication is indictable, there can be

Differentia
between
major and
minor
offence.

¹ *People v. Townsend*, 3 Hill, 479.
² *Supra*, § 130; *infra*, §§ 584, 585.
³ *Supra*, § 131; Whart. Crim. Law, 8th ed. § 542; Whart. Cr. Pl. & Pr. §§ 244-6, 465; *R. v. Oliver*, 8 Cox. C. C. 384; *Bell C. C.* 287; *R. v. Yeadon*, 9 Cox C. C. 91; *R. v. Mitchell*, 12 Eng. L. & Eq. 588; *State v. Waters*, 39 Me. 54; *State v. Dearborn*, 54 Me. 442; *State v. Hardy*, 47 N. H. 538; *State v. Coy*, 2 Aiken, 181; *State v. Burt*, 25 Vt. 373; *Keefe v. People*, 49 N. Y. 348; *State v. Johnson*, 1 Vroom, 185; *Francisco v. State*, 4 Zab. 30; *Hutchison v. Com.*, 82 Penn. St. 472; *State v. Flannigan*, 6 Md. 167; *Davis v. State*, 39 Md. 355; *Stewart v. State*, 5 Ohio, 242; *Wroe v. State*, 20 Oh. St. 460; *State v. Kennedy*, 7 Blackf. 233; *Foley v. State*, 9 Ind. 363; *Gillespie v. State*, 9 Ind. 380; *State v. Lessing*, 16 Minn. 75; *State v. Robey*, 8 Nev.

312; *Swinney v. State*, 8 S. & M. 576; *State v. Fleming*, 2 Strobb. 464; *Johnson v. State*, 14 Ga. 55; *Carpenter v. State*, 23 Ala. 84; *Watson v. State*, 5 Mo. 497; *Reynolds v. State*, 11 Tex. 120; *McBride v. State*, 2 Eng. (Ark.) 374; *Cameron v. State*, 13 Ark. 712.

In *State v. Robey*, 8 Nev. 312, it was held that an indictment charging an assault with intent to commit murder will sustain a conviction of an assault with a deadly weapon with an intent to inflict a bodily injury.

That where a party is indicted for a riot he cannot be convicted of an assault see *Ferguson v. People*, 90 Ill. 510. Otherwise where the indictment avers an assault. Whart. Crim. Law, 8th ed. § 1550.

⁴ *Infra*, §§ 584-5; *supra*, § 130.

⁵ *Supra*, § 130; *infra*, §§ 584-5; Whart. Crim. Law, 8th ed. § 641 a.

convictions, it is said, for fornication.¹ Again, an indictment charging that the defendant did "embezzle, steal, take, and carry away," will be good for larceny, the "embezzle," etc., being rejected as surplusage.²

§ 145. The same rule applies to allegations of number, quantity, and magnitude, where the proof, *pro tanto*, supports the claim or charge. Hence, as we have already seen, if a man be charged with stealing ten sovereigns, he may be convicted of stealing five.³

Number and quantity may be distributively proved.

§ 146. An allegation in an indictment which describes, defines, qualifies, or limits a matter material to be charged, is a descriptive averment, and must be proved as laid, even though such particular description was unnecessary.⁴

Descriptive averments must be proved.

¹ *Resp. v. Roberts*, 2 Dall. 224; *Com. v. Dinkey*, 17 Penn. St. 126; *State v. Cowell*, 4 Ired. 231; *contra*, *State v. Pearce*, 2 Blackf. 318; *Smitherman v. State*, 27 Ala. 23.

² *Com. v. Simpson*, 9 Met. 138. So under an indictment for robbery the defendant may be convicted of larceny. *Whart. Crim. Law*, 8th ed. § 858; *Whart. Cr. Pl. & Pr.* § 246; *People v. Jones*, 53 Cal. 58. It has been held in Texas that theft contains the offence of receiving and concealing stolen property. *Vincent v. State*, 10 Tex. App. 330; *contra*, *State v. Honig*, 9 Mo. App. 298.

³ *Supra*, § 132; *Whart. Crim. Law*, 8th ed. § 951. As to verdict see *Whart. Cr. Pl. & Pr.* § 742.

In Massachusetts, one statute imposed one penalty on having ten or more counterfeit coins in possession, and another statute a penalty for having less than ten counterfeit coins in possession. The defendant was indicted for having in his possession more than ten pieces of counterfeit coins; the verdict found him guilty of having in his possession four pieces. It was contended that the verdict was in effect a verdict of not guilty, and

that the jury could not find the defendant guilty if he had a less number than ten pieces, for that was a distinct offence. But these objections were overruled by the court. Chief Justice Shaw, in delivering the opinion, said: "Although the general rule is that every material averment must be proved, yet it by no means follows that it is necessary to prove the offence charged to the whole extent laid. It is quite sufficient to prove so much of the charge as constitutes an offence punishable by law . . . The substance of the crime, in the case before us, is the possession of counterfeit coins, with the guilty knowledge and intent indicated; and this is a substantive offence whether the number of pieces be over or under ten." The party was therefore found guilty of the offence stated, though not to the extent laid in the indictment. *Com. v. Griffin*, 21 Pick. 523.

⁴ *U. S. v. Howard*, 3 Sumner, 12; *U. S. v. Brown*, 3 McLean, 233; *State v. Noble*, 15 Me. 476; *U. S. v. Jackson*, 30 Me. 29; *State v. Lashus*, 67 Me. 567; *State v. Canney*, 19 N. H. 135; *State v. Langley*, 34 N. H. 529; *Com. v. Atwood*, 11 Mass. 93; *Com.*

Thus, in an indictment for resisting a deputy-sheriff in the discharge of his duty, an averment that the sheriff was "legally appointed and duly qualified" is descriptive and must be proved; as in such case the whole averment of an assault upon a deputy sheriff cannot be omitted without affecting the charge against the prisoner.¹ And so also a description of the termini of a letter in an indictment for stealing it must be proved as laid.² So the misrecital of the names of persons connected with the offence may be fatal.³ On an indictment, also, for stealing a pine log marked with a particular mark, the mark must be proved as alleged, and the description cannot be rejected as surplusage,⁴ nor, on an indictment for cutting trees, can the specific description of the tree, though unnecessarily minute, be rejected.⁵ The same consequences follow from misreciting a public statute,⁶ and from unnecessarily but erroneously inserting the ownership of stolen goods.⁷

§ 147. Language merely formal may always be rejected. Thus, the words "then and there," in the concluding part of a charge against a person present abetting a murder, may be considered as surplusage, or referred to the act done, which caused the death, and not to the time and place of the death;⁸ and so of the words "languishing did live," in an indictment for

Otherwise
as to formal
language.

v. Tuck, 20 Pick. 356; *Com. v. Varney*, 10 Cush. 402; *Com. v. Livermore*, 4 Gray, 18; *Com. v. Dejardin*, 126 Mass. 46; *People v. Jones*, 5 Lansing, 340; *State v. Johnston*, 6 Jones (N. C.) 485; *Morgan v. State*, 61 Ind. 447; *Sweat v. State*, 4 Tex. Ap. 617. *Supra*, § 109. And as to descriptions of property see *supra*, §§ 121 *et seq.*

Under the Ohio statute, where an indictment charged the defendant with stealing a *silver* teapot, and other named articles of *silver* ware, and the evidence on the trial showed that the articles stolen were *plated* ware, consisting of only one twenty-fifth part silver, and there was no finding of the court or evidence showing that the variance was material to the merits of the case, or prejudicial to the defendant, it was held that the variance was not fatal, and the defendant was pro-

perly convicted, there being a good legal description of the articles stolen after the false word "silver" is rejected. *Goodale v. State*, 22 Oh. St. 203. And see *Campbell v. State*, 35 Oh. St. 70.

¹ *State v. Copp*, 15 N. H. 213.

² *U. S. v. Foye*, 1 Curtis C. C. 364.

³ *State v. Weeks*, 30 Me. 182; *State v. Johnston*, 6 Jones (N. C.), 486. *Supra*, § 94.

⁴ *State v. Noble*, 15 Me. 476.

⁵ *Com. v. Butcher*, 4 Grat. 544.

⁶ *Com. Dig. Pl. C. 29*; *Gray v. State*, 11 Tex. App. 411.

⁷ *R. v. Woodford*, 1 M. & Rob. 384 (*Patterson, J.*); *Com. v. King*, 9 Cush. 284. See *supra*, §§ 12, 140.

⁸ *State v. Fley*, Rice's Dig. 104; 2 Brev. 338; *Com. v. Sargent*, 129 Mass. 115.

murder.¹ The words "*contra formam statuti*," erroneously inserted in an indictment for a common law offence, may be rejected as surplusage.² And the words "goods and chattels," when unnecessary, may be thus discharged.³

§ 148. The word "feloniously" cannot, at common law, be discharged as surplusage, so as to sustain a conviction for a misdemeanor on an indictment for a felony.⁴ But in some States this rule has been held to be no longer binding, the reasons for it having ceased;⁵ and in other States the change has been effected by statute.⁶

"Feloniously" may be so rejected.

X. INTENT.

§ 149. The question of intent is one of substantive law, and as such is discussed in another volume.⁷ In several relations, however, such questions may be presented when evidence to prove intent is offered, and when such evidence is objected to on the ground of variance. The first of these questions here to be noticed is that which arises when the intent offered to be proved, though not precisely that averred, is so far incidental to it, that a party attempting to consummate the act proved must be regarded as having contemplated as a possible result of his conduct the act the intent to commit which is alleged. Of this the most common

As to intent there is no variance if party charged contemplated result as a contingency.

¹ *Com. v. Gable*, 7 S. & R. 423; *Penn v. Bell*, Addis. 171, 173.

² *State v. Buckman*, 8 N. H. 203; *State v. Gove*, 34 N. H. 510; *State v. Phelps*, 11 Vt. 116; *Com. v. Hoxey*, 16 Mass. 385; *Southworth v. State*, 5 Conn. 325; *Cruiser v. State*, 3 Harr. 206; *State v. White*, 15 S. C. 381; *State v. Sparks*, 78 Ind. 166; *People v. Buchanan*, 1 Idaho, N. S. 681. See *Cox v. State*, 8 Tex. App. 254; *Calvert v. State*, id. 538.

³ *R. v. Morris*, 1 Leach C. C. 109; *Com. v. Eastman*, 2 Gray, 76; S. C., 4 Gray, 416.

⁴ *R. v. Cross*, 1 Ld. Raym. 711; 3 Salk. 193; 2 Hawk. c. 47, s. 6; *R. v. Woodhall*, 12 Cox C. C. 244; *R. v. Bird*, 2 Den. C. C. 94; *Com. v. New-*

ell, 7 Mass. 245; *State v. Kennedy*, 7 Blackf. 233; *Wright v. State*, 5 Ind. 290, 527; *Black v. State*, 2 Md. 376; *Barber v. State*, S. C. Md. 1879; *State v. Durham*, 72 N. C. 447; *State v. Flint*, 33 La. An. 1288.

⁵ *State v. Wheeler*, 3 Vt. 334; *State v. Scott*, 24 Vt. 129; *People v. White*, 22 Wend. 175; *Lohman v. People*, 1 Comst. 379; *State v. Johnson*, 1 Vroom, 185; *Hunter v. Com.*, 79 Penn. St. 503; *State v. Hess*, 5 Ohio, 1; *State v. Gaffney*, Rice, 431; *State v. Eason*, 86 N. C. 674; *Cameron v. State*, 13 Ark. 712.

⁶ See Whart. Cr. Pl. & Pr. §§ 261, 742.

⁷ Whart. Crim. Law, 8th ed. §§ 106 *et seq.*

illustration is that of shooting into a crowd, or leaving an explosive compound in a public building. The miscreant who shoots at A. in a crowd knows that C. or D., standing near A., may be struck instead of A.; and hence, though it should be plain that the object was to shoot A., yet evidence of this intent will support an indictment for shooting B. in all cases where A. was in such a position that the assailant should have regarded the hitting of B. as a probable consequence of the act.¹ It is otherwise, however, when the intent is to shoot A., but when B. suddenly intervenes under circumstances which make it in the highest degree improbable that the assailant could have contemplated such shooting as even a possible contingency. In such case the better opinion is that the defendant should be indicted for the offence of negligently injuring the person actually injured, and for the malicious attempt to injure the person at whom the intent was aimed, but who was not hurt.² In the same line may be considered the vexed question whether an indictment for inflicting a specific intended injury to the person may be sustained by proof of wounding with intent to kill. This question first arose in a famous case in which the defendant was tried, under the Coventry Act (which made wounding with intent to disfigure a capital offence), for wounding C., "with intent to maim and disfigure him." The evidence was that the defendant's intent was to wound for the purpose of killing, which was then but a misdemeanor. The court held that the evidence supported the indictment;³ and this view is vindicated by Sir James Stephen in his History of Criminal Law, though it has been elsewhere stoutly contested.⁴ And the conviction may be sustained on the ground that wounding with intent to kill comprehends ordinarily wounding with intent to maim and disfigure; and that the inference in such a case increases in strength as the wound is inflicted in a way to make the disfiguring more and more probable. An assailant who brutally hacks, as was the case in the trial now before us, his victim, may naturally be supposed to have said to himself, "if I do not kill, I will at least maim or disfigure."⁵

¹ Ibid. § 120.

² See cases cited in Whart. Crim. Law, 8th ed. §§ 107, 120, 645 a; R. v. Hewlett, 1 F. & F. 91; Com. v. Morgan, 11 Bush, 601; Barons v. State, 49 Miss. 17; Morgan v. State, 13 Sm. &

M. 242; Lacefield v. State, 34 Ark. 275.

³ R. v. Woodburne, 16 St. Tr. 54.

⁴ London Spectator, June 9, 1883, p. 739.

⁵ As to divisible intents see *supra*, § 135.

§ 150. It is otherwise, however, when a specific intent is laid in the indictment, and the proof is of an independent intent, in no sense incidental to or comprehended in the intent laid. Thus, where a statute made it indictable to assault with intent to tear clothes, it was held a fatal variance, where the indictment averred such an assault, that the proof was exclusively of an assault with intent to kill.¹

Otherwise when specific intent is averred, and conflicting intent is proved.

That a man who assaults with intent to kill should say, "any how I will maim," would be natural enough; but it is not at all natural that an intent to tear the victim's clothes should have been latent in an intent to wound. Still more strong are the cases in which specific intents are required to constitute certain common law felonies; and when the intent proved, though sufficient to sustain the offence if properly pleaded, is of a character essentially distinct.² Thus it has been held that an allegation, in an indictment for burglary, of an intent to steal, will not be sustained by proof of an intent to have sexual intercourse.³ And the cases are numerous in which an averment of an intent to steal in larceny has been held not to be sustained by proof of taking in self-defence or on a claim of right.⁴ When, also, under an indictment for murder in the first degree to constitute which a specific intent to take life is necessary, the evidence shows only an intent to do bodily harm, the variance is fatal.⁵

¹ Williams's Case, 1 Leach, 529.

⁴ Whart. Cr. Law, 8th ed. §§ 884

² See R. v. Pembleton, L. R. 2 C. C. 149; Whart. Cr. Law, § 1070.

et seq.

³ Robinson v. State, 53 Md. 151; though see People v. Soto, 53 Cal. 415.

⁵ Whart. Crim. Law, 8th ed. §§ 377

et seq. As to variance in respect to intent in rape, see *infra*, § 734; Ware v. State, 67 Ga. 349.

CHAPTER IV.

PRIMARINESS AS TO DOCUMENTS.

I. GENERAL RULE.

Secondary evidence of documents is inadmissible, § 152.
 Record facts cannot be proved by parol, § 153.
 Otherwise as to incidents collateral to records, § 154.
 Of administrative records parol evidence is inadmissible, § 155.
 Parol evidence not admissible on cross-examination, § 156.
 Statutory designation of writings not necessarily exclusive, § 157.
 Primary means immediate, § 158.
 General test is immediateness, § 159.
 No primary testimony is rejected because of faintness, § 160.
 Written secondary evidence inadmissible, 161.
 Of telegrams original must be produced, § 162.

II. EXCEPTIONS TO RULE.

Rule does not apply where parol evidence is as primary as written, § 163.
 Public officers' commissions need not be produced, § 164.
 Nor charters of acting corporations, § 164 a.
 So where the party charged admits the contents of the document, § 165.
 Summaries of voluminous documents can be received, § 166.
 So of parol evidence of things fleeting and unproducible, § 167.
 So of documents which cannot be brought into court, § 168.
 Statute may require marriage to be proved by record, § 169.

By private international law marriage may be proved by parol, § 170.

In charges of penal marriage strict proof is required, § 171.

In such cases foreign marriage not proved by uncorroborated confession, § 172.

Witness present may prove marriage, § 173.

Foreign certificate must be duly proved, § 173 a.

III. DIFFERENT KIND OF COPIES.

Secondary evidence of documents admits of degrees, § 174.

Photographic copies are secondary, § 175.

All printed impressions are of same grade, § 176.

Press copies are secondary, § 177.

Examined copies must be compared, § 178.

Exemplifications made admissible by statute, § 179.

Statute does not exclude other proofs, § 181.

Only extends to court of record, § 182.

Statute must be strictly followed, § 183.

Office copy admitted when authorized by law, § 184.

Original records receivable in same court, § 185.

Office copies admissible in same State, § 186.

So of copies of records generally, § 187.

Seal of court essential to copy, § 188.

Of deeds, registry is admissible, § 189.

Ancient registries admissible without proof, § 190.

Certified copy of official registry receivable, § 191.

Exemplification of recorded deeds admissible, § 192.

In such case subscribing witness need not be called, § 193.

When deeds are recorded in other States exemplifications must be under acts of Congress, § 194.

Certificates inadmissible by common law; otherwise by statute, § 195.

Certificates cannot bind as to facts out of record, § 196.

Notaries' certificates admissible, § 197.

Copies of public documents receivable, § 198.

IV. SECONDARY EVIDENCE MAY BE RECEIVED WHEN PRIMARY IS UNPRODUCIBLE.

Lost or destroyed documents may be proved by parol, § 199.

So of papers out of power of party to produce, § 200.

Accidental destruction of paper does not forfeit this right, § 201.

Copies of copies inadmissible, § 202.

Abstracts and summaries when receivable, § 203.

So as to records, § 204.

Witness of lost document must be sufficiently acquainted with original, § 205.

Court must be satisfied that original is non-producible and would be evidence if produced, § 206.

Loss may be inferentially proven, § 207.

Or by admission of opponent, § 208.

Probable custodian must be inquired of, § 209.

Search in proper places must be proved, § 210.

Third person in whose hands is document must be subpoenaed to produce, § 211.

V. SO WHEN DOCUMENT IS IN HANDS OF OPPOSITE PARTY.

Notice to produce is necessary when document is in hands of opposite party, § 212.

After refusal secondary evidence can be given, § 213.

Notice must be timely, § 214.

Notice to produce does not make a paper evidence, § 215.

Notice not necessary for document on which prosecution is brought, § 216.

Nor of notice to produce, § 217.

Collateral facts as to instrument may be proved without notice, § 218.

I. GENERAL RULE.

§ 152. Of documents that can be brought into court, secondary evidence is, as a rule, inadmissible. In some instances this exclusion may be based on a statutory limitation. In others it may be sustained on the ground that when a party desirous of expressing himself determines to put his views in writing, then the writing must itself be produced if the object be to exhibit his views. In all cases, however, the exclusion of secondary evidence of a producible document may be based on the ground that when a document can be obtained at first hand, it is against the policy of the law that it should be proved at

Secondary
evidence
inadmis-
sible.

second hand, through agencies by which it is open to greater or less misrepresentation.¹

§ 153. That which could be proved by record, we have first to observe, cannot ordinarily be proved by parol.² Thus the filing of a paper must be proved by the certificate of the clerk;³ the discontinuance of an action must be proved by the record;⁴ a pardon must be proved by the warrant;⁵ a divorce must be proved by the decree.⁶ Parol evidence cannot, therefore, be received of a binding over for a crime;⁷ of conviction of a crime;⁸ of a bastardy order;⁹ of the desertion of a soldier, of which there is an official record;¹⁰ of the action of a town meeting, of which a record is required to be kept;¹¹

Record facts cannot be proved by parol.

¹ See Whart. on Ev. § 60, for authorities to this point.

As cases where the same principle is acknowledged in criminal prosecutions, see *R. v. Doran*, 1 Esp. 127; *R. v. Kitson*, 1 Dears. C. C. 187; *R. v. O'Connell*, Arm. & T. 103; *R. v. Coppull*, 2 East, 25; *Com. v. James*, 1 Pick. 375; *Com. v. McPike*, 3 Cush. 181; *Com. v. Knison*, 9 Mass. 312; *People v. Broughton*, 49 Mich. 339.

Hence, the contents of a letter, written by a prisoner, cannot be testified to by a witness for the prosecution, unless it is shown that the letter is lost or destroyed, or is in the possession of the prisoner. *Dean v. Com.*, 4 Grat. 541.

On an indictment for setting fire to a house with intent to defraud an insurance company, in order to prove that the house was insured the policy must be produced, as being the best evidence, and the insurance office cannot give any evidence from their books unless the absence of the policy is accounted for. *R. v. Doran*, 1 Esp. 127; *R. v. Kitson*, 1 Dears. C. C. 187; *S. C.*, 22 L. J. M. C. 118.

² See Whart. on Ev. § 63, for cases. For authorities in criminal suits see *R. v. Hube*, Peake, 132; *State v. Thompson*, 19 Iowa, 299; *State v. Lon-*

gineau, 6 La. An. 700; *State v. Smith*, 12 La. An. 349; *State v. Edwards*, 19 Mo. 674.

³ *Peterson v. Taylor*, 15 Ga. 483.

⁴ *Sheldon v. Frink*, 12 Pick. 568.

⁵ *Spalding v. Saxton*, 6 Watts, 338.

⁶ *Tice v. Reeves*, 30 N. J. L. 314.

⁷ *Smith v. Smith*, 43 N. H. 536.

⁸ *R. v. Dillon*, 14 Cox C. C. 4; *U. S. v. Biebusch*, 1 McCr. 42; *Clements v. Brooks*, 13 N. H. 92; *Com. v. Quin*, 5 Gray, 478; *Com. v. Gallagher*, 126 Mass. 54; *Newcomb v. Griswold*, 24 N. Y. 298; *Peck v. Griswold*, 24 N. Y. 298; *Peck v. Yorks*, 47 Barb. 131; *Farley v. State*, 57 Ind. 331; *Bartholomew v. People*, 104 Ill. 601; *Johnson v. State*, 48 Ga. 116; *People v. Reinhardt*, 39 Cal. 419; *State v. Rugan*, 68 Mo. 214; *Cooper v. State*, 7 Tex. Ap. 194; *infra*, § 489. See next section as qualifying this. And see *Long v. State*, 10 Tex. Ap. 186. That a witness may be asked whether he has not been in prison, see *infra*, § 474.

⁹ *Tyrrel v. Woodbridge*, 27 N. J. L. 416.

¹⁰ *Terrell v. Colebrook*, 35 Conn. 188; though see *Wilson v. McClure*, 50 Ill. 366. See Whart. on Ev. § 61.

¹¹ *Cameron v. School Dist.*, 42 Vt. 507.

of the time of the terms of a court;¹ of a bankrupt discharge;² of the institution of suits;³ or of the character of the pleadings and docket proceedings.⁴ So, on an indictment for disturbing a Protestant congregation, Lord Kenyon ruled that the taking of the oaths under the Toleration Act, being matter of record, could not be proved by parol evidence.⁵

§ 154. But incidents collateral to a record, when not of record, may be proved by parol.⁶ Thus parol evidence has been held admissible to prove that two records relate to the same cause of action,⁷ though in such cases the records must first be put in evidence;⁸ to prove that a judgment was put in evidence in a former suit;⁹ to prove the alteration of a record;¹⁰ to prove attendance on court as a witness;¹¹ to prove a *jurat* of town officers, in lack of record;¹² to prove that a certain entry was not recorded;¹³ to prove that a particular person had been in prison;¹⁴ to prove the attendance of juries and of judges as parts of a trial;¹⁵ and to prove that a bill before a grand jury was not ignored, but only continued.¹⁶

Incidents
collateral
to records
may be
proved by
parol.

¹ *Michener v. Lloyd*, 16 N. J. Eq. 38.

² *Regan v. Regan*, 72 N. C. 195.

³ *Sherman v. Smith*, 20 Ill. 350; *Hughes v. Christy*, 26 Tex. 230.

⁴ *Foster v. Trull*, 12 Johns. 456; *Harker v. Dement*, 9 Gill. 7; *Reilly v. Cavanagh*, 29 Ind. 435; *Milan v. Pemberton*, 12 Mo. 598; *Flynn v. Ins. Co.*, 17 La. An. 135; *Gliddon v. Goos*, 21 La. An. 682.

⁵ *R. v. Hube*, Peake, 132. In *R. v. Rowland*, 1 F. & F. 72, *Bramwell, B.*, held that on an indictment for perjury, in order to prove the proceedings of the county court, it was necessary to produce either the clerk's minutes, or a copy thereof bearing the seal of the court; the County Court Act (9 & 10 Vict. c. 95, s. 111) directing that such minutes should be kept, and that such minutes should be admissible.

⁶ *Whart. on Ev.* § 64.

⁷ See *R. v. Bird*, 2 Den. C. C. 94; 5 Cox C. C. 20; *Perkins v. Walker*, 19 Vt. 144; *Com. v. Dellane*, 11 Gray,

67; *Com. v. Sutherland*, 109 Mass.

342; *Porter v. State*, 17 Ind. 415;

State v. Maxwell, 51 Iowa, 314;

Duncan v. Com., 6 Dana, 295; *State v.*

Andrews, 27 Mo. 267; *State v. Scott*,

31 Mo. 121; *State v. Thornton*, 37 Mo.

360; *State v. DeWitt*, 2 Hill (S. C.),

292; *State v. Mathews*, 9 Porter, 370.

See fully *infra*, § 593, to the effect that parol evidence is admissible to identify or distinguish records.

⁸ *Webb v. Alexander*, 7 Wend. 281; *Inman v. Jenkins*, 3 Ohio, 271.

⁹ *Denny v. Moore*, 13 Ind. 418.

¹⁰ *Brier v. Woodbury*, 1 Pick. 362.

¹¹ *Baker v. Brill*, 15 Johns. 260; *Brown v. Com.*, 76 Penn. St. 319.

¹² *Hathaway v. Adison*, 48 Me. 440.

¹³ *Infra*, §§ 166, 616.

¹⁴ *Infra*, § 474; *Real v. People*, 42 N. Y. 270; S. C., 55 Barb. 186; *Rathbun v. Ross*, 46 Barb. 127; *Howser v. Com.*, 51 Penn. St. 332.

¹⁵ *Massey v. Westcott*, 40 Ill. 160.

¹⁶ *Knott v. Sargent*, 125 Mass. 95.

How far a record can be impeached will be considered in a following section.¹

§ 155. Wherever a statute requires that a record of administrative acts should be kept by law, the same rule is applied. Hence, parol evidence of a person's enlistment in the service of the United States is not admissible.²

Of administrative records parol evidence is inadmissible.

§ 156. Much interest has been felt on the question whether a witness, on cross-examination, can be examined as to the contents of a writing not yet in evidence and not placed in the witness's hands. In *Queen Caroline's Case*, in 1820, it was substantially held that such cross-examination is not admissible.³

Parol evidence of writings not admissible on cross-examination.

In this country the rule in *Queen Caroline's Case* has been so far recognized as to preclude the proving, on cross-examination, by parol, a written instrument.⁴ It has also been held that when a witness is cross-examined as to whether he wrote a letter containing certain statements, the writing must be first shown to the witness.⁵ Merely showing the letter to the witness is insufficient. He must have time to notice its contents.⁶

¹ *Infra*, § 596 a.

² *Atwood v. Winterport*, 60 Me. 250. See cases in Whart. on Ev. § 65.

³ *Best's Evidence*, § 473; 2 B. & B. 286; Whart. on Ev. § 68; and see a discussion of *Queen Caroline's Case*, in this relation, in *International Review* for September, 1877.

The answers of the judges in *Queen Caroline's Case* were condemned by the Common Law Commissioners of 1850, and at length reversed by the legislature. The 17 & 18 Vict. c. 125, s. 24, follows almost verbatim the recommendation of those commissioners.

⁴ *Speyer v. Stern*, 2 Sweeny, 516; *Newcomb v. Griswold*, 24 N. Y. 298; *Gaffney v. People*, 50 N. Y. 415, cited *infra*.

⁵ *Stephens v. People*, 19 N. Y. 549; *Stamper v. Griffin*, 12 Ga. 450; *Callanan v. Shaw*, 24 Iowa, 441; *Cavanah*

v. State, 56 Miss. 299. *Contra*, *Randolph v. Woodstock*, 35 Vt. 291.

⁶ *Morrison v. Myers*, 11 Iowa, 538.

"It is competent for a party on the trial to prove that a witness, on the part of his adversary, has made oral statements inconsistent with evidence upon a material question given by such witness on the trial, for the purpose of impeaching the credibility of a witness, and weakening the force of the evidence. But it is requisite that the party offering the impeaching evidence should first call the attention of the witness to the circumstances under which the statements were made, that he may have an opportunity of correcting the evidence given on the trial, or of explaining the apparent inconsistency between his evidence and his former statement. The reason of the rule applies as strongly to written as to oral

§ 157. It sometimes happens that a statute designates a certain kind of evidence as proof of certain facts, as in cases where a statute legitimates a particular kind of copy, or prescribes that having spirituous liquor on a counter in a public house shall be *prima facie* proof of selling. This designation, however, does not, unless it expressly so provides, exclude other proof of such facts.¹

Statutory designation of evidence not necessarily exclusive.

§ 158. "Primary," in the sense now before us, means that which the parties whose rights are to be determined set forth as the final expression of their views. Thus there may be several preliminary drafts of an agreement to be executed, but only the agreement as executed is primary.

"Primary" means "immediate."

And on an indictment for a libel in a newspaper, the original manuscript from which the paper is printed is secondary; and a written copy or reprint by third parties of the newspaper is secondary; the primary evidence, receivable as such, is the newspaper itself, as issued by the party whose liability is sought to be established.²

§ 159. The difficulties that have arisen in this connection are largely due to the ambiguity of the terms employed.

Mr. Bentham³ distinguishes the two classes as "original" and "unoriginal;" which Mr. Best, though following in most points Mr. Bentham, changes into "original" and "derivative." To this, however, it may be objected that there is no evidence that is not in some sense "original;" none that is not in some sense "derivative."⁴ The distinction may be more properly rested on the relationship of the document in controversy to the person to whom it is imputed. If it sprang directly from him, then it is primary so far as he personally is concerned. If it was meant by him as merely provisional, to be merged in a

The test is immediateness of impression.

statements made by the witness; and when his evidence is sought to be impeached by written statements, alleged to have been made by him, the writing should be first produced, so that he may have an opportunity for inspection and examination. And as the writing is the best evidence of the statement made by the witness therein, questions as to the contents are not ordinarily admissible. The Queen's

Case, 2 B. & B. 287; Newcomb v. Griswold, 24 N. Y. 298; Greenleaf on Evidence, § 463; 2 Phillips on Evidence, 982." Andrews, J., Gaffney v. People, 50 N. Y. 223.

¹ See Whart. on Ev. § 69, for cases.

² Brunswick v. Harmer, 14 Q. B. 185; R. v. Amphlit, 6 D. & R. 126; Bond v. Bank, 2 Ga. 92.

³ Rat. Jud. Ev. b. vi. c. iii.

⁴ See *supra*, §§ 5-11.

subsequent paper, then it is secondary to such subsequent paper. If it is only imputable to him penally (as in cases of libel or false affidavits) when put in a specific shape, then it is only primary when put in such shape.

§ 160. A series of forged notes may be issued, some peculiarly distinct, others faint. If the forger be put on his trial for the manufacturing of forged paper, the faint note is as much primary evidence as is the distinct. In other words, that which constitutes the test of secondariness

No primary evidence is rejected because of its faintness.

is, not inferiority as to distinctness, but removal, by the interposition of intelligent media, from the object to be proved. There may be several thousand sheets, to take another illustration, printed from the same type, and the last sheets printed may be blurred and confused; but on an indictment for a libel contained in the impression the last is as much an original as the first, and would be as admissible as the first; while a written copy made by an amanuensis from the first would be excluded, because secondary.¹ Hence comes the maxim, that secondariness goes not to conclusiveness but to grade.

• Secondary evidence is excluded not merely because it is inferior, but because it presupposes more direct and immediate evidence held back by the party offering.² We may extend these remarks to the relation between eye-witnesses with superior and those with inferior opportunities of observation. A mere stranger, for instance, is as admissible to testify to identity as is an intimate friend. So among witnesses standing on the same grade, one may be inferior to another as to trustworthiness, but this does not exclude him.³ The test is, "Do you testify at first hand?" If so, no matter how weak may be the impression on the mind of the person testifying, the testimony is receivable, so far as concerns the present test. Hence testimony of a mere bystander is primary evidence of a conversation he overhears, though not likely to be so accurate as that of a participant.⁴ The fact, also, that the alleged writer is not called as to the forgery of his signature, does not exclude other witnesses.⁵ An ordinary observer, also, will be permitted to testify as to blood-

¹ *Bond v. Bank*, 2 Ga. 92.

² *Infra*, § 360. Whart. on Ev. § 72.

³ *Infra*, §§ 360, 549, 550.

⁴ *Peeples v. Smith*, 8 Rich. 90.

⁵ *R. v. Hazy*, 2 C. & P. 458; *R. v.* §§ 705-707.

Hurley, 2 M. & Rob. 473; *Smith v.*

Prescott, 17 Me. 277; *Ainsworth v.*

Greenlee, 1 Hawks, 190; *McCaskle v.*

Amarine, 12 Ala. 17; Whart. on Ev.

stains, though experts were attainable who might have spoken more authoritatively;¹ and on the same reasoning a non-expert may be received to prove insanity, though an expert might have been secured for this purpose.² To keep back, however, an intelligent eye-witness, and bring forward one of weak capacity, is always ground for suspicion; and as to documents, where secondary evidence, likely to be of high accuracy, is suppressed by a party, the court may refuse to permit him to produce evidence of an inferior type until the superior be accounted for.³ Hence if a party has a fac-simile of a lost paper, he cannot prove such paper by calling a witness as to its contents.⁴ A letter-book, however, in which press copies are taken, is held to be so far a copy as to stand in the same relation to the original as do copies taken from itself. The letter-book, and copies taken from it, are equally secondary.⁵

§ 161. Hence copies of documents, under the limitations just expressed and elsewhere more fully noticed, are as inadmissible as are oral statements of their contents.⁶

Written
secondary
evidence
inadmissible.

§ 162. Of a telegram, so far as concerns the criminal responsibility of the sender, the original message is the primary evidence, and must be duly proved as such;⁷ and only on proof excusing its production can its contents be shown by parol.⁸ It has, however, been ruled that if the company is authorized by the sender to act for him (which is inferred from his sending a message over its lines), the message delivered is primary evidence as against the sender, in a suit by persons to whom such message is sent;⁹ but if the receiver is the employer, then the original message given by the sender to the operator must be produced.¹⁰ A telegraphic answer

Originals
of tele-
grams
must be
produced.

¹ *People v. Bell*, 49 Cal. 486.

² *Infra*, § 417.

³ *Whart. on Ev.* §§ 72, 90.

⁴ *Stevenson v. Hoy*, 43 Penn. St. 191.

⁵ *Whart. on Ev.* §§ 72, 93; citing *Goodrich v. Weston*, 102 Mass. 363.

⁶ *Whart. on Ev.* § 73.

⁷ *Lewis v. Havens*, 40 Conn. 363.

⁸ *Whart. on Ev.* § 76; *Scott & Jarn. on Tel.* § 340; *Howley v. Whipple*, 48

N. H. 488; *Durkee v. R. R.*, 29 Vt.

127; *Com. v. Jeffries*, 7 Allen, 548;

Lewis v. Havens, 40 Conn. 363; *Ben-*

ford v. Sanner, 40 Penn. St. 9; *West.*

Un. Tel. Co. v. Hopkins, 49 Ind. 223;

Matteson v. Noyes, 25 Ill. 591; *Wil-*

liams v. Brickell, 37 Miss. 682; *Richie*

v. Bass, 15 La. An. 668.

⁹ *Morgan v. People*, 59 Ill. 58. See

Howley v. Whipple, 48 N. H. 487.

¹⁰ *Durkee v. R. R.*, 29 Vt. 127.

to a letter may, with such letter, be used to prove a contract.¹ In such case, the telegram *as delivered* and acted on by the *receiver* becomes primary evidence of the contract.² When there have been no previous communications between the parties, a telegram sent for the purpose of settling a particular detail is evidence only against the sender as to the particular point.³ Proof that the message was sent over the wires addressed to a particular person at a particular place, he being shown to be at the time resident at such a place, may present a *prima facie* case of the reception of such telegram by the sendee.⁴ But the sending of a telegram addressed to a person at a given place, and the receipt of an answer purporting to be from him in due course, is not admissible to prove that he was in the place at the time in question.⁵

II. EXCEPTIONS TO RULE.

§ 163. The first exception to be noticed is that which arises where parol evidence of a fact, of which there is a written memorandum, is from its nature as near to the thing testified to as is the writing.⁶ The date of A.'s birth, for instance, is registered by one of his parents; this is primary evidence. But the testimony of a relative cognizant of A.'s birth is also primary evidence of the fact.⁷ Marriage, as will hereafter be abundantly shown, may be proved by parol, though there be a written contract and a registry.⁸ Proof, again, of what is done at a legislative or corporate meeting is not excluded by the fact that the meeting kept minutes which may be evidence.⁹ The fact, also, that trains on a railroad are due at a certain point on a certain time may be proved by parol as well as by the time table.¹⁰

¹ Taylor v. Campbell, 20 Mo. 254; Whart. on Ev. § 618.

² Dunning v. Roberts, 35 Barb. 463; Trevor v. Wood, 36 N. Y. 307.

³ Beach v. R. R., 37 N. Y. 457.

⁴ Com. v. Jeffries, 7 Allen, 548. See Whart. on Ev. §§ 1323-8-9.

⁵ Howley v. Whipple, 48 N. H. 487.

⁶ Whart. on Ev. § 77.

⁷ Evans v. Morgan, 2 C. & J. 453; R. v. Manwaring, Dears. & B. 132;

Morris v. Miller, 4 Bur. 2057; Sussex Peerage, 11 Cl. & F. 85; Com. v. Norcross, 9 Mass. 492; Carskadden v. Poorman, 10 Watts, 82; Beeler v. Young, 3 Bibb, 520.

⁸ *Infra*, §§ 169, 170. See Limerick v. Limerick, 4 Sw. & Tr. 252.

⁹ Miles v. Bough, 3 Q. B. 848; Inglis v. R. R., 1 Macqueen, S. C. 112.

¹⁰ Chicago R. R. v. George, 19 Ill. 510. In suits for trover, for the conversion

It has also been held that the inscription on a trunk tag can be proved without producing the tag;¹ that a highway can be proved to be such without producing the deeds or record establishing it;² that the nature of clothes can be proved without producing the clothes;³ that the fact that a witness has been in prison can be proved without producing the record of conviction.⁴ Parol evidence is also admissible of a license hanging on a wall, such license being put in evidence as a matter of description, for the purpose of identifying the building.⁵ The reason for these exceptions is, that when a document exists, not for the purpose of supplying specific words for limiting a thing, but for the purpose of giving a generic designation which can be equally proved by parol, then the parol proof is equally primary with the document.

§ 164. Proof that an individual has acted notoriously as a public officer is *prima facie* evidence of his official character, without producing his commission or appointment.⁶ It may also be proved by parol (there being nothing in the certificate to such effect) that a person taking an acknowledgment was a justice of the peace, or other proper officer;⁷ and

Authority
of public
officer may
be proved
by parol.

of a document, the document may be generally proved by parol description. *Jolley v. Taylor*, 1 Camp. 143; *Scott v. Jones*, 4 Taunt. 865.

¹ *Com. v. Morrell*, 99 Mass. 542.

² *Woburn v. Henshaw*, 101 Mass. 193.

³ *Com. v. Pope*, 103 Mass. 440.

⁴ See *infra*, § 474; *supra*, § 154.

⁵ *Com. v. Brown*, 124 Mass. 318; citing *Com. v. Powers*, 116 Mass. 337.

It was proved, in a homicide case, that scrip of a particular issue, not then in circulation, was found the day after the murder in the house of the deceased, and that the defendant the same day passed similar scrip. The witness who found the scrip was asked to describe it. This was objected to, on the ground that the scrip should be produced. The prosecution stated that the scrip would be produced. It was held that the witness was rightly

allowed to describe it for the purpose of identifying the scrip when produced. *Com. v. Sturtivant*, 117 Mass. 122.

⁶ See *infra*, § 832; *Berryman v. Wise*, 4 T. R. 366; *Doe v. Brawn*, 5 B. & A. 243; *McGahey v. Alston*, 2 M. & W. 206; *R. v. Roberts*, 38 L. T. (N. S.) 690; 14 Cox C. C. 106; *R. v. Gordon*, 2 Leach, 581, 585, 586; *R. v. Shelley*, 2 Leach, 381; *U. S. v. Reyburn*, 6 Peters, 352, 367; *Jacob v. U. S.*, 1 Brock. 520; *Milnor v. Tillotson*, 7 Peters, 100, 101; *Bank of U. S. v. Dandridge*, 12 Wheat. 70; *Cabot v. Given*, 45 Me. 144; *State v. Robert*, 52 N. H. 492; *Webber v. Davis*, 5 Allen, 393. See *State v. Livingston*, 1 Houst. C. C. 71; and see *Whart. Crim. Law*, 8th ed. §§ 1589, 1617, 1671.

⁷ *R. v. Howard*, 1 M. & R. 187; *Rhoades v. Selin*, 4 Wash. 715; *Shultz v. Moore*, 1 McLean, 520; *State v. McNally*, 34 Me. 210.

that certain persons were partners, without producing the articles.¹ So, as is elsewhere shown more fully, the fact of agency may be proved *prima facie* by recognition of the principal.² But secondary proof of the contents of a letter of appointment cannot be received in evidence to establish the agency of a government agent, without first accounting for the non-production of the original.³

§ 164 a. The same rule has been extended to corporations, it being held unnecessary to prove the charter of a corporation acting and recognized generally as such.⁴ Whether the court will take judicial notice of a charter is elsewhere considered.⁵

§ 165. A party, also, who admits a document to have certain contents, may relieve the opposite party from producing such document.⁶ And a defendant, who on cross-examination admits that he possessed or passed certain papers, may make it unnecessary for the prosecution to put these papers in evidence.⁷ This is also the case with his answers as to prior imprisonments.⁸

§ 166. Of public documents, which public policy requires to be kept without removal in their archives, sworn abstracts, or summaries, as well as extracts, may be received.⁹ This liberty, however, is not allowed as to bank books, which must at common law be produced in court or their absence accounted for,¹⁰ nor as to the books of a railroad company.¹¹ Nor can the certificate of an officer having charge of public records, that a certain fact appears by the records, be received, as the records themselves must be proved or exemplified;¹² though an officer may be called to prove that a certain entry is not

¹ Alderson v. Clay, 1 Stark. 405.

² *Infra*, § 833.

³ U. S. v. Boyd, 5 How. 29.

⁴ *Supra*, § 102 a; *infra*, § 254; Calkins v. State, 18 Oh. St. 236; State v. Balt. and O. R. R., 15 W. Va. 363; State v. Thompson, 23 Kan. 338; Whart. Cr. Pl. & Pr. § 111.

⁵ Whart. on Ev. §§ 292-3. See Johnson v. State, 65 Ind. 204.

⁶ *Infra*, § 684.

⁷ *Infra*, §§ 430, 474.

⁸ *Infra*, § 474.

⁹ Whart. on Ev. § 80; Roberts v. Doxon, 2 Peak's Cas. 83; Meyer v. Sefton, 2 Stark. 276; Burton v. Driggs, 20 Wall. 133; Henderson v. Hackney, 16 Ga. 521. See Johnson v. Kershaw, 1 De G. & Sm. 264, ruling that to admissibility of the abstract it is necessary that the books should be ready to be produced if required.

¹⁰ Ritchie v. Kinney, 46 Mo. 298.

¹¹ McCombs v. R. R., 67 N. C. 193.

¹² Wayland v. Ware, 109 Mass. 248. See Weidman v. Kohr, 4 S. & R. 174.

in the docket.¹ And where a mass of private documents to be inquired into is so great that they cannot possibly be mastered in court, then, whenever a result can be ascertained by calculation, the result of such calculation, subject to be tested by other expert witnesses, is admissible.²

§ 167. Secondary evidence may also be given of documents so evanescent and transient that the incapacity of the party to produce them may be assumed without proof. Thus, without production, or explanation of non-production, witnesses have been permitted to give parol evidence of the inscriptions on banners exhibited at public meetings;³ of the writing, as we have seen, on a trunk tag, at least for purposes of identification;⁴ of a license hanging on a wall;⁵ of the marks on clothes and other articles of personal property;⁶ and of the marks on the heads of certain barrels, for the purpose of identifying them.⁷

§ 168. Unmovable structures, such as monuments or tombstones, with the inscriptions that are on them, may be proved either by photographs or by copies duly proved.⁸ In the same way proof may be made of marks on trees;⁹ of libels written on walls;¹⁰ of placards posted on walls.¹¹ It must appear, however, that the paper is so attached to the wall as to be irremovable.¹² And the courts have admitted duly certified copies of papers in a country which forbids the removal of the originals;¹³ and in such cases abstracts of voluminous but unobtainable foreign documents may be received.¹⁴

So may parol evidence of things fleeting and unproductive.

And so as to things which cannot be brought into court.

¹ *McGrath v. Seagrave*, 2 Allen, 448; *Com. v. Evans*, 101 Mass. 25. *Infra*, § 616.

² *Stephen's Ev.* p. 70, citing *Roberts v. Doxen*, Peake, 83; *Meyer v. Sefton*, 2 Stark. 276.

³ *R. v. Hunt*, 3 B. & Ald. 566; *Sheridan's Case*, 31 How. St. Tr. 679; *R. v. O'Connell*, Arm. & T. 235.

⁴ *Com. v. Morrell*, 99 Mass. 542.

⁵ *Supra*, § 163.

⁶ *Com. v. Pope*, 103 Mass. 440. See *Com. v. Hills*, 10 Cush. 530.

⁷ *U. S. v. Graff*, 14 Blatch. 381.

⁸ *Jones v. Tarleton*, 9 M. & W. 675;

R. v. Fursey, 6 C. & P. 84; *Doe v. Cole*, 6 C. & P. 360; *Haslam v. Cron*, 19 W. R. 969; *North Brookfield v. Warren*, 16 Gray, 171. See *Shrewsbury Peerage Case*, 7 H. L. C. 1, 16. *Infra*, § 454.

⁹ *Ibid.*

¹⁰ *Mortimer v. McCallen*, 6 M. & W. 67.

¹¹ *Bruce v. Nicolopulo*, 11 Ex. 133. See *Bartholomew v. Stephens*, 8 C. & P. 728; *Com. v. Brown*, 124 Mass. 318.

¹² *Jones v. Tarleton*, 9 M. & W. 675.

¹³ *Infra*, § 187; *Whart. on Ev.* § 83.

¹⁴ *Whart. on Ev.* § 81.

§ 169. In ordinary cases, on the principle *locus regit actum*, a marriage must be contracted with the formalities prescribed in the country of solemnization; and if these formalities are dispensed with, in a country where they are essential to the validity of the marriage, such marriage cannot extra-territorially be held valid.¹ When the *lex fori* makes the record the proper evidence, then the record must be produced.² Where, however, parties have lived together as man and wife in the United States, it will require very strong proof that their marriage was void for want of formality in the place of solemnization, to induce our courts, in a civil suit, to hold it invalid so as to render children illegitimate, or to stigmatize the union as adulterous.³ We may also hold that parties marrying in their domicile of origin, with the intention of settling in the United States, are subject to the law of their intended matrimonial domicile, and after they arrive in this country are to be regarded as man and wife, in cases where their marriage was solemnized in a way held sufficient in the place of such domicile.⁴ Nor, *a fortiori*, are we required to hold that marriages abroad of domiciled citizens of the United States are void unless solemnized with formalities requisite in the place of solemnization. It has indeed been argued with great ability by eminent jurists, that in such cases marriages void at the place of solemnization are void everywhere. This rule, as we have elsewhere seen, is open to serious doubt.⁵ Admitting it, however, does not invalidate marriages of domiciled Americans abroad when such marriages are not solemnized with the forms of the place of solemnization, since French and German courts of high authority have held that domiciled subjects of other States are to be governed, as to the capacity and forms of matrimony, by their own law. It is also to be remembered that in any view the *judex fori* will presume, until the contrary be proved, that a marriage abroad was in conformity with the *lex loci contractus*.⁶

¹ See Whart. Conf. of L. §§ 127 *et seq.*; Holmes v. Holmes, 1 Abb. U. S. 526. Compare *infra*, §§ 530-3.

² *Infra*, § 533; State v. Horn, 43 Vt. 20. See State v. Wallace, 9 N. H. 515; Jackson v. People, 2 Scam. 232; Glenn v. Glenn, 47 Ala. 204.

³ See Whart. Conf. of L. §§ 173 *et seq.*

⁴ See on this point the judicious remarks of Cooley, J., in Hutchins v. Kimmell, 31 Mich. 133. As adopting the views of the text see London Law Mag. 1878, 236; Revue General du droit, Sept. and Oct. 1877.

⁵ Whart. Conf. of L. § 171.

⁶ *Infra*, § 827; R. v. Newton, 2 M. &

§ 170. It may happen that the *lex loci contractus* may prescribe that no marriage shall be valid unless solemnized and recorded in a particular way, and it may happen, also, that the *lex fori* may prescribe that in this respect the provisions of the *lex loci contractus* must be shown to have been satisfied, to prove a marriage. Except in such cases, which are not likely to occur, marriage may be proved by parol; and this is a rule of international law.¹ This parol proof may be resolved into several ingredients. It may consist of the testimony of witnesses present at the ceremony.² It may consist of proof of cohabitation and admission;³ and, as has been elsewhere shown, cohabitation is an admission by acts. It does not follow, however, because parties cohabit as man and wife that they are actually married. It may be that the pretence that they are man and wife is a fraud, got up to cover an adulterous intercourse. It may be that the parties honestly believe that they have been legally married, but that such belief is founded on a mistake. It may be that the cohabitation was in a community in which the term marriage is applied loosely to sexual relations not strictly marital.⁴ As to reputation, also, when adduced to prove marriage, similar cautions may be suggested. Did the reputation take shape in a community jealous of marriage sanctity, and likely to repel any attempt to invade that sanctity? If so, reputation in such a community is of value, as showing that in the belief of the neighbors of the parties they were actually married.⁵ Still stronger does this proof become when it goes to show that the parties fitted into a compact and extended family system, in which the family relationships of the several members of a large group were reciprocally ac-

By private international law marriages may be proved by parol.

Rob. 505; Com. v. Holt, 121 Mass. 61; 75 Ill. 315; Brewer v. State, 59 Ind. Com. v. Jackson, 11 Bush, 679; Arnold 101; Murphy v. State, 50 Ga. 150; v. State, 53 Ga. 594; Brown v. State, 52 Dickerson v. Brown, 49 Miss. 357; Ala. 338. Campbell v. Gullatt, 43 Ala. 57; Williams v. State, 54 Ala. 131. See Omohundro's Est., 66 Penn. St. 113; People v. Broughton, 49 Mich. 339.

¹ Whart. Conf. of L. § 171; Whart. Crim. Law, 8th ed. § 1700 *et seq.*; Com. v. Holt, 121 Mass. 61; Van Tuyl v. Van Tuyl, 8 Abb. (N. Y.) Pr. N. S. 5; S. C., 53 Barb. 235; Bissell v. Bissell, 55 Barb. 325; Physick's Estate, 2 Brewst. 179; Guardians of the Poor v. Nathans, 2 Brewst. 149; Richard v. Brehm, 73 Penn. St. 140; Ill. Land Co. v. Bonner,

² *Infra*, § 173.

³ Whart. Crim. Law, 8th ed. § 1700.

⁴ Presumptions from cohabitation are hereafter distinctively discussed, *infra*, § 827.

⁵ See *infra*, § 246.

knownledge as legitimate. In criminal issues, however, the latter form of proof is usually admissible only for collateral purposes, the marriage being proved by record or by eye-witnesses. But it is easy to conceive of cases in which the fact of marriage may be adequately proved by reputation, and by marital cohabitation, with the admission it necessarily involves.¹

¹ See *Evans v. Morgan*, 2 C. & J. 453. For a special consideration of the topic in the text in connection with bigamy, the reader is referred to Whart. Crim. Law, 8th ed. §§ 1696 *et seq.*

In its international relations, the law of the solemnization of marriage may be thus stated:—

1. When a marriage by competent parties is proved to have been solemnized abroad, the presumption is that it was in accordance with the *lex loci contractus*.

2. The old common law of England, adopting in this respect the canon law, validates consensual marriages contracted by competent parties, irrespective of ecclesiastical benediction; and this law was brought to the United States by the English colonists, and became part of the common law of the English settled States.

3. Each sovereignty will maintain its distinctive policy as to marriage. France, for instance, as in *Jerome Bonaparte's* case, may decline to accept an American marriage as changing the *status* of one of her domiciled subjects. On the other hand, in the United States, we would hold such marriage binding, when validly solemnized within our borders, by parties whom we regard competent. This is now settled in England to be the case when it is only by the law of the domicile of one of them that the marriage is invalid. But on reason and on authority, we must hold with Sir J. Hannen (*Sottomayer v. De Barros*, 41 L. T. 281), that even though by the

court of the domicile of both parties the marriage is invalid, it would still be sustained by the courts of the State where the marriage is solemnized, where, by the laws of that State, the parties would have been capable of marriage if subjects.

Each sovereignty applying its distinctive policy, as has been said, to its subjects, the courts of domicile, should the parties return to it after contracting a marriage abroad, would hold the marriage invalid in all cases in which its own prohibition is based on national policy, or on national conception of morals, and not on matters of form. We may illustrate this by the English rulings as to the marriage of a man with his sister-in-law, and by our own rulings in cases of marriages of negroes with whites. In some States these marriages are void. There can be no question that domiciled citizens of States marrying in defiance of this prohibition in England would be regarded in England as validly married. There is no doubt that should they return, after the marriage, to their domicile, the courts of that domicile would hold the marriage invalid.

Nor does it follow that because a State requires certain conditions to validate marriages within its borders, the marriage of foreigners, within such borders, without complying with such conditions, would be held invalid by the courts of the domicile of the parties so marrying.

Undoubtedly this position has been disputed by high authority; but for it

§ 171. An important distinction, however, is to be noticed between suits in which the legitimacy of children or the sanctity of the domestic relation is at issue, and those in which the effort is to impose on the defendant penalties attachable to an illegal marriage. In the first case we have in favor of the marriage the presumption of legitimacy,¹ as well as those of good faith,² and of regularity.³ In the second case we have against the marriage the presumption of innocence, as the marriage must be proved beyond reasonable doubt.⁴ We cannot, therefore, hold the decisions in the last class of cases

In cases charging a penal marriage stricter proof is required.

the following reasons may be given : *First.* In marriage, as has been said, each sovereignty is governed, as to matters involving state policy or morals, by its distinctive standards. *Secondly.* We have American rulings to this effect, holding that American citizens, marrying abroad, though without complying with requisites established by the law of the place of solemnization, will be regarded as lawfully married by the courts of their domicile if such marriage would have been valid if solemnized at such domicile. The examination of the recent rulings to this effect I must remand to the second edition of my book on Conflict of Laws. *Thirdly.* German and French courts, as has been stated in the text, have held that in such cases the *lex domicilii* is to control, and that if the marriage of Americans in Paris, for instance, is in conformity with the law of their domicile, though not in conformity with the law of France, it would be held good in France. If good in France, it would be regarded, even by those who insist upon the ubiquity of the *lex loci contractus*, as good in the United States. For authorities on these points, see Whart. Crim. Law, 8th ed. §§ 1698 *et seq.* In Massachusetts and Maryland it has been held, in deviation from the canon and common law, that a marriage contracted merely *per*

verba de praesenti is not valid without the ceremony prescribed by statute. *Com. v. Munson*, 127 Mass. 460 ; *Denison v. Denison*, 35 Md. 361. See, however, for a more liberal view, *Barnum v. Barnum*, 42 Md. 251. See, also, *Holmes v. Holmes*, 1 Abb. U. S. 525 ; *State v. Grisham*, 2 Yerg. 589.

The right to prove marriages by parol is not affected by the statutes permitting parties to be called as witnesses. *Rockwell v. Tunnicliff*, 62 Barb. 408.

That the declarations of an ancestor can be received to establish marriage we will elsewhere see. *Infra*, § 233 ; Whart. on Ev. § 203.

That reputation without cohabitation cannot prove marriage see *Westfield v. Warren*, 3 Halst. 349 ; *Minor v. State*, 58 Ill. 59 ; *Wood v. State*, 62 Ga. 406. That this is eminently the case with the marriage of "freedmen," see *Steward v. State*, 7 Tex. Ap. 326. That when the first marriage was with a person under the age of consent, the prosecution must prove subsequent acquiescence, see *People v. Bennett*, 39 Mich. 208 ; *Buchanan v. State*, 58 Ala. 154. *Infra*, § 246.

¹ *Infra*, § 828.

² *Infra*, § 727.

³ *Infra*, § 829.

⁴ See *Squire v. State*, 46 Ind. 459 ; *Com. v. Jackson*, 11 Bush, 679.

binding on the former. In this country the distinction is of peculiar interest. An emigrant lands on our shores with a wife whom he has married without the observance of those restrictions which the distinctive social condition of several European States has imposed. He rears children whom he acknowledges, and who claim after his death to inherit his estate. Here, the validity of the marriage being in litigation, come in two important presumptions to sustain the legitimacy of the children. The first is that all acts are presumed to be regular until the contrary appears. The second is that when the evidence is equally balanced, the courts, in all questions of legitimacy, will favor the hypothesis of matrimony.¹ A

¹ See *Patterson v. Gaines*, 4 How. U. S. 550; *Shaffer v. State*, 20 Ohio, 3. *Infra*, §§ 810, 828.

In *R. v. Willshire* (1881), 6 Q. B. D. 366, 810; 44 L. T. N. S. 222, the evidence was that the defendant in 1864 married wife No. 1; in 1868 he was indicted and convicted for marrying No. 2, his wife No. 1 being then alive; in 1879 he married No. 3, and in 1880 he married No. 4. He was indicted for marrying No. 4 in 1880, his wife No. 3 being alleged to be then alive; and upon the trial he proved by a witness and the production of the record that in 1868 his wife No. 1 was then alive. The judge at the trial ruled that this was no evidence that No. 1 was alive in 1879, when the defendant married No. 3 and that he was bound to show that she was alive in 1879 to entitle him to an acquittal. It was further ruled that the question was one for the jury whether No. 1 was alive or dead in 1879, at the time of the last marriage; and that the conflicting presumptions of the continuance of the life of No. 1 after 1868, there being no evidence to the contrary, and of the prisoner being innocent and free to contract the marriage in 1879, were evidence for the jury to consider in determining the question.

"I am of opinion," said Lord Cole-

ridge, C. J., "that this conviction cannot be sustained. The facts are short, and it appears that there was an undoubtedly valid marriage contracted by the prisoner in 1864, and there was some evidence given at the trial that that wife was alive in 1868. I carefully abstain from saying that she was proved to be alive in 1868, but there was some evidence of the presumption that she was alive in 1868. Then, in 1879, the prisoner contracted a marriage *in facie ecclesie*, and it is said that it is to be presumed that that was a valid marriage. Now the prisoner is indicted in respect of his marriage in 1880, and the marriage in 1879 is relied upon to show that the marriage in 1880 was illegal. Upon the trial of the indictment, the prisoner showed a valid marriage in 1864, and gave some evidence of the presumption that the woman he then married was alive in 1868, thus setting up a life in 1868 which, in the absence of any evidence to the contrary, must be presumed to be continuing in 1879, no evidence of any kind being given, but it being shown simply that the woman was alive in 1868. It is said that the fact of the marriage in 1879 shows either that the prisoner must have stated that he was an unmarried man and free to marry then, or that the presumption that the prisoner was then

different line of presumptions, however, applies when an emigrant comes to this country without a wife, marries here, establishes a home and family, and then is arrested here on the charge of bigamy, based on an alleged prior marriage in his native land. If, in such case, he should be charged with bigamy in contracting the second marriage, the prosecution, instead of being aided by presumptions which in a doubtful case would turn the scales in its favor, has to encounter presumptions which in a doubtful case will turn the scales against it. The defendant's second marriage is not contested, and is looked on with peculiar favor by the judicial polity of a country such as this, which seeks to encourage family growth.¹ But, what is more important, the fact of the first marriage is the gist of the prosecution's case, and to it applies eminently the maxim, that the charge of guilt, to justify a conviction, must be made out beyond reasonable doubt. Hence we find courts which are ready, when a marriage is to be adjudicated on its civil relations, to regard the husband's own admissions as proof of the fact, shrinking from this conclusion when the object is to sustain a criminal prosecution against him for bigamy. Confessions are only authoritative, it is

innocent of any crime was sufficient to rebut the presumption of the continuance of the life of the woman he married in 1864. I agree that this conflict of presumptions was sufficient to raise a question of fact for the jury to determine whether that woman was alive in 1879, or whether the prisoner told a falsehood when he was married in 1879, but the learned common serjeant did not leave that question to the jury. He ruled that, besides showing the existence of the life in 1868, the prisoner was bound to prove that it continued till 1879. There is no such rule of law. The prisoner was not bound to do more than set up the life in 1868, which would be presumed to continue, and it was then for the prosecution to show by evidence that that presumption was rebutted. It was for the prosecution to determine the life; not for the prisoner to show its prolongation. I am, therefore, of opinion that

this ruling was wrong, and that the conviction cannot be sustained."

See *Hyde Park v. Canton*, 130 Mass. 505; *Squire v. State*, 46 Ind. 458; *People v. Feilen*, 58 Cal. 218; *Hull v. State*, 7 Tex. Ap. 593; *Whart. Crim. Law*, 8th ed. §§ 1682, 1708.

In *R. v. Curgerwen*, L. R. 1 C. C. 1, the evidence was that the prisoner and his wife had been separated for seven years before the second marriage, and this was held to throw on the prosecution the burden of proving that the defendant at the time of the second marriage knew of the first wife being alive. But when there is no proof of such separation or absence, or of facts from which death can be inferred, then the first wife is presumed to remain alive, and the defendant cannot set up belief in her death. *R. v. Jones*, 48 L. T. N. S. 768; 11 Q. B. D. 172.

¹ See *Whart. Conf. of L.* § 150.

well argued, when there is clear proof of the *corpus delicti*; and here the *corpus delicti* is the alleged first marriage.¹ How is this to be "clearly proved," independent of the defendant's confession? Now, in view of the issue being criminal, we can easily understand how a court should say, as some courts have said: "The *lex loci contractus* prescribes certain solemnities as necessary to constitute the formalities of marriage, and therefore, in view of the maxim, '*locus regit actum*,' we must hold that any other proof of the fact of marriage is but secondary, and is not to be received." Had the first wife been brought to this country, and here acknowledged, the case would have been different. But when the prosecution rests simply on a technical first marriage, it is not inconsistent in courts, who recognize the validity of a consensual marriage, to hold that such technical first marriage should, in a criminal issue, in order to be made out beyond reasonable doubt, be proved in the way the *lex loci contractus* prescribes, and that secondary evidence should only be received when the prescriptions of the *lex loci contractus* are peculiarly onerous, or when the primary evidence cannot be obtained.²

¹ *Infra*, § 633.

That confessions may be received as competent proof of marriage in those States in which record proof is not made requisite, see *R. v. Simmonsto*, 1 C. & K. 164; *Truman's Case*, 1 East P. C. 470; *R. v. Upton*, 1 C. & K. 55; *Cayford's Case*, 7 Greenl. 57; *State v. Hodgskins*, 19 Me. 155; *State v. Libbey*, 44 Me. 469; *Com. v. Holt*, 121 Mass. 61; *State v. Lash*, 1 Harr. (N. J.) 380; *Com. v. Murtagh*, 1 Ashm. 272; *Wolverton v. State*, 16 Ohio, 173; *Carmichael v. State*, 12 Oh. St. 553; *Jackson v. People*, 2 Scam. 231; *State v. Seals*, 16 Ind. 352; *Squire v. State*, 46 Ind. 459; *State v. Sanders*, 30 Iowa, 582; *Warner's Case*, 2 Va. Cas. 95; *O'Neale v. Com.*, 11 Grat. 582; *State v. Hilton*, 3 Rich. 424; *State v. Britton*, 4 McCord, 256; *Cook v. State*, 11 Ga. 53; *Cameron v. State*, 14 Ala. 546; *Langtry v. State*, 30 Ala. 536; *Williams v. State*, 54 Ala. 131; *Robinson*

v. Com., 6 Bush, 309; *Com. v. Jackson*, 11 Bush, 679; *Gorman v. State*, 23 Tex. 640.

But where the confession is without proof of cohabitation and reputation, it will not sustain a conviction. *Dove v. State*, 3 Heisk. 760; *Weinberg v. State*, 25 Wis. 370; *R. v. Savage*, 13 Cox C. C. 178; overruling *R. v. Newton*, 2 M. & R. 503.

In *Miles v. U. S.*, 103 U. S. 304, it was held that the defendant's admissions were evidence to prove a prior Mormon marriage. But in this case there was evidence to show cohabitation and reputation. In Maryland it has been held that mere reputation and cohabitation cannot establish a marriage in the face of the proof of a duly solemnized marriage to another person. *Jones v. Jones*, 48 Md. 391. See, however, *Miles v. U. S.*, 103 U. S. 304.

² Whart. on Ev. § 85; *R. v. Savage*, 13 Cox C. C. 178.

§ 172. Confessions of marriage, it should be remembered, are of two kinds: (1) Those incidental to cohabitation; and (2) Those not so incidental. As to the latter (*e. g.*, when a man cohabiting with a woman to whom he has been married in due form admits that he was previously married to another woman still living), they should be regarded as insufficient to sustain a conviction without proof *aliunde* of the first marriage.¹ But to the first class of cases (those in which the admission is incidental to cohabitation) other considerations apply. Such admissions, in connection with cohabitation as man and wife, are abundant proof of marriage, with the limitations to be hereafter noticed.² It should also be noticed that if a man, after a consensual marriage in a country where consensual marriages are invalid, comes with his wife to a country where they are valid, and there lives with her as her husband, then this may be held a validation of the former invalid marriage. But if he leave her abroad, without such validation, then a court in our own land, should a prosecution be brought against him for bigamy, may well refuse to be satisfied by mere confessions, or even by proof of prior cohabitation. There must be proof in such case, to sustain the allegation of the indictment, of the solemnization of the first marriage.³ We may not insist upon proof that all the prescriptions of the *lex loci contractus* were complied with; for these

When the contested marriage is foreign, confession should be corroborated.

¹ As to scrutiny to be applied to confessions, see *infra*, § 623; *R. v. Flaherty*, 2 C. & K. 782; *Ham's Case*, 2 Fairf. 391; *Com. v. Littlejohn*, 15 Mass. 163; *State v. Roswell*, 6 Conn. 446; *People v. Humphrey*, 7 John. 314; *Clayton v. Wardell*, 4 Comst. 230; *Gahagan v. People*, 1 Parker C. R. 383; *State v. Armstrong*, 4 Minn. 335; *People v. McCormack*, 4 Parker C. R. 17; *Green v. State*, 59 Ala. 68.

In Massachusetts it is now provided by statute that circumstantial and presumptive evidence may be received to prove the fact of marriage. Suppl. Rev. Stat. 166-7, 184; *Com. v. Johnson*, 10 Allen, 196.

Where a slave was married before his emancipation, and subsequently

continued to live and cohabit with his wife, this amounts to a legal marriage, and a second marriage is bigamy. *McReynolds v. State*, 5 Cold. (Tenn.) 18. See Whart. Crim. Law, 8th ed. § 1686, and notes.

In *Kirk v. State*, 65 Ga. 159, it was held that cohabitation and reputation might prove a marriage in violation of an anti-miscegenation law.

² See *infra*, §§ 623 *et seq.*, 686, 827.

In *Com. v. Holt*, 121 Mass. 61, it was held that in prosecutions for adultery, confession and reputation might prove marriage.

³ But see *Com. v. Jackson*, 11 Bush, 679; *State v. Hilton*, 3 Rich. S. C. 434; *Williams v. State*, 54 Ala. 131; *Carotti v. State*, 42 Miss. 344.

are sometimes so contrary to our national policy, and so repugnant to the common law of Christendom, that there may be cases in which we may refuse to recognize them as limiting an international institution such as marriage really is. But while we may thus occasionally dispense with these formalities, we must, nevertheless, insist, when a foreign marriage is made the basis of a criminal prosecution in our own land, that such foreign marriage should be proved by showing that in such marriage there was a *bona fide* matrimonial contract by parties capable of contracting, followed by cohabitation.¹ To establish the contract, the foreign registry, sustained by proof of the foreign law, is the best evidence,² wherever such foreign law, requiring a registry, is put in evidence. If, however, there be no proof of such foreign law, then the presumption is that consensual marriages are valid by the *lex loci contractus*; and as has been seen, such marriages may be proved by parol, *e. g.*, by proof of admissions, of cohabitation,³ and of reputation, as well as by the testimony of witnesses present, as will be seen in the next section.⁴

Witness
present
may prove
marriage.

§ 173. The testimony of a witness, present at the marriage, is ordinarily admissible and adequate proof, unless the law requires official evidence.⁵ When the marriage

¹ *Infra*, § 530. See *State v. Horn*, 43 Vt. 20; *People v. Humphrey*, 7 Johns. 314; *Weinberg v. State*, 25 Wis. 370; *Bird v. Com.*, 21 Grat. 800. See, in a civil issue, *Harris v. Cooper*, 31 Up. Can. Q. B. 182.

² *Bird v. Com.*, 21 Grat. 800. The unwritten law of foreign countries may be proved by experts or in some jurisdictions by published reports of decisions. *Infra*, § 404; *State v. Moy Looke*, 7 Or. 54.

On a trial for bigamy the evidence on the part of the crown to establish the alleged bigamous marriage proved that the ceremony took place in an American State, that both the parties were British subjects professing the Roman Catholic religion, that the ceremony was performed by Roman Catholic priests in a Roman Catholic church

after publication of banns, and that the parties afterwards cohabited. No evidence was given of the law of the State in which the marriage was solemnized. This was held sufficient to support a conviction. *R. v. Griffin*, 14 Cox C. C. 308.

³ Whart. on Ev. § 86. *Infra*, § 686.

⁴ *Com. v. Holt*, 121 Mass. 61; *Redgrave v. Redgrave*, 38 Md. 93; *Squire v. State*, 46 Ind. 459; *Com. v. Jackson*, 11 Bush, 679; *Brown v. State*, 52 Ala. 338; *Arnold v. State*, 53 Ga. 594. As to this presumption see *infra*, §§ 827 *et seq.*

⁵ *R. v. Manwaring*, D. & B. C. C. 132; 7 Cox C. C. 192; *State v. Kean*, 10 N. H. 347; *State v. Clark*, 54 N. H. 446; *Com. v. Putnam*, 1 Pick. 136; *Warner v. Com.*, 2 Va. Cas. 95; *Wol-*

is extraterritorial, the officiating clergyman, according to American cases, may not only prove the marriage, but the foreign law under which it was solemnized.¹ But in England, unless a witness be an expert, he cannot prove in this respect the foreign law.² In domestic marriages, the fact that a justice of the peace or clergyman performed the ceremony is proof that he professed and was generally understood to have the authority so to do,³ and it will be presumed that the formal requisites of the ceremony were complied with.⁴ Whether the wife can be a witness is hereafter discussed.⁵

§ 173 a. When the prosecution relies on a foreign certificate of marriage, such certificate will not be received, unless, Foreign certificate must be duly proved. (1) The record be shown to have been kept in conformity with law; (2) The authority and identity of the registrar be established; (3) The certificate be authorized by and in conformity with the law of the place from which it emanates; and (4) The signature be duly proved.⁶

verton v. State, 16 Ohio, 176, and other cases cited Whart. Crim. Law, 8th ed. § 1701.

¹ *Bird v. Com.*, 21 Grat. 800; *Am. Life & Trust Co. v. Rosenagle*, 77 Penn. St. 507; *State v. Abbey*, 29 Vt. 60; *State v. Goodrich*, 14 W. Va. 851.

² *R. v. Povey*, 6 Cox C. C. 83; *S. P., R. v. Smith*, 14 Up. Can. Q. B. 565; but see Whart. Conf. of L. § 775, and *Sussex Peerage Case*, there cited; and see fully Whart. on Ev. § 300.

³ *Infra*, § 827; *Bird v. Com.*, 21 Grat. 800; *State v. Abbey*, 29 Vt. 60.

⁴ *Infra*, § 827.

⁵ See *infra*, §§ 380 et seq.

In *State v. Rowe*, 61 Me. 171, it was held that testimony of the *particeps criminis*, that she was "married two years ago by C. L. at his house," it not appearing that C. L. professed to be "a justice of the peace or an ordained or licensed minister of the gospel," or that the marriage was "consummated with a full belief on the part of either of the persons mar-

ried, that they were lawfully married," is not sufficient evidence of a marriage in an indictment for adultery.

⁶ *Infra*, § 530-3; *State v. Dooris*, 40 Conn. 145. See *State v. Wallace*, 9 N. H. 515; *State v. Horn*, 43 Vt. 20.

In *State v. Dooris*, *ut supra*, for the purpose of proving the first marriage in a prosecution for bigamy, the State offered in evidence a document purporting to be a copy of an entry in the "Marriage Register Book" in the office of the Superintendent Registrar of Births, Marriages, and Deaths for the district of M., in Ireland, that the prisoner was, on a day stated, married to the alleged first wife; the entry containing the signatures of the officiating priest, the parties, and two witnesses; and the copy being certified as such by T. W. in his official capacity as Superintendent Registrar for the district of M. It was ruled that the document was inadmissible: because (1) it did not appear that the keeping of such a book was required

III. DIFFERENT KINDS OF COPIES.

§ 174. Although the question is still regarded as open, the conclusion seems reasonable that a party who has in his power evidence of a higher degree throws much suspicion on his case if he withhold such higher evidence, and offer that which is not only lower, but necessarily inferior as a means of expressing truth, although such evidence may be technically of the same grade.¹ We may illustrate this principle by the circumstance that it has been held that if an exemplification of a lost record or deed be obtainable, a party will not be permitted to prove such deed or record by memory of witnesses.² Hence a party cannot prove a record by parol when he has an opportunity to obtain an exemplification.³ The principle is that where a particular kind of copy is by law especially directed and guarded, such a copy is to be regarded as so far primary as to exclude, so long as it can be produced, mere recollections by unofficial persons of what is registered in the copy.⁴ But unless a particular kind of copy, either by statute or common law, or by peculiar reasons of policy, is made primary, the fact that it is withheld, however much it may detract from the credit of a party,⁵ does not preclude him from offering other secondary evidence. The testimony, also, of a deceased witness can be proved either by notes of a short-hand writer sworn to by him, or by the recollection of a witness, or by an official reporter, if such be appointed by statute;⁶ and the validation of one of these modes of proof does not exclude the other. So it has been even argued that a party is not precluded from proving a lost document, by the fact that he has possession of a written copy of such document which could be verified.⁷

by law; nor (2) that T. W. was in fact the superintendent registrar; nor (3) that his signature was genuine, if he was such officer.

The original certificate of marriage by the officiating clergyman is not admissible unless the handwriting be proved, when such proof is attainable. *State v. Colby*, 51 Vt. 291.

A copy of the town record is inadmissible unless ample. *Ibid.*

¹ Whart. on Ev. § 90.

² *Ibid.*

³ *Ibid.* See *infra*, § 202.

⁴ See *R. v. Wylde*, 6 C. & P. 380.

⁵ Whart. on Ev. § 1266; and see *Shoenberger v. Hackman*, 37 Penn. St. 87.

⁶ *Infra*, § 231.

⁷ See Whart. on Ev. §§ 90, 177. *Infra*, §§ 227, 231.

§ 175. Wherever the original can be produced, a photograph copy is inadmissible; though when the original is non-producible, such copies are of high value.¹ And photographic copies are admissible for the purpose of distinguishing or identifying the original.²

Photo-graphic copies secondary evidence.

§ 176. When the object is to prove a manuscript (as distinguished from a printed publication), the original must be produced or accounted for.³ But the several printed copies produced by a single impression, and issued in a single edition, come in *pari passu*. If the published sheet (as in prosecutions for libel) be the object of proof, all impressions are admissible. If they be offered as secondary evidence of the original, they are primary as to each other.⁴

All printed impressions are of same grade.

§ 177. A press copy, also, is secondary to the original document from which it is taken,⁵ and is receivable on the loss of the original.⁶ Being only secondary, a copy can be produced from a press copy of a lost writing without producing the press copy.⁷ But though a press copy is thus secondary, it may be used as a means of determining the identity and genuineness of an instrument.⁸

Press copies secondary evidence.

§ 178. According to the English practice, an examined copy, to be admissible, must be verified by a witness, who will swear that he has compared the copy tendered with the original, either directly, or through a person employed to read the original.⁹ A copy made by a witness, though without comparison, is undoubtedly evidence of a high grade, if he testifies to its accuracy; the more cautious course is to add comparison by another's aid.¹⁰ The copy, to be admissible, must be

Examined copies must be compared.

¹ *Infra*, §§ 544-5, 805.

² *Infra*, §§ 415, 545, 805.

³ *R. v. Watson*, 32 How. St. Tr. 82. See *supra*, § 162.

⁴ *R. v. Ellicombe*, 5 C. & P. 522; *R. v. Kitson*, Pearce & D. 187; *R. v. Doran*, 1 Esp. 129. See, *supra*, §§ 159, 160.

⁵ Whart. on Ev. §§ 92, 133.

⁶ *Cameron v. Peck*, 37 Conn. 555.

⁷ *Goodrich v. Weston*, 102 Mass. 362. See *supra*, § 160.

⁸ *Com. v. Jeffries*, 7 Allen, 561.

⁹ See details of practice in Whart. on Ev. § 95.

¹⁰ "The general rule of the law upon this subject requires that a copy, in order to be admitted as secondary evidence, should be proved by some one who has compared it with the original. 1 Starkie on Ev. 270, 9th Amer. ed.; *Kerns v. Swope*, 2 Watts, 75." *Sharswood, J., McGinniss v. Sawyer*, 63 Penn. St. 267.

complete; and it will be excluded if it give abbreviations of that which in the original is given at length.¹

§ 179. The Act of Congress of May 24, 1790, provides that
 “the records and judicial proceedings of the courts of
 any State shall be proved or admitted in any other court
 within the United States, by the attestation of the clerk,
 together with a certificate of the judge, chief justice, or
 presiding magistrate, as the case may be, that the said
 attestation is in due form. And the said records and judicial pro-
 ceedings, authenticated as aforesaid, shall have such faith and credit
 given to them in every court within the United States, as they have
 by law or usage in the courts of the State from whence the said
 records are or shall be taken.”²

Exempli-
fications
made ad-
missible by
Federal
statute.

§ 180. Although by the terms of the original statute it is limited to State courts, it is extended, by the Act of March 27, 1804, to the “public acts, records, office books, judicial proceedings, courts, and officers of the respective territories of the United States, and countries subject to the jurisdiction of the United States,” and it has been held that while the statute is not formally applicable to the Federal courts, yet exemplifications of the records of such courts will be regarded as admissible when the prescriptions of the statute are followed.³

§ 181. The Federal statute, while making it obligatory on State courts, under the Federal Constitution, to accept exemplifications proved in accordance with its provisions, does not preclude a State from authorizing records of other States to be received in evidence on proof of less stringency, or on common law proof. The act does not say that records shall only be received upon such proof; it merely says that when verified by such proof they shall be received.⁴ A Federal court sitting in a particular State will accept the proof prescribed in such State of intraterritorial records.⁵ And it has been held that a State court may receive records of Federal courts upon an ordinary exemplification.⁶

Federal
statute
does not
exclude
other
proofs.

¹ R. v. Christian, C. & M. 388;
Com. v. Trout, 76 Penn. St. 379.

² See, as to rulings as to the character of exemplifications under this statute, Whart on Ev. § 824.

³ Whart on Ev. § 98.

⁴ Ibid.

⁵ Ibid.

⁶ Womack v. Dearman, 7 Porter, 513.

§ 182. Only courts of record are within the statute.¹ It does not, therefore, include the proceedings of municipal magistrates or justices of the peace who keep no records;² though it is otherwise when the justice of the peace holds a court of record, and is obliged by statute to keep a record of his proceedings;³ or when his proceedings are certified by him to the county court, and there verified under the statute.

Only extends to courts of record.

§ 183. It is essential that the clerk, who under the act is to attest the record, should be the chief clerk of the court or of its successor, to whom the care of its records, in case of its expiration, is committed. The certificate of an under clerk, or of a deputy or substitute, is inadequate.⁴

Statute must be strictly followed.

§ 184. An "office copy" of a record is a copy made by an officer duly authorized for the purpose either by rule of court or by statute. Such copy, when the officer is authorized only by rule of court, is admissible as evidence in the *same court* and in the *same cause*; and, at common law, the copy must be proved to be correct, if it be produced, either in another court, or even in the same court in another cause.⁵

Office copy admitted when authorized by law.

§ 185. When on a pending trial the records of the court trying the case are relevant, they may be omitted without further proof than is given by their production by the clerk from the proper archives.⁶ We have also authority to the effect that the original papers in an inferior court may be received in evidence in a superior court.⁷ But the genuineness of the paper must be proved as a condition precedent to its reception.⁸

Original records of court in which suit is pending are evidence in such court.

§ 186. A copy, certified to be correct by the clerk or proper officer of the court where the record is deposited, will usually be received in evidence as *prima facie* proof of the record in the State by which the court is constituted; nor is it necessary that the certificate of the

or proper officer of the court where the record is deposited, will usually be received in evidence as *prima facie* proof of the record in the State by which the court is constituted; nor is it necessary that the certificate of the

¹ See Brightly's Federal Digest, 265.

See, also, *Barron v. Daniel*, *Craw. & D.* 283.

² Whart. on Ev. § 99.

³ Ibid.

⁴ Whart. on Ev. § 106.

⁵ Whart. on Ev. § 100.

⁷ *State v. Bartlett*, 47 Me. 396; and other cases cited Whart. on Ev. § 106.

⁸ *Den v. Fulford*, 2 Burr. 1179; *Jack v. Kiernan*, 2 Jebb & Sy. 231.

⁹ *Perry v. May*, 1 Hill (S. C.), 76.

judge should be appended.¹ The same decision has been reached where the copy and the certificate are by the judge and not the clerk of the court.² But the certificate to the verity of the transcript must be explicit.³

§ 187. When the removal of the originals from their proper archives is refused, or is productive of great public inconvenience, there is a growing tendency, even at common law, to permit the records to be represented by exemplifications or by other authenticated copies.⁴ The document, however, must be of a character technically public.⁵

§ 188. In ordinary practice, the seal of a court of record is an essential to the attestation of the court of the accuracy of copies from its records.⁶ The seal proves itself.⁷ In Massachusetts, however, it has been held that it is sufficient for the clerk of the court to attest a copy without attaching the seal of the court.⁸ And in England, an ancient exemplification has been received without a seal.⁹

§ 189. Statutes authorizing the recording of deeds or other instruments ordinarily make the book in which the registry is made admissible as evidence. Where it is not made so admissible, then, in order to enable such book to be put in evidence, the usual foundation accounting for the non-production of the original must be laid.¹⁰

§ 190. Proof of execution is not exacted in cases of ancient deeds when accompanied with thirty years' possession; of ancient registries, and of ancient maps, establishing boundaries, so as to cure irregularity of authentication.¹¹

§ 191. Even at common law it has been the practice, in consequence of the inconvenience of bringing books of registry into court, to prove their contents by exem-

¹ State v. Bartlett, 47 Me. 396; and other cases cited in Whart. on Ev. § 107.

² Brackett v. Hoitt, 20 N. H. 257.

³ Lyon v. Bolling, 14 Ala. 753.

⁴ See Whart. on Ev. § 108.

⁵ See *infra*, § 198; *supra*, § 167.

⁶ Whart. on Ev. § 109.

⁷ Whart. on Ev. §§ 318-21, 695.

⁸ Chamberlain v. Ball, 15 Gray, 352.

⁹ Beverley v. Craven, 2 M. & Rob. 140.

¹⁰ Whart. on Ev. § 111.

¹¹ See Whart. on Ev. § 113. *Infra*, § 547.

plications or certified copies.¹ The originals, however, must be in some sense records.²

§ 192. Statutes authorizing the recording of deeds and other instruments usually provide that exemplifications of the instruments so recorded shall be admissible in evidence as *prima facie* proof of their contents. To make such copies evidence, however, the requisites of the statute prescribed for the recording and for exemplifications must be complied with.³

Exemplifications of recorded deeds admissible.

§ 193. Of deeds duly acknowledged and certified, copies may be read in evidence, irrespective of the mode of attestation, in all cases where the statute does not prescribe a particular mode of attestation. In such case there is no necessity of calling subscribing witnesses.⁴

Subscribing witnesses need not be called.

§ 194. Exemplifications from registries of other States must be authenticated (unless there be local legislation or adjudications prescribing less stringent tests) according to the act of Congress.⁵ When the act of Congress is substantially complied with, they may be received.⁶

Exemplifications of deeds in other States must be proved under act of Congress.

§ 195. By statutes existing in many jurisdictions, it is provided that the certificates of public officers shall, under certain conditions, be admissible to prove facts within the range of the officer's official duty. At common law, however, the certificate of a public officer, no matter how high and solemn his office, is inadmissible to prove any disputed fact. The officer, if living, must be produced to swear to the fact. If he be dead, his official entries, made in the discharge of his duties, may be evidence. If the object is to prove that a fact appears by record, the record itself must be exemplified or produced. His certificate, however, being of the nature of hearsay, and *ex parte*, is in itself inadmissible.⁷ If the certificate states simply a conclusion or an inference from a record, then the record itself, or an exemplified copy, is the proper proof.⁸ From the necessity of

Certificates of officers admissible when provided by statute.

¹ Whart. on Ev. §§ 108, 114, 127.

⁴ Ibid.

² Schaben v. U. S., 6 Ct. of Cl. 230.

⁵ Whart. on Ev. § 118.

See Steere v. Tenney, 50 N. H. 461;

⁶ Whart. on Ev. § 118.

Pennywit v. Kellogg, 1 Cincin. 17.

⁷ Whart. on Ev. § 120.

⁸ See Whart. on Ev. § 115.

⁸ Ibid.

the case, however, an officer may be admitted to prove that a certain entry is not to be found in a registry or record.¹

§ 196. A certificate of a public officer cannot cover facts out of the range of the officer's official cognizance; nor facts which are but a summary of writings on file in the archives of such officer; nor facts collateral to the record. The certificate cannot be by an informal letter or memorandum; it must be formally verified, under the officer's seal, and it must be made by the officer himself or his legal deputy.²

Certificate cannot bind as to facts out of record.

§ 197. In England the execution of a foreign or colonial deed cannot be proved by a notary's certificate.³ It is otherwise, however, by the law merchant, in respect to foreign negotiable paper; as to which the original protests or duly certified copies, when proved by the notarial seal, are *prima facie* evidence of demand and protest.⁴ Such certificates, however, must be in conformity with the law of the place of execution, on the principle, *locus regit actum*.⁵

Notary's certificate admissible.

§ 198. Public documents, like statutes, may be proved by the printed volumes in which they are published by authority. In some cases this is provided by statute; in others, publications of this class fall within the range of matters of which courts take judicial notice.⁶

Printed copies of public documents receivable.

IV. SECONDARY EVIDENCE MAY BE RECEIVED WHEN PRIMARY IS UNPRODUCIBLE.

199. Parol evidence is admissible to prove the contents of documents (including deeds, records, letters, notes, accounts, wills, and private memoranda) which have been lost or destroyed without any suspicion of spoliation attaching to the party offering to prove them by such evidence.

Lost or destroyed document may be proved by parol.

As a prerequisite, however, to such admissibility, it must appear (1) that the document existed, and (2) that due, but fruit-

¹ *McGrath v. Seagrave*, 2 Allen, 448; 331; *Karle's Trusts*, L. R. 8 Eq. 98; *Com. v. Evans*, 101 Mass. 25; cited Whart. on Ev. §§ 120-3.

supra, § 166. *Infra*, § 616.

² Whart. on Ev. § 122.

³ 2 Daniel on Negot. Inst. § 959;

Whart. on Ev. § 123.

⁴ *Nye v. Macdonald*, L. R. 3 P. C.

⁵ Whart. on Ev. § 123.

⁶ Whart. on Ev. §§ 108, 127, 317.

less, efforts have been made to produce them in court;¹ though, if the document were executed in duplicate or triplicate, the loss of the parts must be proved, in order to let in secondary evidence of its contents.² Where an indictment for forgery, libel, or larceny avers the character or contents of a lost document, secondary evidence of the document may be produced before the grand jury, and its purport or substance, as near as may be, may afterwards be proved on trial before the petit jury.³ A volume of reports has been held admissible for the purpose, when the papers in the case were lost, of proving secondarily certain facts stated in the papers.⁴ Where, however, the party could legitimately procure the document, a copy cannot be received.⁵

§ 200. It is also admissible to prove by secondary evidence a document which it is out of the power of the party to produce.⁶ This right has been held to apply to papers in the hands of an attorney who could not be compelled to deliver them up,⁷ though it is otherwise if the delivery could be compelled;⁸ to papers fraudulently concealed by the opposite party;⁹ and to papers out of the jurisdiction of the court,¹⁰ provided due efforts be made to obtain the evidence of the

So of papers out of power of party to produce.

¹ *Supra*, § 118; *R. v. Vernon*, 12 Cox C. C. 153; *R. v. Colucci*, 3 F. & F. 103; *R. v. Johnson*, 7 East, 66; *R. v. Harworth*, 4 C. & P. 254; *Brewster v. Sewell*, 3 B. & A. 303; *U. S. v. Reyburn*, 6 Pet. 352; *U. S. v. Britton*, 2 Mason, 468; *Hedrick v. Hughes*, 15 Wall. 123; *Augur v. Whittier*, 118 Mass. 532; *Chamberlin v. Man. Co.*, 118 Mass. 532; *People v. Badgley*, 16 Wend. 53; *People v. Kingsley*, 2 Cow. 522; *Pendleton v. Com.*, 4 Leigh, 694; *Allen v. Parish*, 3 Ohio, 107; *Thompson v. State*, 30 Ala. 28; *Page v. State*, 59 Miss. 474; *Sager v. State*, 11 Tex. Ap. 110; *Haun v. State*, 13 Tex. Ap. 383; and other cases cited Whart. on Ev. § 129. See *State v. Grant*, 74 Mo. 33; *infra*, § 206.

So as to papers mutilated by defendant, *State v. Shinborn*, 46 N. H. 497; *Thompson v. State*, 30 Ala. 28.

² *R. v. Castleton*, 6 T. R. 236; *B. N.*

P. 254; Alivon v. Furnival, 1 C., M. & R. 292.

³ Whart. Cr. Pl. & Pr. § 176. *Infra*, § 216.

In an indictment for forgery, where the forged paper had been partly burned and blotted, it was held that the substance only need be stated, although parol evidence could have supplied the missing part. *Munson v. State*, 79 Ind. 411.

⁴ *Taylor v. Com.*, 29 Grat. 788.

⁵ Whart. on Ev. § 129.

⁶ *Dyer v. Smith*, 12 Conn. 383; *Denton v. Hill*, 4 Hayw. 73; *Cooper v. Day*, 1 Rich. Eq. 26.

⁷ *Lynde v. Judd*, 3 Day, 499.

⁸ *Bird v. Bird*, 40 Me. 392.

⁹ *Marlow v. Marlow*, 77 Ill. 633.

¹⁰ *Burton v. Driggs*, 20 Wall. 133; and other cases cited Whart. on Ev. § 130.

person holding the papers.¹ Thus, parol evidence of an insurance policy is admissible when it has been surrendered by the defendant before the trial to the insurance agent who was out of the jurisdiction of the court.²

§ 201. We will hereafter see³ that a party who wilfully destroys or mutilates papers subjects himself to a presumption of spoliation which tells seriously against him on trial. It does not, however, follow because the paper is accidentally destroyed by the party himself, or otherwise negligently injured, that secondary proof of its contents is inadmissible. In such case, there being no fraud attached to the party offering the parol evidence, it may be received.⁴

Accidental destruction of a document by a party does not preclude from this resort.

§ 202. Different grades of authority, as we have already seen, are assignable to copies, in proportion to their apparent accuracy. Undoubtedly, an examined copy is far more authoritative than a *memoriter* report.⁵ Thus, a letter book of a party, sworn to by himself or his clerk, will be received as proof of the contents of a lost letter;⁶ nor will a party who has or may obtain such a copy, but withholds it, be permitted to prove portions of such letter, or give orally its imperfect substance.⁷ But even a letter-press copy cannot, it is held, be treated as an original.⁸ And a copy must be proved by a witness who has compared it with the lost original.⁹ A copy of a copy, it need scarcely be added, is inadmissible.¹⁰

Copies of copies not receivable.

§ 203. A witness called upon to speak as to the contents of a lost document may refresh his memory by abstracts or memoranda whose correctness he can verify,¹¹ though such papers are open to

¹ *McGregor v. Montgomery*, 4 Barr, 237; *Dickinson v. Breeden*, 25 Ill. 186; *Wood v. Cullen*, 13 Minn. 334.

² *State v. Watson*, 63 Me. 128.

³ *Infra*, §§ 741-8.

⁴ Whart. on Ev. § 132; *supra*, § 174; *People v. Dennis*, 4 Mich. 609; *State v. Taunt*, 16 Minn. 109.

⁵ Whart. on Ev. § 133.

⁶ *Supra*, § 177.

⁷ *Dennis v. Barber*, 6 S. & R. 420; *Merritt v. Wright*, 19 La. An. 91. See,

however, as to degrees of secondary evidence, *supra*, § 174.

⁸ *Chapin v. Siger*, 4 McLean, 378; *Merritt v. Wright*, 19 La. An. 91. See *supra*, § 174.

⁹ *McGinniss v. Sawyer*, 63 Penn. St. 259. See *supra*, § 178.

¹⁰ Whart. on Ev. § 133.

¹¹ *Burton v. Driggs*, 20 Wall. 133; *Sizer v. Burt*, 4 Denio, 426; *Ins. Co. v. Weide*, 9 Wall. 677; *Mayson v. Beazley*, 27 Miss. 106. In *State v. Collins*,

the inspection of the opposite side.¹ And a reporter may, in like manner, refresh his memory by printed notes.² Abstracts and summaries receivable.

§ 204. Records when lost or destroyed may in like manner be proved either by copy, or by the recollection of witnesses.³ In such case, if there be a certified copy extant, that should be produced.⁴ And where a record has become illegible from wear and lapse of time, a witness who has examined and copied it when legible may be called to supply the defect.⁵ But parol evidence will not be received of a record of which only part is lost. That which still exists must be produced or exemplified.⁶ Nor is a party permitted to prove orally a record of which he could obtain an office copy unless the record be shown to be lost so that the office copy is unattainable.⁷ Where the non-production of the original is owing to the misconduct of the opposing party a copy is admissible.⁸ So as to records.

§ 205. A witness, to be entitled to give *memoriter* proof of a lost document, must have read it, or heard its contents from its author, and be able to speak at least to the substance of such contents.⁹ As we have seen, in testifying he may refresh his memory by abstracts taken by himself.¹⁰ The admissions of the party himself are sufficient to sustain the accuracy of a copy.¹¹ But to prove the contents of a lost writing it is not necessary to call the writer; any witness familiar with the contents is equally admissible.¹² Witness must have been acquainted with original.

15 S. C. 373, the officers of a hospital were permitted to refresh their memory by entries in the books, though such books were not produced in court.

¹ *People v. Lyons*, 49 Mich. 78.

² *Com. v. Ford*, 111 Mass. 394.

³ *Whart. on Ev.* § 135; *State v. Hare*, 70 N. C. 658; *Allen v. State*, 21 Ga. 217; *Davis v. State*, 58 Ga. 170.

⁴ *Whart. on Ev.* § 136.

⁵ *Little v. Downing*, 37 N. H. 355. See *Coffeen v. Hammond*, 3 Green (Iowa), 241.

⁶ *Nims v. Johnson*, 7 Cal. 110.

⁷ *Whart. on Ev.* § 136. See *supra*, § 174.

⁸ *Whart. on Ev.* §§ 137, 1264-70. *Infra*, § 741.

⁹ See *infra*, § 461; *Whart. on Ev.* § 205.

¹⁰ *Supra*, § 203; *Barton v. Driggs*, 20 Wall. 133; *Inst. Co. v. Weide*, 9 Wall. 677; *Sizer v. Burt*, 4 Denio, 426; *Whart. on Ev.* § 516.

¹¹ *Whart. on Ev.* § 1091. *Supra*, § 165.

¹² *R. v. Hurley*, 2 M. & Rob. 473; *R. v. Benson*, 2 Camp. 508; *Bank Prosecutions*, R. & R. 378. See *supra*, § 174.

§ 206. Whether secondary evidence of a lost document is admissible is a question exclusively for the court; and to sustain such admission, the prior existence and genuineness of the document must be established, and it must also be satisfactorily shown that the document cannot be produced by the party seeking to prove secondarily its contents.¹

Court must be satisfied that original writing is not producible, and would be evidence if produced.

§ 207. Loss can only be established inferentially. In one sense no existing instrument can be spoken of as lost, or irrevocably out of the power of the party desiring to produce it. A check or promissory note may be carefully put away in a book, and the place of deposit forgotten. Every effort may be honestly made to find it; it is all the time in the seeker's library, in the very place where he put it; yet after all it may be hopelessly lost. It is not necessary, therefore, to prove exhaustively that the paper exists nowhere. It is sufficient if the party offering parol proof show such diligence as is usual with good business men under the circumstances.²

Loss to be inferentially proved.

As an accomplice is presumed to destroy letters implicating him in guilt, it is not necessary, it has been said, to prove diligent search for such letters, traced to his possession, in order, on general proof of their loss, to give parol evidence of their contents.³

§ 208. Proof of the loss of a non-produced document may be dispensed with by the admissions of the opposing party.⁴

Or by admission of opponent.

§ 209. The custodian of a document, if it is alleged to be lost, must, unless he be one of the defendants in the case and set up privilege, be required to make due search, and the fruitlessness of such search must be shown before secondary evidence can be let in. Where such person is dead, inquiry must be made of his legal representatives, if the matter concerns his personalty, or of his heirs, if it concerns his realty.⁵

Custodians to be inquired of.

¹ Whart. on Ev. § 141. See *Watson Shortz v. Unangst*, 3 W. & S. 45; *v. State*, 63 Ala. 19. *Cooper v. Maddan*, 6 Ala. 431. See

² Whart. on Ev. § 142.

Whart. on Ev. § 1091.

³ *U. S. v. Doeblor*, 1 Bald. 519.

⁵ Whart. on Ev. § 144.

⁴ *R. v. Haworth*, 4 C. & P. 254;

§ 210. It is not enough for a party offering secondary evidence simply to swear that he has made general search for the missing paper.¹ Search in probable places of deposit must be proved, and the parties last in possession of the paper must, if possible, be examined; and the search must be by persons having access to probable places of deposit, and must be recent.²

Search in proper places must be proved.

§ 211. When a document is traced into the hands of a third party, he should be summoned by a *subpœna duces tecum* to bring it into court. If living, and with in reach of process, his declarations as to the fate of the paper are inadmissible.³

Third person, in whose hands is document, must be subpoenaed to produce.

V. SO WHEN DOCUMENT IS IN HANDS OF OPPOSITE PARTY.

§ 212. When it is desired to give secondary evidence of a document in the possession of an opposing party, it is necessary, by the common law practice, to give such party notice to produce the paper a suitable period before the trial.⁴ The rule is not restricted to paper documents. Thus where it was proved that a ring which had been lost had an inscription upon it, and that the prisoner had been seen with a ring like the one which had been lost and with an inscription upon it, the counsel for the prosecution was not permitted to ask what was the inscription upon the ring seen in the prisoner's possession, no notice to produce the ring having been given to the prisoner.⁵ But this does not extend, as will be hereafter seen, so far as to require that notice should be given to produce documents which are the subject of the indictment;⁶ and in Indiana the Supreme Court has gone so far as to hold that the rule

Notice to produce necessary when document is in the hands of opposite side.

¹ R. v. Vernon, 12 Cox C. C. 153; 2 Dev. 431; State v. Davis, 69 N. C. 313; Henderson v. State, 14 Tex. 503. and other cases cited Whart. on Ev. § 147.

² Whart. on Ev. § 147.

³ Whart. on Ev. § 150.

⁴ Atty. Gen. v. La Merchant, 2 T. R. 201; R. v. Haworth, 4 C. & P. 254; R. v. Hunter, 4 C. & P. 128; Williams v. State, 16 Ind. 401; State v. Kimbrough,

For other cases see Whart. on Ev. § 152. For the practice as to inspection of papers see Whart. on Ev. § 745. *Infra*, § 564.

⁵ R. v. Farr, 4 F. & F. 336.

⁶ *Supra*, § 216.

requiring notice to produce to be given does not apply to criminal prosecutions in any case.¹

§ 213. After refusal of the party having the instrument to produce it, the party calling for it may produce secondary evidence of its contents. If the secondary evidence so offered is vague and indistinct, this, it must be remembered, is to be imputed, not to negligence on the part of the party offering it, but to the refusal of the party holding the superior evidence to produce such evidence.²

After refusal secondary evidence can be introduced.

§ 214. Of documents which are in court, a notice given at the trial is generally sufficient;³ but as to a document not in court, the notice must be given a sufficient period before the trial to enable the party called upon conveniently to produce it.⁴ The question of the length of notice is dependent upon that of the object for which the notice is given.⁵ But where the time is insufficient to enable the documents to be brought in, and where there is no bad faith or negligence in the party in putting them at a distance,⁶ then the notice is not sufficient to admit secondary evidence.⁷ In criminal issues, the practice in England

Notice must be timely.

¹ *McGinnis v. State*, 24 Ind. 500, in which the court said: "It is well settled in criminal cases that the court cannot compel the defendant to produce an instrument in writing in his possession, to be used in evidence against him, as to do so would be to compel the defendant to furnish evidence against himself, which the law prohibits. . . . It is difficult to perceive what benefit could result, either to the State or the defendant, from the giving of such a notice, while to the defendant it is liable to work a positive injury, by producing an unfavorable impression against him in the minds of the jury, upon his refusal to produce it after notice."

² *R. v. Watson*, 2 T. R. 201; *Com. v. Goldstein*, 114 Mass. 272; *State v. Davis*, 69 N. C. 313. For other cases see *Whart. on Ev.* § 153.

³ *Whart. on Ev.* § 155.

⁴ *R. v. Ellicombe*, 1 M. & Rob. 260; *R. v. Hankins*, 2 C. & K. 823; *R. v. Kitson*, P. & D. 187; 6 Cox C. C. 159; *R. v. Hamp*, 6 Cox C. C. 167; *Shreve v. Dulany*, 1 Cranch C. C. 499; *People v. Badgely*, 16 Wend. 53; *Williams v. State*, 16 Ind. 401; *Henderson v. State*, 14 Tex. 503.

In *R. v. Barker*, 1 F. & F. 326, a notice to produce policies of insurance served on the prisoner's attorney on Tuesday evening, the policies being then twenty miles off, and the trial taking place on the Thursday, was held sufficient, it being shown that there was an opportunity of procuring the policies, if the prisoner had chosen to do so.

⁵ See *Whart. on Ev.* § 155.

⁶ As to this, see *Bryan v. Wagstaff*, Ry. & M. 327; S. C., 2 C. & P. 123; *Sturge v. Buchanan*, 10 A. & E. 598.

⁷ *Whart. on Ev.* § 155.

is to give notice to produce a reasonable time before the commencement of the assizes.¹

§ 215. A mere notice to produce does not make the document called for admissible as evidence, though where A. calls upon B. to produce a document, and B. produces it, this *prima facie* avoids the necessity of proving such document on A.'s part, where it is relied on by B. as part of his title. But A. is not obliged to put in evidence the papers called for by him; though when A., after notifying B. to produce a paper on trial, takes such paper and inspects it, so as to become acquainted with its contents, then A. is bound to treat the paper, if relevant, as his evidence.²

Notice to produce does not make a document evidence

§ 216. In criminal issues, the fact that the indictment charges the defendant with stealing, or in other way misappropriating a particular document, is a sufficient notice to the defendant to produce the document; and under such circumstances, parol evidence of the document is admissible without notice to produce.³ Nor is it necessary that the indictment should aver the loss or destruction of the document.⁴ The same rule has been applied under an indictment for administering an unlawful oath, so to enable the prosecution to prove by parol the paper from which the oath was read without notice to produce the paper.⁵ But an indictment for arson, with intent to defraud an insurance office, does not convey such a notice that the policy will be required as to dispense with a formal notice to produce.⁶ And the rule has been held not to extend to an indictment for forging a deed.⁷

Notice not necessary as to document on which prosecution is brought.

¹ R. v. Hunter, 4 C. & P. 128; R. v. Haworth, 4 C. & P. 254; R. v. Robinson, 5 Cox C. C. 183.

² Whart. on Ev. § 156.

³ R. v. Aickles, 1 Leach, 294; R. v. Hunter, 4 C. & P. 128; R. v. Downham, 1 F. & F. 386; R. v. Elworthy, L. R. 1 C. C. 103; State v. Mayberry, 48 Me. 218; People v. Holbrook, 13 Johns. 90; People v. Kingsley, 2 Cow. 522; People v. Badgely, 16 Wend. 53; State v. Potts, 4 Halst. 26; Com. v. Messenger, 1 Binn. 274; Pendleton v. Com. 4 Leigh, 694; McGinnis v. State, 24 Ind.

500; State v. Davis, 69 N. C. 313; Gray v. Kernahan, 2 Mill (S. C.), 65; Morgan v. Jones, 24 Ga. 155. See *supra*, § 119.

⁴ State v. Potts, 4 Halst. 26.

⁵ R. v. Moors, cited 6 East, 421.

⁶ R. v. Ellicombe, 5 C. & P. 522, per Littledale, J.; 1 M. & Rob. 260; R. v. Kitson, 22 L. J. M. C. 118; 6 Cox C. C. 159; P. & D. 187. See R. v. Humphries, cited 2 Russ. on Cr. 745; R. v. Mortlock, 7 Q. B. 459.

⁷ R. v. Haworth, 4 C. & P. 254.

"Upon an indictment for perjury, it

No notice
needed as
to notice to
produce.

§ 217. Where a party is served with a notice to produce, it is not necessary, in order to prove such notice, that the party served should be called on to produce it in court.¹

Collateral
facts as to
document
may be
proved
without
notice.

§ 218. Facts collateral to documents can be proved without notice; and this includes the fact that a letter was sent, and facts relating to the existence and execution of a document when not involving its contents.²

was held that secondary evidence of a draft last seen in the possession of the prisoner was inadmissible, no notice to produce having been given, and the indictment not operating as a notice. It must be observed, however, that the course which the evidence took at the trial was such, that a great deal turned on the contents of the draft, and on alterations alleged to have been made in it, and it would appear that this circumstance was regarded by several

of the judges as of great importance." *R. v. Elworthy*, L. R. 1 C. C. R. 103; 37 L. J. M. C. 3, as cited in *Roscoe's Ev.* 8th ed. 10.

¹ Whart. on Ev. § 162. And when the document is itself a notice—as to quit or to forbear trespassing—a duplicate original may be given in evidence. *Eisenhart v. Slaymaker*, 14 S. & R. 156; *Watson v. State*, 63 Ala. 19.

² Whart. on Ev. § 163.

CHAPTER V.

PRIMARINESS AS TO ORAL TESTIMONY.

- I. HEARSAY GENERALLY INADMISSIBLE.**
Hearsay in its largest sense convertible with non-original, § 220.
Non-original evidence generally inadmissible, § 221.
Objection to such evidence, § 222.
Acts may be hearsay, § 223.
Interpretation is not hearsay, § 224.
Testimony of non-witnesses not ordinarily receivable when reported by another, § 225.
So of acts concerning strangers, § 226.
- II. EXCEPTION AS TO WITNESS ON FORMER TRIAL.**
Evidence of deceased witness in former trial admissible, § 227.
Death of witnesses may be presumed from lapse of time, § 228.
Case of witnesses out of jurisdiction or subsequently incompetent, § 229.
So of insane or sick witness, § 230.
Mode of proving evidence in such case, § 231.
- III. EXCEPTION AS TO MATTERS OF GENERAL INTEREST.**
Reputation of community admissible as to matters of public interest, § 232.
- IV. EXCEPTION AS TO PEDIGREE, RELATIONSHIP, BIRTH, MARRIAGE, AND DEATH.**
Hearsay may prove pedigree, § 233.
Marriage may be so proved, § 234.
Relationship of declarants necessary to admissibility, § 235.
Such declarations may extend to facts of birth and death, § 236.
Writing of deceased ancestor admissible for same purpose, § 237.
- And so may conduct, § 238.
Declarations may go to facts from which relationship may be inferred, § 239.
Must have been *ante litem motam*, § 240.
Declarant must be dead, § 241.
Ancient family records and monuments admissible for same purpose, § 242.
So of inscriptions on tombstone and rings, § 243.
So of pedigree and armorial bearings, § 244.
Death may be proved by reputation, § 245.
So may marriage, § 246.
Peculiarity in suits for adultery, § 247.
- V. EXCEPTION AS TO SELF-DISSERVING DECLARATIONS OF DECEASED PERSONS.**
Such declarations receivable, § 248.
No objection that such declarations are based on hearsay, § 249.
Declarations must be self-disserving, § 250.
- VI. EXCEPTION AS TO BUSINESS ENTRIES OF DECEASED PERSONS.**
Entries of deceased or non-procurable persons in the course of their business admissible, § 251.
So of notes of counsel and other officers, § 252.
So of notaries' entries, § 253.
- VII. EXCEPTION AS TO GENERAL REPUTATION WHEN SUCH IS MATERIAL.**
Admissible to bring home knowledge to a party, § 254.
But inadmissible to prove facts, § 255.

Hearsay is admissible when hearsay is at issue, § 256.

So to prove condition of party's mind, § 257.

Value so provable, § 258.

And so as to character, § 259.

But not conclusions of law; *e. g.*, nuisance, gaming-house, barratry, § 260.

Otherwise when notoriety is at issue, § 261.

VIII. EXCEPTION AS TO REFRESHING MEMORY OF WITNESS.

For this purpose hearsay admissible, § 261 *a*.

IX. EXCEPTION AS TO *RES GESTÆ*.

Res gestæ admissible though hearsay, § 262.

Must spring immediately from act, § 263.

Retrospective narratives not part of *res gestæ*, § 264.

Coincident business declarations admissible, § 265.

What is done, said, or exhibited at occurrence may be proved, § 266.

Test of secondariness does not apply, § 267.

Statements in preparation of crime inadmissible, § 268.

Declarations inadmissible to explain inadmissible acts; nor are declarations admissible without acts, § 269.

Inadmissible if the witness himself could be obtained, § 270.

X. EXCEPTION AS TO DECLARATIONS CONCERNING PARTY'S OWN HEALTH AND STATE OF MIND.

Declarations of a party as to his own injuries admissible, § 271.

So as to his condition of mind when such is at issue, § 272.

So as to prosecutrix in rape, but not in other cases, § 273.

So as to person whose assent to an act has to be proved, § 274.

XI. DYING DECLARATIONS.

General grounds of admissibility, § 276.

Evidence does not conflict with constitutional limitation, § 277.

But cannot be received to prove facts distinct from homicide, § 278.

Such facts may be received to sustain declarant's mental capacity, § 279.

Declarations of dying persons not admissible as to another's death who was simultaneously killed, § 280.

Declaration must be under a solemn sense of impending dissolution, § 281.

Yet this may be inferentially shown, § 282.

No objection that medical attendant had hope, § 283.

Expressions indicating belief in impending death, § 284.

Even a faint hope excludes, § 285.

Need not have been immediately before death, § 286.

Prior declarations may be affirmed immediately before death, § 287.

Only admissible when death is the subject of the charge, § 288.

Admissible from husband against wife, and *vice versa*, § 289.

Deceased must have been competent as a witness, § 290.

Infants and insane persons, § 290.

Infidels, § 291.

Infamous persons, § 292.

May be proved by signs, § 293.

Evidence must have been admissible had deceased been sworn.

Matters of opinion, § 294.

Declarations reduced to writing, § 295.

Admissible without above limitations when part of the *res gestæ*, § 296.

Admissibility is for the court, § 297.

Are to be examined and impeached by same tests as are applicable to evidence adduced on trial, § 298.

Inadmissible if clearly fragmentary, § 299.

No objection that questions were leading if deceased spoke intelligently, § 300.

Substance may be proved, § 301.
 Character of deceased for truth
 may be impeached, § 302.
 Jury to judge of credibility, §
 303.
 Admissible when in defendant's
 favor, § 304.

XII. THREATS OF DECEASED.

Such threats admissible in homi-
 cide cases, § 305.

XIII. DEPOSITIONS.

Practice as to local regulation,
 § 306.

I. HEARSAY GENERALLY INADMISSIBLE.

§ 220. ACCORDING to Mr. Bentham,¹ hearsay evidence is divisi-
 ble as follows:—

1. Supposed oral through oral; which he defines to be “supposed orally delivered evidence of a supposed extra-judicially narrating witness, judicially delivered *vivâ voce* by the judicially deposing witness;” which he declares to be the only species of unoriginal evidence to which the term “hearsay” is strictly applicable.

In its
 largest
 sense con-
 vertible
 with non-
 original.

2. Supposed oral through “scriptitious,” or written.

3. Supposed scriptitious through oral.

4. Supposed scriptitious through scriptitious.

To which may be added—

5. Supposed material through oral or scriptitious.

The third and fourth of these modifications have been already partially considered under the general head of secondary evidence. The fifth, as of comparatively unfrequent occurrence, may be noticed at the outset.²

§ 221. Suppose, for instance, after a *post-mortem* examination, in a case where poisoning is charged, portions of the remains are given by E., the examining physician (an extra-judicial witness, as Mr. Bentham would call him), to J., and J. produces these remains on trial, where, under the direction of the court, they are subjected to a chemical analysis. This is hearsay, because E. is not examined on trial to prove the identity of the remains with those which J. produces. Or, after a murder, the deceased's clothes are taken off by E. and handed to J., who brings them into court, and testifies that they

Non-orig-
 inal evi-
 dence in-
 admissible.

¹ Rationale of Jud. Ev. Lond. 1827, iii. 439, Jas. Mill's ed. See discussion in London Law Times, Oct. 30, 1880, p. 440.

² It is important, as to these several

classes, to keep in mind the general qualification that no primary evidence is rejected because of its faintness. *Supra*, § 160.

are the clothes given to him by E. as having been taken from the body of the deceased. The articles thus produced are hearsay, in the wide sense of the term, and should be rejected.¹ The question of terms is comparatively unimportant. With Mr. Bentham we may call such evidence simply "unoriginal;" with Mr. Best, "second-hand;" or we may fall back, as is here done, upon the general title of hearsay, as designating all testimony from a non-original source. It is in this sense that the term "hearsay" is to be used in the following selections.

Objections to such evidence. § 222. The objections to hearsay testimony are as follows:—

1. *The depreciation of truth arising from its passing through one or more fallible media.*
2. *The abuses likely to arise from a non-discrimination by juries between primary and secondary.*
3. *Its irresponsibility.*²

§ 223. Acts as well as words may be hearsay, just as acts as well as words may be primary evidence.³ An impostor dresses himself as an officer of the army, and obtains credit on the basis of his being such an officer. If so, his dress and style are as much a declaration on his part as would be the words, "I am an officer of the army." In such case these acts, when put in evidence against him, bind him as much as would verbal statements to the same effect.⁴ On the other hand, when we can get primary and immediate evidence of a particular condition, it is as much hearsay to put in evidence what third persons *did* in consequence of such a condition, as what third persons *said*.⁵

§ 224. The evidence of a sworn interpreter, as given in court, is not hearsay, the transmission being immediate, and the witness interpreted being sworn in court.⁶ An illustration not hearsay.

¹ In *Smith v. State*, 13 Tex. Ap. 507, it was held that the best evidence of non-consent of the owner of goods to their taking was to be obtained by examining the owner, and if this examination could be had, other evidence was secondary.

² See these points developed in Whart. on Ev. §§ 172 *et seq.*

³ See *Porter v. State*, 1 Tex. Ap. 394.

⁴ See *R. v. Giles*, L. & C. 502; *R. v. Story*, R. & R. 81; *R. v. Barnard*, 7 C. & P. 784; *R. v. Hunter*, 10 Cox C. C. 642; and see *Wright v. Tatham*, 7 A. & E. 313. *Infra*, § 683.

⁵ Whart. on Ev. § 173.

⁶ See *Swift v. Applebone*, 23 Mich. 252; *People v. Ah Wee*, 48 Cal. 236; *Scheerer v. Harber*, 36 Ind. 536. *Infra*, § 375.

tion of the same principle may be found in the fact that a witness may interpret for himself, without the intervention of an interpreter.¹ We should remember, also, following the distinction already noticed, that when an interpreter acts, out of court, as an agent for a party, his statements are to be regarded as the statements of the party whom he represents.² So we may receive in evidence the rendering in the vernacular by a witness of a confession heard by him in a foreign tongue.³

§ 225. Extra-judicial statements of third persons cannot be proved by hearsay, unless such statements were part of the *res gestae*, or made by deceased persons in the course of business, or as admissions against their own interest, or are material for the purpose of determining the state of the mind of a party who cannot be examined in court.⁴ In this sense as hearsay are to be considered opinions of others as to the wealth and *status* of an individual;⁵ letters from third parties, though non-residents;⁶ information derived from others as to contemporaneous historical events;⁷ recitals in deeds as against strangers;⁸ declarations of relatives (living at the trial) as to the

Testimony of non-witnesses not ordinarily receivable when reported by another.

¹ Com. v. Kepper, 114 Mass. 278.

² Whart. on Ev. 174.

³ People v. Ah Wee, 48 Cal. 236.

⁴ See Whart. on Ev. § 175; and see *Mima Queen v. Hepburn*, 7 Cranch, 290; *Nudd v. Burrows*, 91 U. S. 426; *Hopt v. People*, Sup. Ct. U. S., 1884; *Gaines v. Relf*, 13 How. 472; *Weston v. Iron Co.*, 13 Allen, 95; *Brown v. Mooers*, 6 Gray, 451; *Young v. Makepeace*, 103 Mass. 50; *Com. v. Ricker*, 131 Mass. 58; *State v. Boyle*, 13 R. I. 537; *Luby v. R. R.* 17 N. Y. 131; *Thomas v. People*, 67 N. Y. 218; *People v. Beach*, 87 N. Y. 508; *Wiggins v. People*, 4 Hun, 540; *Lancaster Co. Bk. v. Moore*, 78 Penn. St. 407; *Rosenstock v. Tormey*, 32 Md. 169; *People v. Lyon*, 49 Mich. 78; *People v. Mead*, 50 Mich. 228; *Cheek v. State*, 35 Ind. 492; *Merishorn v. State*, 54 Ind. 14; *Bergen v. People*, 17 Ill. 426; *State v. Stubbs*, 49 Iowa, 203; *State v. Vincent*, 24 Iowa, 570; *State v. Reidel*, 26 Iowa,

430; *State v. Weaver*, 57 Iowa, 730; *State v. Haynes*, 71 N. C. 79; *State v. Davis*, 77 N. C. 483; *State v. Boon*, 80 N. C. 461; *State v. Reitz*, 83 N. C. 684; *State v. King*, 86 N. C. 603; *Harishorn v. Williams*, 31 Ala. 149; *Hall v. State*, 51 Ala. 9; *Rogers v. State*, 62 Ala. 170; *State v. Newland*, 27 Kan. 764; *State v. Umfried*, 76 Mo. 404; *Davis v. State*, 37 Tex. 277; *Harris v. State*, 1 Tex. Ap. 74; *Hunter v. State*, 13 Tex. Ap. 16; *Campbell v. State*, 8 Tex. Ap. 84; *Bornheimer v. Baldwin*, 42 Cal. 27. See *North Stonington v. Stonington*, 31 Conn. 412; *Munhower v. State*, 65 Md. 11; *Grigsby v. State*, 4 Baxt. 19.

⁵ *Caswell v. Howard*, 16 Pick. 567.

⁶ U. S. v. Barker, 4 Wash. C. C. 464; and other cases cited Whart. on Ev. § 175.

⁷ *Swinerton v. Ins. Co.* 9 Bosw. 361; *Milbank v. Dennistoun*, 10 Bosw. 382.

⁸ *Spaulding v. Knight*, 116 Mass.

mental condition of a person whose sanity is disputed;¹ and opinions of a neighborhood as to such sanity.² Hence, on an indictment for murder, the admissions of other persons that they killed the deceased, or committed the crime in controversy, are not evidence;³ and evidence of threats by other persons are inadmissible;⁴ and so of declarations of the deceased before his death that he was about to disappear,⁵ or that he expected violence;⁶ and so of declarations of deceased witnesses to homicide.⁷ On an indictment for larceny, also, declarations of third parties that they committed the theft are inadmissible.⁸ Nor is the opinion of counsel as to a litigated act admissible unless it is proved that the party acted under such opinion.⁹ But it has been held admissible for a witness to state that he was induced by information derived from a negro to waylay a party suspected of a design to commit a felony,¹⁰ and for a party charged with receiving stolen goods to put in evidence the declarations of his

148; *Rose v. Taunton*, 119 Mass. 99; *Hardenburgh v. Lakin*, 47 N. Y. 111; *Yahoola Co. v. Irby*, 40 Ga. 479. See *Whart. on Ev.* §§ 1034, 1042.

¹ *Heald v. Thing*, 45 Me. 392.

² *Lancaster Co. Bk. v. Moore*, 78 Penn. St. 407; qualifying *Rogers v. Walker*, 6 Barr, 375.

³ *Thomas v. People*, 67 N. Y. 218; *Greenfield v. People*, 85 N. Y. 75; *Smith v. State*, 9 Ala. 990; *Snow v. State*, 54 Ala. 136; S. C., 58 Ala. 372; *Sharp v. State*, 6 Tex. Ap. 650; *Holt v. State*, 9 Tex. Ap. 571.

⁴ *Thomas v. People*, 67 N. Y. 218; *State v. Duncan*, 6 Ired. 236; *State v. Haynes*, 71 N. C. 79; *State v. Davis*, 77 N. C. 483; *Alston v. State*, 63 Ala. 178; *State v. Johnson*, 30 La. An. 924; *Walker v. State*, 6 Tex. Ap. 576; *People v. Murphy*, 45 Cal. 137.

⁵ *State v. Vincent*, 24 Iowa, 570; *Crookham v. State*, 5 W. Va. 510.

⁶ Even the declarations of a husband, alleged to have been killed by his wife, made some time before his death, and not shown to have been communicated to her, cannot be ad-

mitted against her. *Weyrich v. People*, 89 Ill. 90. See, however, *infra* § 264; *R. v. Edwards*, 12 Cox, C. C. 230; *infra*, § 281.

⁷ *Poteete v. State*, 9 Baxt. 261.

⁸ *Rhea v. State*, 10 Yerg. 258. See *Davis v. State*, 37 Tex. 277. *Smith v. State*, 9 Ala. 980; *Daniel v. State*, 65 Ga. 199.

⁹ *People v. Long*, 30 Mich. 249.

¹⁰ *Whaley v. State*, 11 Ga. 123, *sed quare*.

In conformity with the general rule, where, on trial of an indictment for murder, a witness for the prosecution testified that she had seen the two defendants come from a room where the dead body was found, under suspicious circumstances, it was held that the prosecution could not show by other witnesses, that she at once, while giving the alarm, gave the names of the two persons thus seen. *Com. v. James*, 99 Mass. 438. And with this accords the well-known position that a witness cannot in general be corroborated by proof of prior statements made by him to others. *Infra*, § 492.

alleged vendor made at the time of the sale.¹ It is no reason for receiving hearsay statements of this class that the person making them is dead² (unless under the limitations which will be hereafter designated), or that he was called as a witness, and, being suddenly taken sick, is unable to attend the trial;³ or that he is legally incompetent as a witness.⁴

§ 226. As hearsay are to be regarded, except under limitations to be hereafter noticed, adjudications between strangers, and public acts affecting strangers, or in which strangers are concerned.⁵ Such evidence is also held inadmissible as *res inter alios acta*.⁶

So of acts
as to
strangers.

II. EXCEPTION AS TO WITNESS ON FORMER TRIAL.

§ 227. To the rule excluding hearsay the first exception we have to notice is the following: What a deceased witness testified to on a former procedure against the same defendant, for the same offence as that under trial, or for an offence substantially the same, may be proved by witnesses who heard the testimony of the witness; nor is such oral evidence excluded by the fact that the original testimony was reduced to writing, nor in criminal cases, by the constitutional provision that the defendant is entitled to be confronted with the witnesses against him.⁷ The exception is thus given

Evidence
of deceased
witness on
former
trial ad-
missible.

¹ *People v. Dowling*, 84 N. Y. 478; *Hooker*, 17 Vt. 658; *Com. v. Richards*, Leggett v. State, 15 Ohio, 283; *Lander v. People*, 104 Ill. 248.

² *Crump v. Starke*, 23 Ark. 131.

³ *Gaither v. Martin*, 3 Md. 146.

⁴ *Churchill v. Smith*, 16 Vt. 595; *Nettles v. Harrison*, 2 McCord, 230; *Smith v. State*, 41 Tex. 352 (a case of an infant too young to be sworn).

⁵ See, as to judgments, *infra*, § 595; and as to public acts, *Whart. on Ev.* § 176; and see *supra*, § 195.

⁶ See on this topic an interesting essay by Mr. C. H. Barrows in the *American Law Review* for May, 1880.

⁷ *R. v. Bromwich*, 1 Leach, 180; *Salk*, 281; *Roscoe's Crim. Ev.* 67; *U. S. v. White*, 5 Cranch C. C. 457; *U. S. v. Macomb*, 5 McLean, 287; *State v.*

Hooker, 17 Vt. 658; *Com. v. Richards*, 18 Pick. 434; *Finn v. Com.*, 5 Rand. (Va.) 701; *Summons v. State*, 5 Oh. St. 325; *O'Brien v. Com.*, 6 Bush, 563; *Roberts v. State*, 68 Ala. 515; *State v. Cook*, 23 La. 347; *State v. McO'Brien*, 24 Mo. 402; *State v. Baker*, 24 Mo. 437; *State v. Houser*, 26 Mo. 431; *State v. Able*, 65 Mo. 357; *People v. Diaz*, 6 Cal. 248; *People v. Devine*, 46 Cal. 45; *People v. Brotherton*, 47 Cal. 388; *People v. Murphy*, 45 Cal. 137; though see *People v. Qurise*, 59 Cal. 343; *State v. Johnson*, 12 Nev. 121; *Johnson v. State*, 1 Tex. Ap. 333; *Dunlap v. State*, 9 Tex. Ap. 179; *State v. Wilson*, 24 Kan. 189. The deposition of a party may be so used, and so may notes of his testimony.

by Mansfield, C. J.: "What a witness, since dead, has sworn upon a trial between the same parties may be given in evidence, either from the judge's notes, or from notes that have been taken by any other person who will swear to their accuracy; or the former evidence may be proved by any person who will swear from his memory to its having been given."¹ In criminal prosecutions this rule has been frequently applied to evidence taken under the statutes 1 & 2 and 2 & 3 Phil. & M., which have been held to have the force of common law in several of the United States.² What a deceased witness swore to at the preliminary hearing before the committing magistrate is evidence at the trial in chief;³ what a deceased witness swore to on a criminal trial is evidence on a second trial for the same offence, or an offence substantially the same.⁴ If the evidence was *coram non judice*, or the witness was not sworn,⁵ or cross-examination was precluded or restricted,⁶ or the witness was incompetent,⁷ the ground for admissibility fails. It is not,

Rhine v. Robinson, 27 Penn. St. 30; Jones v. Ward, 3 Jones (N. C.) 24; Whart. on Ev. § 227.

¹ Mayor of Doncaster, v. Day, 3 Taunt. 262; Powell's Evidence, 4th ed. 217.

² See R. v. Smith, 2 Stark. 208.

³ R. v. Edmunds, 6 C. & P. 164; State v. Hooker, 17 Vt. 658; Robinson v. State, 68 Ga. 833; State v. Jefferson, 77 Mo. 136; though see *contra*, State v. Campbell, 1 Rich. 124. In Louisiana this has been held as to evidence offered by a defendant of statements at a coroner's inquest. State v. McNeil, 33 La. An. 1332. Otherwise, where the evidence is offered by the prosecution, and there was no specific issue as to the defendant at the inquest. McLain v. Com., 99 Penn. St. 86; cited in detail, *infra*, § 280; Sylvester v. State, 71 Ala. 17.

⁴ R. v. Joliffe, 4 T. R. 290; R. v. Smith, R. & R. 339; R. v. Lee, 4 F. & F. 63; R. v. Dilmore, 6 Cox, 52; R. v. Williams, 72 Cox, 101 (under stat-

utes); U. S. v. Macomb, 5 McLean, 287; U. S. v. White, 5 Cranch, 457; U. S. v. Wood, 3 Wash. C. C. 440; Com. v. Richards, 18 Pick. 434; Brown v. Com., 73 Penn. St. 321; Summons v. State, 5 Oh. St. 325; Barnett v. People, 54 Ill. 325; State v. McO'Brien, 24 Mo. 402; State v. Houser, 26 Mo. 431; O'Brien v. Com., 6 Bush, 563; Kendrick v. State, 10 Humph. 479; Wade v. State, 7 Baxt. 80; People v. Diaz, 6 Cal. 248; State v. Atkins, 1 Overt, 229; though see *contra*, Finn. v. Com., 5 Rand. 701; U. S. v. Sterland, 3 Quart. L. J. 244; 6 Pitts. L. J. 50; Brogy v. Com., 10 Grat. 722.

⁵ See R. v. Eriswell, 3 T. R. 721.

⁶ Steinkeller v. Newton, 1 Scott N. R. 148; S. C., 9 C. & P. 313; R. v. Ledbetter, 3 C. & K. 108; Bebee v. People, 5 Hill (N. Y.), 32; Barron v. People, 1 Comst. 386; Summons v. State, 5 Oh. St. 325; State v. Campbell, 1 Rich. 124.

⁷ Schell v. State, 2 Tex. Ap. 30.

however, necessary that there should be an actual cross-examination, provided there be liberty to cross-examine.¹

§ 228. As the testimony taken in a former trial cannot be read if the witness is obtainable, the question arises, what proof is requisite to establish the fact that the witness cannot be obtained. This question is generally presented in the shape of alleged death; and on this topic it is enough to say that death is to be inferred from the circumstances of each particular case, irrespective of any general presumption of law.²

Death may be presumed from lapse of time.

§ 229. Proof of mere disappearance of the original witness is not by itself enough to admit such testimony if by due diligence the witness's attendance could have been secured; nor in criminal trials is such testimony made admissible by the fact that the witness, since the examination, has left the jurisdiction, and is not amenable to process.⁴

Case of witnesses out of jurisdiction or since become incompetent.

But in such cases the testimony of a former witness, corruptly or otherwise unlawfully kept from court by the party against whom he is called, it has been held, may be in like manner reproduced, the defendant in the former trial having had the opportunity of cross-examining the witness.⁵ And the former testimony of a witness

¹ *Cazenove v. Vaughan*, 1 M. & S. 4; *McCombie v. Anton*, 6 M. & Gr. 27.

² See this discussed, *infra*, § 809. See, also, *Benson v. Olive*, 2 Str. 920.

³ *U. S. v. Macomb*, 5 McLean, 287; *State v. Staples*, 47 N. H. 113; *Powell v. Waters*, 17 Johns. 176; *Wilbur v. Selden*, 6 Cow. 162; *Crary v. Sprague*, 12 Wend. 41; *Berney v. Mitchell*, 34 N. J. L. 337; *Brogy v. Com.*, 10 Grat. 722; *Summons v. State*, 5 Oh. St. 325; *Bergen v. People*, 17 Ill. 426; *Kendrick v. State*, 10 Humph. 479; *State v. King*, 86 N. C. 603; *Dupree v. State*, 33 Ala. 380; *Hobson v. Harper*, 2 Blackf. 309; *Collins v. Com.*, 12 Bush, 271; *Gerhauser v. Ins. Co.*, 7 Nev. 174.

⁴ *U. S. v. Angell*, 11 Fed. Rep. 34; *People v. Newman*, 5 Hill, 295; *Brogy v. Com.*, 10 Grat. 722; *Bergen v. People*, 17 Ill. 426; *State v. Houser*, 28 Mo. 178; *Collins v. Com.*, 12 Bush, 271; *Hall v. State*, 6 Baxt. 522; *Finn v. Com.*, 5 Rand. 701. In civil issues such evidence is admissible. *Fry v.*

Wood, 1 Atk. 445; *Carpenter v. Groff*, 5 S. & R. 162; *Cavanhovan v. Hart*, 21 Penn. St. 495; *Wright v. Cumsty*, 41 Penn. St. 102; *Wilder v. St. Paul*, 12 Minn. 192. In Texas, such evidence is admitted if defendant was in any way chargeable with the non-attendance; *Sullivan v. State*, 6 Tex. Ap. 319; or if, after diligent inquiry, the whereabouts of the witness cannot be ascertained. *Ibid.*

⁵ *Morley's Case*, 6 How. St. Tr. 770; *R. v. Scaife*, 2 Den. C. C. 281; 17 Q. B. 238; *R. v. Guttridge*, 9 C. & P. 471; *Williams v. State*, 19 Ga. 402; *State v. Houser*, 26 Mo. 431; *U. S. v. Reynolds*, 1 Utah T. 319; aff. 98 U. S. 145. *Infra*, §§ 741 *et seq.*, 749.

"In the leading text-books, it is laid down that if a witness is kept away by the adverse party, his testimony, taken on a former trial between the same parties upon the same issues, may be given in evidence. 1 Green. Ev. § 163; 1 Taylor Ev. § 446. Mr.

who has intermediately become incompetent may, at least in civil cases, be proved on a second trial.¹

§ 230. Whether the deposition of a sick or insane witness can be taken in a criminal case depends upon local statutes,² but wherever

Wharton (1 Whart. on Ev. § 178) seemingly limits the rule somewhat, and confines it to cases where the witness has been corruptly kept away by the party against whom he is to be called, but in reality his statement is the same as others; for in all it is implied that the witness must have been wrongfully kept away." Waite, C. J., *U. S. v. Reynolds*, 98 U. S. 145. I have accordingly added "unlawfully" to the text.

¹ Whart. on Ev. § 178.

² In England the practice is thus stated:—

"Where the physician stated that the witness could not speak or hear from paralysis, and that if brought to court he would not be able to give evidence, yet that he might be brought there without danger to life, though he, as his physician, would not permit the prisoner to roam abroad if he knew it, it was held by the Court of Criminal Appeal that the deposition was rightly received. *R. v. Cockburn*, Dears. & B. C. C. 203; S. C., 7 Cox, 265. In *R. v. Walker*, 1 F. & F. 535, where it was proposed to put in evidence the deposition of a woman who had been recently confined, Wills, J., is reported to have said: 'Illness from a confinement is an ordinary state, and not such an illness as is contemplated by the statute. I have considered the question with my brother Crowder. If you find it necessary for your case to put in the deposition, I have made up my mind to reserve the question for the opinion of the judges. It is one of importance; I have considered it; and my brother Crowder and myself are agreed upon it.' But it be-

came unnecessary to reserve the point. There may, however, be incidents in regard to the state of pregnancy which may bring the case within the statute. *R. v. Stephenson*, 1 L. & C. 165; 31 L. J. M. C. 147. In *R. v. Boucher*, where evidence was given by the witness's husband, without medical evidence, that she was pregnant, but he could not state how far advanced she was, and that she was then attending to her household duties as usual, and he stated that, a fortnight before, he had driven her some distance, and she had suffered somewhat in consequence, Bramwell, B., admitted the deposition. 3 F. & F. 285. Where a witness came to the assizes, but returned home by the advice of a medical man, who deposed that it would have been dangerous for the witness to remain, Parke, B., held that the witness was 'unable to travel' within the meaning of this section, and allowed his depositions to be read. *R. v. Wicker*, 18 Jur. 252. A superintendent of police having seen a policeman in bed two days before the trial stated that he appeared ill, and that when he tried to get out of bed he could not stand, but he was unable to state what was the matter with him, except that he believed it to be rheumatics, and no medical man was called to be examined as to his condition. Held, that the deposition could not be admitted. Per Piggott, B., *R. v. Williams*, 4 F. & F. 515. See, also, *R. v. Welton*, 9 Cox, 281; *R. v. Bull*, 12 Cox C. C. 31.

"It is a question for the judge at the trial to determine whether the proof of a witness being so ill as not to be able to travel is sufficient; and the

a deposition has been duly taken in a preliminary procedure, it can be received in subsequent proceedings against the same defendant, the witness being unobtainable.¹

So of sick
and insane
witness.

Court of Criminal Appeal will not interfere with the exercise of his discretion. *R. v. Stephenson*, 1 L. & C. 165; 34 L. J. M. C. 147.

"There is nothing in the words of the statute which renders it necessary that the inability of the witness to attend at the trial should be permanent; it may, therefore, be implied that it need not be so. Before the statute it seems to have been doubted whether a merely temporary illness (as with a woman about to be confined) was a sufficient ground for admitting the deposition. 2 Stark. Ev. 383, 3d ed.; *R. v. Savage*, 5 C. & P. 143. And there can be no doubt that a judge would now exercise his discretion and decide whether, in the interests of justice, it were better to read the deposition or to adjourn the trial in order to obtain the oral testimony of the witness. See *R. v. Tait*, 2 F. & F. 553, where Crompton, J., postponed the trial to the next assizes." Roscoe's Cr. Ev. 8th ed. 69. See, also, *R. v. Hogg*, 6 C. & P. 176; *R. v. Wilshaw*, C. & M. 145. The declarations of an infant, too young to be examined under oath, are necessarily excluded. *Smith v. State*, 41 Tex. 352.

¹ Whart. on Ev. § 178. In *McLain v. Com.*, 99 Penn. St. 86, it was held that the evidence of a witness taken at a coroner's inquest could not be received on a trial for homicide based on the inquest, though the witness could not attend the trial of homicide, on account of sickness. "The hearing before the coroner," said Mercur, J., "was not between the parties to the issue in which the evidence was offered. No issue was there formed between the Commonwealth and the

plaintiff in error. An inquiry there takes a broad range. It is not to ascertain the guilt of any particular person, but of every person that the evidence might implicate. No technical rules restrict or control the admission of evidence. No cross-examination of witnesses is had. The coroner's discretion makes the line where the evidence of a witness shall begin and where it shall end. It was contended that the evidence should have been received under the British statutes, more especially under the 1 and 2 Phil. and Mary, and the construction given thereto. Chapter 13, section 5, of that statute does require the coroner in inquisitious finding murder or manslaughter to put in writing the effect of the material evidence given to the jury before him, and to certify and return the same with the inquisition, thus making it a part of his judicial action. When so taken, certified, and returned, and the witness be dead, the courts in England have held the evidence admissible. Our attention has not been called to any Pennsylvania authority giving such construction to the statute. If, however, it were otherwise, the rule could not apply to this case, as the witness is still living. Other reasons exist for its exclusion. The testimony offered was not taken down by the coroner, nor under his direction or supervision. Nor was it certified or returned by him with the inquisition. It was taken by a shorthand writer at the instance of some person not clearly disclosed by the evidence and as testified by the writer for 'whomever it might concern.'" And see *Sylvester v. State*, 71 Ala. 17.

§ 231. The evidence of the original witness may be proved by the notes of counsel, or of the judge, or of a short-hand reporter, sworn to by the reproducing witness; nor is it necessary that the notes should purport to give more than the substance of the language of the original witness.¹

In such case the notes are not evidence *per se*; their only value being as means of refreshing the memory of the witness.² The testimony of the reproducing witness is not excluded by the fact that he does not recollect the testimony independent of his notes.³ But the whole relevant part of the testimony as remembered must, if required, be given,⁴ and the mere notes of the judge, unsworn to,

See, however, *State v. McNell*, 33 La. An. 1332, cited *supra*, § 227.

Where the deposition of a witness has been read by agreement, the witness cannot afterwards testify in person. *State v. Kring*, 74 Mo. 612.

¹ Whart. on Ev. § 514; *Tod v. Winchelsea*, 3 C. & P. 387; *Doncaster v. Day*, 3 Taunt. 262; *R. v. Christopher*, 1 Den. C. C. 536; 2 Car. & K. 994; *U. S. v. Macomb*, 5 McLean, 286; *U. S. v. White*, 5 Cranch C. C. 457; *Emery v. Fowler*, 39 Me. 326; *Lime Bank v. Hewett*, 52 Me. 531; *Young v. Dearborn*, 22 N. H. 372; *Williams v. Willard*, 23 Vt. 369; *Huff v. Bennett*, 6 N. Y. 337; *Wolf v. Wyeth*, 11 S. & R. 149; *Rhine v. Robinson*, 27 Penn. St. 30; *Brown v. Com.*, 73 Penn. St. 321; *Summons v. State*, 5 Oh. St. 325; *Burson v. Huntington*, 21 Mich. 415; *Fisher v. Kyle*, 27 Mich. 454; *Jones v. Ward*, 3 Jones, 24; *Trammell v. Hemp-hill*, 27 Ga. 525; *Gildersleeve v. Caraway*, 10 Ala. 260; *People v. Murphy*, 45 Cal. 137. For a more stringent rule see *U. S. v. Wood*, 3 Wash. C. C. 440; *Com. v. Richards*, 18 Pick. 434; *Warren v. Nichols*, 6 Met. 261; *Wilber v. Selden*, 6 Cow. 162; *Black v. Woodrow*, 39 Md. 194. See *Black v. State*, 1 Tex. Ap. 368. See, *contra*, *People v. Ah Yute*, 56 Cal. 119, where the reproducing witness was a reporter, who had

taken down notes of a foreigner's testimony from an interpreter. See *People v. Chung Ah Chung*, 57 Cal. 567. *Stern v. People*, 102 Ill. 540.

The question whether all had been sworn to which a deceased witness testified to at a former trial in a criminal case is properly within the province of the jury, and is preliminary to the consideration of such evidence. When it is evident that certain matters have been omitted in giving the evidence of a deceased witness, by a person who professes to give the substance of all the statements of such deceased witness, the evidence of such person will not be rejected, if the jury are satisfied that, in connection with the testimony of others, they have the substance of all the evidence given by such witness at the former trial. It is not necessary, therefore, that the testimony should all be proved by a single witness. *Summons v. State*, 5 Oh. St. 325.

² *Waters v. Waters*, 35 Md. 531; *Zitske v. Goldberg*, 38 Wis. 217. See fully Whart. on Ev. § 514.

³ *Rhine v. Robinson*, 27 Penn. St. 30; *Brown v. Com.*, 73 Penn. St. 321; *Jones v. Ward*, 3 Jones, N. C. 24; though see *Lightner v. Wike*, 4 S. & R. 203; *Puryear v. State*, 63 Ga. 692.

⁴ Whart. on Ev. § 180.

"The rule is settled, that when

or unproved, cannot be received.¹ If the judge be alive he must be called as a witness, the notes being then receivable to refresh his memory.²

A statute making admissible a certified copy of evidence by a sworn court stenographer is not unconstitutional.³

III. EXCEPTION AS TO MATTERS OF GENERAL INTEREST.

§ 232. In criminal issues (*e. g.*, prosecutions for nuisance) as well as in civil, it may become important to prove certain matters of public interest out of the personal knowledge of living witnesses. In such cases, where there is no ground to suspect fraud, or interest in a pending litigation, the statements of deceased witnesses, cognizant with the facts, may be received.⁴

Reputation
admissible
as to mat-
ters of pub-
lic interest.

IV. EXCEPTION AS TO PEDIGREE AND RELATIONSHIP: BIRTH, MARRIAGE, AND DEATH.

§ 233. To establish pedigree, family hearsay is essential, since if what has been handed down in families cannot be in this way proved, pedigree could not in most cases be proved at all.⁵

Hearsay ad-
missible as
to pedigree.

§ 234. In prosecutions for bigamy, hearsay, as we have seen, is a necessary incident of cohabitation. The parties, it is alleged, lived together as man and wife. "They were reputed to be man and wife in the neighborhood," a witness states; "they were addressed as such; they answered when so addressed, accepting the *status* thus given to them; they

Marriage
may be so
proved.

proof is offered of what a deceased witness has testified at a former hearing, it must be not merely of a part of it, or the substance of it, but the whole of the testimony touching the matter in controversy. *Com. v. Richards*, 18 Pick. 434; *Warren v. Nichols*, 6 Met. 261." *Chapman, J., Woods v. Keyes*, 14 Allen, 238.

¹ *Miles v. O'Hara*, 4 Binn. 108; *Livingston v. Cox*, 8 W. & S. 61; *State v. McLeod*, 1 Hawks, 344. See *Whart. on Ev.* § 180, for cases.

² *Grimm v. Hamel*, 2 Hilt. 434. See

Conradi v. Conradi, L. R. 1 P. & D. 514.

³ *State v. Frederick*, 69 Me. 400.

⁴ *Whart. on Ev.* § 185. That this is the case with regard to the boundary line between counties, see *People v. Velarde*, 59 Cal. 457.

⁵ *Whart. on Ev.* § 201; *Comstock v. State*, 14 Neb. 205. See the important case of *Sturla v. Freccia*, 43 L. T. N. S. 209, where it was held that a foreign official report of the deceased's place and time of birth, made in a collateral proceeding, was inadmissible.

were talked of in the neighborhood as well as in their family as married." Now this may be all hearsay, yet, in many cases, it is the highest and best evidence that can be obtained. And in many issues in which pedigree is involved it is the only proof obtainable.¹

§ 235. But to the admissibility of declarations when offered to prove legitimacy, in a question of title, it is essential that they should be made by lawful relatives.² The limitation, however, must be restricted to cases in which the object is to establish such declarations as emanating from the family of a particular claimant. In such cases the statement of illegitimate members of the family, or of connections by marriage, will not be received.³

§ 236. The same reasoning requires us to receive family reputation, duly authenticated, to prove the time of the birth and the time and place of the death of the several members of the family.⁴ A party's age may be proved by his own testimony, based on family reputation.⁵

§ 237. Written declarations of deceased relatives, when not self-serving, are admissible for the same purposes. Among such writings we may notice a provision in a will by a deceased person recognizing or ignoring certain persons as his children; descriptions in a will; an acknowledgment of a deed by certain persons styling themselves heirs at law; recitals in family settlements; recitals of consistent antecedent deeds and wills; and, generally, recitals in a deed executed by a member of the family.⁶

§ 238. Conduct of deceased relatives, involving their attitude to and recognition of persons claimed to be in the same family, is, on the reasoning already given, receivable on such issues; and the manner in which a person has been brought up and treated by his family is here of peculiar weight.⁷

¹ See *supra*, § 172; *Dumas v. State*, 14 Tex. Ap. 464.

² Whart. on Ev. § 202.

³ See limitations given Whart. on Ev. §§ 234 *et seq.*

⁴ Whart. on Ev. § 208.

⁵ *Hill v. Elridge*, 126 Mass. 234; *Cherry v. State*, 68 Ala. 29. Testi-

mony as to the age of a witness based on statements made by his mother is admissible, though no reason is given for not summoning her. *Bain v. State*, 61 Ala. 75. *Infra*, § 459.

⁶ See Whart. on Ev. § 210.

⁷ Whart. on Ev. § 211.

§ 239. Declarations of the class before us are receivable to prove the facts by which relationship is constituted. Hence, as has been previously stated, it is admissible, in order to prove relationship, to adduce declarations of deceased relatives as to marriages and deaths. Any other family incidents, calculated to fix points of pedigree, will be in like manner admissible.¹

Declarations may go to the facts from which relationship may be inferred.

§ 240. In civil issues it has been ruled that declarations of deceased relatives, to be admissible in such cases, must have been *ante litem motam*. Yet, in view of the recent statutes admitting parties as witnesses, it is hard to see why the suspicion of concoction, imputable to declarations *post litem motam*, should not be left to the determination of the jury. There are some pedigree cases so old, that if declarations of deceased persons concerning them be received at all, such declarations must be *post litem motam*; nor is it always possible to determine where the suspicion in question begins.²

Declaration must have been *ante litem motam*.

§ 241. If the declarant is living, he must be produced; for if within the process of the court, his declarations, like the declarations of persons against their interest, are inadmissible.³

Declarant must be dead.

§ 242. Ancient family records or memorials are admissible, also, to prove pedigree, provided, always, that there is evidence that they have been treated as authoritative by the family, and the parties making the record are dead.⁴

Ancient family records and memorials admissible.

§ 243. For the same purpose it is competent to put in evidence inscriptions on tombstones, and also inscriptions on rings and on portraits, which, if preserved in a family, may be regarded as giving a family tradition, to be received for what it is worth.⁵ As has been already seen,⁶ where the original monument cannot be brought into court, then a copy will be permitted.

So of inscriptions on tombstones and rings.

§ 244. Charts of pedigree and armorial bearings have in like manner been received, when it is proved they have been kept as

¹ Whart. on Ev. § 212.

⁴ Whart. on Ev. § 219.

² Whart. on Ev. § 213.

⁵ Whart. on Ev. § 220.

³ Whart. on Ev. § 215.

⁶ *Supra*, § 168.

So of pedigrees and armorial bearings.

family records ; though they must be regarded as showing rather what the family claimed to be than what it was.¹

§ 245. In future sections the natural presumptions as to death will be discussed.² It may be here noticed that death may be proved by the continuous and abiding general reputation of the community to which the party belongs, as well as by general family belief.³ But to make such reputation or belief admissible it must be general, not limited or special.⁴

Death may be proved by reputation.

§ 246. Reputation in a community, we have already seen,⁵ is, when accompanied by cohabitation, among the facts by which a marriage can be proved. But by itself, it is not enough to prove marriages as to sustain a penal charge.⁶

So may marriage.

§ 247. Reasoning from the analogy of suits for damages to the husband against a third party for adultery with the wife, we may hold that in criminal prosecutions for adultery it may be admissible, in order to show the relation of the husband and wife before the alleged adultery, to put in evidence, not only their correspondence with each other, but their correspondence with third persons.⁷ It is necessary, however, as a prerequisite to the admission of such evidence, that it should be shown, independent of the date appearing on the face of the letters, that they were written prior to any suspicion of misconduct.⁸

In adultery correspondence may be proved to show relation of parties.

V. EXCEPTION AS TO SELF-DISSERVING DECLARATIONS OF DECEASED PERSONS.

§ 248. Declarations of deceased persons made against their interest are, at common law, admissible, although such declarations are offered in suits in which neither such de-

Declarations of deceased

¹ Whart. on Ev. § 219.

⁵ Ibid. Wood v. State, 62 Ga. 406.

² *Infra*, §§ 809-14.

⁷ Trelawney v. Colman, 2 Stark. R.

³ *Infra*, § 812; and see cases cited in Whart. on Ev. § 223.

191; 1 B. & A. 90, S. C.; Willis v. Bernard, 8 Bing. 376; Winter v. Wroot, 1 M. & Rob. 404, per Ld. Lyndhurst; Taylor's Ev. § 520.

⁴ See *infra*, § 813; and see Whart. on Ev. § 245 for authorities.

⁶ Whart. on Ev. § 225.

⁵ *Supra*, §§ 170, 234-5.

ceased persons, nor those claiming under them, were or are parties.¹

§ 249. Such declarations against interest are admissible against third parties, even though the declarant himself received the facts on hearsay, provided the person from whom the hearsay springs was competent to speak.²

§ 250. It is essential, however, that such declarations, when made, should have been *self-dis-serving*; i. e., that they should have been, when made, against the pecuniary interests of the declarant.³ And in a conspicuous English case, when the declaration of a deceased clergyman was offered on this ground to prove a marriage solemnized by him, the limitation just expressed was rigidly enforced.⁴

persons against their interest receivable.

No objection that such declarations are based on hearsay.

Declarations must be self-dis-serving.

VI. EXCEPTION AS TO BUSINESS ENTRIES OF DECEASED PERSONS.

§ 251. It has been just observed that declarations of deceased persons are admissible when made against their interest.

We have now to consider the case of business entries of deceased persons; and as to these it is settled that the memoranda or book entries of an officer, agent, or business man, made when in the due performance of his duties, are evidence, after his death, or after he has passed out of the range of process, of the truth of such entries; subject, however, to be excluded if it appear that in making the entries he was not registering, but manufacturing, current facts; and provided such entries were original, contemporaneous, and in the line of the writer's duty.⁵

Entries by deceased or absent persons in the course of their business may be evidence.

§ 252. On the same reasoning the notes of deceased counsel of a former trial, and of counsel or other officers who are out of the reach of the process of the court,⁶ are admissible to prove any relevant fact;⁷ and the courts have admitted a bank messenger's entries in his book, record-

So of counsel and other officers.

¹ Whart. on Ev. § 226.

² Whart. on Ev. § 227.

³ Whart. on Ev. § 228.

⁴ *Sussex Peerage Case*, 11 Cl. & F. 112, cited Whart. on Ev. § 250.

⁵ Whart. on Ev. § 238.

⁶ Whart. on Ev. § 249.

⁷ *Supra*, § 231.

ing notices given him as messenger, after he has absconded, or is from any cause out of reach of process.¹

§ 253. Entries in the books of deceased notaries when made in the course of their business, and similar entries made in notaries' books by deceased clerks, are also admissible.²

So of notaries' entries.

VII. EXCEPTION AS TO GENERAL REPUTATION WHEN SUCH IS MATERIAL.

§ 254. Whenever it is material to bring home to a party cognizance of a particular fact, it has been held admissible, under circumstances to be presently noticed, to show that such fact was at the time generally known and talked about in the neighborhood where the party in question resided, or was a matter of common reputation in the business community to which both parties belonged.³ It is on this ground that proof of notorious usage has been received, as well as evidence of character, when character is introduced as infecting another with notice.⁴ Notoriety of a man's intemperance, therefore, is admissible to impute knowledge of such intemperance to a person selling him liquor.⁵ Hence, when the issue was whether a person to whom spirituous liquor was illegally sold was an habitual drunkard, evidence of his reputation in this respect was held admissible.⁶ And when *scienter* is an issue, in a trial for receiving stolen goods, the reputation of the alleged thief is admissible; and he may be shown by the defence to have the reputation of being a regular and fair dealer in the article received.⁷ And common rumor that a party is guilty of a crime is held admissible, in connection with other criminatory evidence, as part of the evidence for the defence in actions of malicious prosecution.⁸ It has also been

¹ *Welsh v. Barrett*, 15 Mass. 380; *North Bank v. Abbott*, 13 Pick. 465; *Shove v. Wiley*, 18 Pick. 558; *Washington Bank v. Prescott*, 20 Pick. 339.

² *Whart. on Ev.* § 251. *Supra*, § 197.

³ *Whart. on Ev.* § 252.

⁴ *Supra*, § 58.

⁵ *Atkins v. State*, 60 Ala. 45.

⁶ *Adams v. State*, 25 Oh. St. 584.

⁷ *Com. v. Gazzolo*, 123 Mass. 220.

"Where the question of reasonable cause to believe a person insolvent is in issue, it has been held that the general reputation of such person as to credit and solvency was competent." *Morton, J., Com. v. Gazzolo*, 123 Mass. 220, citing *Bartlett v. Decreet*, 4 Gray, 111; *Heywood v. Reed*, 4 Gray, 574.

⁸ *Pullen v. Glidden*, 68 Me. 559.

allowed, on a trial for attempting to produce miscarriage by administering ergot, to prove that ergot was popularly believed to produce miscarriage, the object being to explain the intent.¹ And it has been allowed, as a *prima facie* case, to prove the existence of a corporation by general reputation.²

§ 255. But evidence of general reputation must be in such cases received only as a mode of proving the condition of a particular person's mind as to a certain issue. General reputation is inadmissible to prove any objective fact unless when general reputation is at issue. Thus, when the question is whether certain places or structures are nuisances, general reputation can be admitted neither in proof nor disproof,³ though when general reputation is a constituent of the offence it may be proved.⁴ And, as a general rule, evidence of a rumor is inadmissible to justify a libel.⁵ On the other hand, in trespass for destroying a picture, when the plea was not guilty, and the defence that the picture was a libel on the defendant's sister and brother-in-law, and that he had therefore destroyed it, Lord Ellenborough held, "that the declarations of the spectators while they looked at the picture in the exhibition room were evidence to show that the figures portrayed were meant to represent the defendant's sister and brother-in-law."⁶

§ 256. It may happen that a question at issue is whether certain things were said at a particular time, independently of the truth of what is thus said. If so, proof that such things were said is admissible, though hearsay. The question, for instance, is, whether certain acts of violence are excusable; and on such an issue it would be admissible, for the reason here given (if for no other), to prove certain exclamations of terror or of threat, without calling the persons by whom such exclamations were uttered.⁷ And when the issue is whether a railroad officer acted prudently at the time of a collision, there can

But inadmissible to prove facts.

Admissible when the issue is hearsay.

¹ *Carter v. State*, 2 Ind. 617.

² *Supra*, §§ 102 a, 164 a; *State v. Thompson*, 23 Kan. 338.

³ *Whart. Crim. Law*, 8th ed. §§ 1430, 1451; *State v. Foley*, 45 N. H. 466; *Com. v. Stewart*, 1 S. & R. 342; *Overstreet v. State* 3 How. (Miss.) 328. *Infra*, § 261.

⁴ *Infra*, § 261.

⁵ *Whart on Ev.* § 253.

⁶ *Du Bost v. Beresford*, 2 Camp. 511; *Powell's Evidence* (4th ed.), 148.

⁷ See *Com. v. Daley*, Appen. to *Whart. on Hom.*; *R. v. Vincent*, 9 C. & P. 276, cited *infra*, § 272; *Redford v. Birley*, 3 Stark. 88.

be no question that cries of alarm uttered at the time, or even telegrams delivered an hour or two before, can be received, if relevant, without calling the persons from whom either cries or telegrams issued.¹ Where, in other words, it is material to prove that certain things were said at a particular time, then the saying of these things, though hearsay, is to be proved.

§ 257. Whenever it is material to ascertain the condition of a party's mind at a particular time, statements made to him, accounting for his attitude, are not excluded for the reason that they are hearsay. Threats made by A. of violence to B. are hearsay when repeated by a third party, yet when B. is on trial for injury done, as he alleges in self-defence, to A., it is admissible for him to prove that these threats were communicated to him by such third party.² For the same reasons a belief floating about the community, to the effect that A. is a man of great ferocity, is admissible, as we have seen, in the same issue on B.'s behalf.³ In fine, when the state of a party's mind, is at issue, communications made to such party, accounting for his conduct, are admissible, though hearsay.⁴

§ 258. As is elsewhere established, hearsay is a primary evidence of value, and in proving value, therefore, it is admissible to resort to hearsay.⁵ The inquiry is, what the thing at issue would bring at a well-conducted sale.⁶

§ 259. Whenever character is at issue, then, as is elsewhere more fully seen, evidence of general reputation is admissible. Reputation is in such cases the only mode in which character can be exhibited to us.⁷

§ 260. Where an offence is laid generally in the indictment, as where the defendant is charged as a common barrator, or a common scold, or as keeping a common gaming-house, or disorderly house, evidence of general reputation is not admissible, it being necessary, to sustain the indictment, that the particular facts which constitute the offence

¹ Whart. on Ev. § 254.

² *Infra*, § 757.

³ *Supra*, § 69; *infra*, §§ 756, 757; Williams v. State, 14 Tex. Ap. 102.

⁴ *Infra*, §§ 540-2; Whart. on Ev. §§ 447-50; State v. Lull, 48 Vt. 581, cited *supra*, § 67. Compare Sheen v. Bumpstead, 2 H. & C. 193; Du Bost v. Be-

resford, 2 Camp. 511, cited *supra*, § 255; State v. Wagner, 64 Me. 178; Lee v. Kilburn, 3 Gray, 594; Bartlett v. Decreet, 4 Gray, 113.

⁵ Whart. on Ev. §§ 447-50; Smith v. State, 48 Iowa, 595.

⁶ State v. James, 58 N. H. 67.

⁷ *Supra*, §§ 57 *et seq.*

should be proved.¹ Thus upon the trial of one indicted as a common gambler, evidence that he was and is by reputation "a common gambler" is not admissible; his acts, not his character, are to be shown.² And so, on an indictment for fornication, general reputation in the neighborhood, that the defendant lived in fornication with a woman, is inadmissible.³

§ 261. On indictments, however, for keeping houses of "ill-fame," when such is the statutory term describing the offence, the "ill-fame" or bad reputation of the house may be put in evidence.⁴ The bad reputation of the visitors is in any view competent evidence.⁵ But of a disorderly house the reputation is inadmissible, being secondary evidence of disorder, which is susceptible of immediate proof.⁶ Particular acts of disorder, however, are admissible, from which the character of the house may be inferred,⁷ and so may the bad conduct of those frequenting the house.⁸ But when "notorious adultery" is by statute indictable, proof of notoriety is as material as proof of the fact of adultery in making out the offence.⁹ And so is

Otherwise
when noto-
riety is at
issue.

¹ *Com. v. Stewart*, 1 S. & R. 342; Archb. C. P. 105. See *R. v. Rogier*, 1 B. & C. 272; 2 D. & R. 431; Whart. Crim. Law, 8th ed. §§ 1410 *et seq.*, 1430, 1451.

² *Com. v. Hopkins*, 2 Dana, 418.

³ *Overstreet v. State*, 3 How. (Miss.) 328.

⁴ *U. S. v. Gray*, 2 Cranch C. C. 675; *U. S. v. Stevens*, 4 Cranch C. C. 341; *Cadwell v. State*, 17 Conn. 467; *State v. Morgan*, 40 Conn. 44; *People v. Lockwing*, 61 Cal. 378; *People v. Buchanan*, 1 Idaho, N. S. 681; see *U. S. v. Johnson*, 12 Rep. 135. And so where a statute makes it indictable to keep a house "reputed" to be a tippling-house. *State v. Buckley*, 40 Conn. 246; *State v. Haley*, 52 Vt. 476. But see *contra*, *State v. Boardman*, 64 Me. 543; and see *Com. v. Davis*, 11 Gray, 48; *State v. Brunell*, 29 Wis. 435.

⁵ *State v. Boardman*, 64 Me. 543; *State v. McGregor*, 41 N. H. 407; *Com. v. Gannett*, 1 Allen, 7; *Com. v. Lam-*

bert, 12 Allen, 177; *Com. v. Kimball*, 7 Gray, 328; *Harwood v. People*, 26 N. Y. 190; *Sparks v. State*, 59 Ind. 82; *O'Brien v. People*, 28 Mich. 213; *State v. Brunell*, 29 Wis. 435; *Clementine v. State*, 14 Mo. 112; *King v. State*, 17 Fla. 183; *Morris v. State*, 38 Tex. 603; *Sylvester v. State*, 42 Tex. 496. See *Berry v. People*, 1 N. Y. Cr. Rep. 43, 57; *Territory v. Chartrand*, 1 Dak. 379.

⁶ *U. S. v. Jourdan*, 4 Cranch C. C. 338; *State v. Foley*, 45 N. H. 466; *Com. v. Stewart*, 1 S. & R. 342; *Com. v. Hopkins*, 2 Dana, 418. *Supra*, § 255.

⁷ *Com. v. Davenport*, 2 Allen, 299; *Com. v. O'Brien*, 8 Gray, 487; *Com. v. Cardozo*, 119 Mass. 210; *Com. v. Stewart*, 1 S. & R. 342; *State v. Webb*, 25 Iowa, 231; *State v. Patterson*, 7 Ired. 70; *Mahalovitch v. State*, 54 Ga. 217.

⁸ *Com. v. Kimball*, 7 Gray, 328; *State v. Patterson*, 7 Ired. 70.

⁹ *People v. Gates*, 46 Cal. 52; see *State v. Thomas*, 47 Conn. 646; *Com.*

reputation when the defendant is charged with the statutory offence of being a notorious thief.¹

VIII. EXCEPTION AS TO REFRESHING MEMORY.

§ 261 *a.* Conversations with third persons may become admissible when introduced for the purpose of identifying facts. But such conversations are not evidence of the truth of facts, which they state. They are evidence only on the single point of fixing particular dates, places, or other extrinsic incidents of the facts testified to by the witness.² The same rule exists as to writings introduced in order to refresh memory.³

Collateral
hearsay
admissible
to refresh
memory
as to inci-
dents in
chief.

IX. RES GESTAE.

§ 262. *Res gestae* are events speaking for themselves, through the instinctive words and acts of participants, not the words and acts of participants when narrating the events. What is done or said by participants, under the immediate spur of a transaction, becomes thus part of the transaction, because it is then the transaction that thus speaks. In such cases it is not necessary to examine as witnesses the persons who, as participators in the transaction, thus instinctively spoke or acted. What they did or said is not hearsay; it is part of the transaction itself. And as long as the transaction continues, so long do acts and deeds emanating from it become part of it, so that in describing it in a court of justice they can be detailed. The question is, is the evidence offered that of the event speaking through participants, or that of observers speaking about the event. In the first case, what was thus said can be introduced without calling those who said it; in the second case, they must be called. Nor are there any limits of time within which the *res gestae* can be arbitrarily confined. They vary, in fact, with each particular case. If in one of our streets there is an unexpected collision between

Res gestae
admissible
though
hearsay.

v. Whitaker, 131 Mass. 234, cited *infra*, §§ 323, 329, 393; Whart. Crim. Law, 8th ed. § 1747. As to constitutionality of such laws, see *infra*, § 716 *a.*

¹ *World v. State*, 50 Md. 49.

² See Whart. on Ev. §§ 258, 519. See *Com. v. Ford*, 130 Mass. 64; *State v. Collins*, 13 S. C. 373; *Cooper v. State*, 59 Miss. 267.

³ *Com. v. Jeffs*, 132 Mass. 5. See *Ruston v. State*, 4 Tex. Ap. 432.

two men, entire strangers to each other, then the *res gestae* of the collision are confined within the few moments that it occupies. But when there is a social feud, in which two religious factions, as in the case of the Lord George Gordon disturbances, or of the Philadelphia riots of 1844, are arrayed against each other for weeks, and are so absorbed in the collision as to be conscious of little else, then all that such parties do and say under such circumstances is as much part of the *res gestae* as the blows given in the homicides for which particular prosecutions may be brought.¹—Declarations claimed to be part of the *res gestae*, may precede, accompany, or follow the transaction to which they relate. It is only when they accompany the transaction so as to be wrought up in it, and to emanate from it, that they can be rightfully regarded as excepted from the rule that excludes hearsay. It is agreed on all sides that narratives of a transaction after it has transpired are inadmissible unless as admissions by the party charged;² and on the same principle declarations prior to the transaction are excluded.³ The conflicting cases are those in which, as a matter of fact, it was questioned whether the declarations offered were part of the transaction. In *Bedingfield's Case*, hereafter discussed in detail, it was held by Cockburn, C. J., and Field and Manisty, JJ., that a declaration by the deceased about a quarter of an hour after her throat had been cut by the defendant, and about ten minutes before her death, charging him with the assault, was not part of the *res gestae*. In *McPike's Case*, decided in 1849,⁴ the declaration was “made after a very considerable interval of time . . .

¹ See rulings substantially to this effect in *Com. v. Sherry* and *Com. v. Daley*, reported in the Appendix to Whart. on Homicide. See *R. v. Gordon*, 21 How. St. Tr. 542; *U. S. v. Angell*, 11 Fed. Rep. 34; *Robinson v. State*, 57 Md. 15. *Infra*, § 263. As to *res gestae* in relation to confessions see *infra*, § 691; in relation to dying declarations, *infra*, § 296. Compare *Nutting v. Page*, 4 Gray, 584; *Meek v. Perry*, 36 Miss. 190. See a ruling in *Edmonds v. State*, 34 Ark. 720, where it was held that declarations of the deceased made when there could have been no

lis mota, could be admitted as part of the *res gestae* to prove the existence of a peculiar tooth in his mouth. And see generally Thompson's Note, 10 Am. Rep. 28-9; 1 Crim. Law Mag. (note), 69; 21 Alb. L. J. 484, 504; 22 id. 4.

² *Infra*, § 264.

³ *Infra*, § 268.

⁴ *Com. v. McPike*, 3 Cush. 181, cited *infra*, §§ 263 *et seq.* The head note of this case shortens the time between the transaction and the declaration as given in the succeeding statement of facts. See as sustaining text, *Walker v. State*, 13 Tex. Ap. 643.

great enough to allow the deceased, after receiving the wound, to go upstairs and despatch a messenger for the doctor, and then to allow the witness, after meeting this messenger on the stairs, to go after a watchman, return to the house, and go up to the room where the deceased lay."¹ Now, whatever we may say as to the ruling in Bedingfield's Case, that in McPike's Case cannot be sustained. The declaration admitted in the latter case cannot be regarded as a dying declaration, as there was no proof of consciousness of approaching death. And to take it out of the category of hearsay on the ground that it was part of the *res gestae*, would require the admission of narratives by participants in past transactions no matter how long may have been the interval between the transaction and the narrative. For as soon as we pass the line which distinguishes between the transaction talking of itself, and talking as modifying the transaction,—in other words, as soon as we pass the line between the time of the transaction and the time that follows it—we have no limits that can be imposed. If we are to receive declarations made ten minutes after a transaction, we must receive declarations made ten years afterwards. The impulses of anger, or it may be of ungrounded suspicion, may, in many minds, operate even more effectively and passionately ten minutes after an injury than they would after ten years had elapsed.²

¹ Prof. Thayer, in Am. Law Rev., Jan. 1881, p. 85.

² See to this effect Roscoe's Cr. Ev. 261; People v. Williams, 3 Abb. Ct. App. Dec. 596; Cheek v. State, 35 Ind. 492; People v. Ah Lee, 60 Cal. 85; overruling People v. Vernon, 35 Cal. 49. The better rule is that when the transaction is over, no matter how short may have been the interval, and the assailant is absent, declarations by the assailed, even though subsequently deceased, are not part of the *res gestae*.

In Com. v. Hackett, 2 Allen, 136 (1861), the declaration of the deceased was made "twenty seconds" after the deceased's cry on being struck, but after the defendant had escaped. It was held competent evidence, Bigelow, C. J., saying: "The true test of the

competency of the evidence is not . . . that the declaration was made after the act was done, and in the absence of the defendant. . . . They (these conditions) are outweighed by the other facts in proof, from which it appears that they were uttered after the lapse of so brief an interval, and in such connection with the principal transaction as to form a legitimate part of it," etc.

As cases where declarations by the deceased prior to the fatal act were admitted, see Hunter v. State, 40 N. J. L. 495, and Hayden's Case, cited *infra*; Cf. Thomas v. State, 67 Ga. 460.

The question in the text is discussed in 21 Alb. L. J. 484 *et seq*; 22 Alb. L. J. 4 *et seq*; 10 Cent. L. J. 23; 16 Cent. L. J. 2. A series of elaborate articles

§ 263. The distinguishing feature of declarations of this class is that they should be the necessary incidents of the litigated act; necessary in this sense, that they are part of the immediate concomitants or conditions of such act, and are not produced by the calculated policy of the actors. In other words, they must stand in immediate causal relation to the act, and become part either of the action immediately producing it or of the action which it immediately produces. Incidents that are thus immediately and unconsciously associated with an act, whether such incidents are doings or declarations, become in this way evidence of the character of the act.¹ Under the rule before

Res gestae
must
spring im-
mediately
from act.

by Prof. Thayer, discussing Bedingfield's Case, and the *res gestae* in general, was published in the American Law Review for December, 1880, and January and February, 1881.

Declarations of the deceased, prior to receiving poison from the defendant, of an arrangement made with the defendant to meet him, were received, as will be seen, in Hayden's Case, *infra*, § 263.

This is in conflict with *People v. Williams*, 3 Abb. Ct. App. Dec. 596; *Cheek v. State*, 35 Ind. 492; *Cooper v. State*, 63 Ala. 180; *State v. Pomeroy*, 25 Kan. 349; *Pharr v. State*, 10 Tex. Ap. 485; *Cf. State v. Dickinson*, 41 Wis. 299.

That the declarations are admissible of a wounded person immediately after recovering consciousness lost on receiving the wound, see *Johnson v. State*, 65 Ga. 94; *Lanier v. State*, 57 Miss. 102.

Ins. Co. v. Mosely, 8 Wall. 397, pushes the limits of the *res gestae* to an extent which may be gravely questioned. See Whart. on Ev. §§ 261, 268; Grover, J., *People v. Davis*, 56 N. Y. 102; and comments of Prof. Thayer, in Am. Law Rev., Jan. and Feb. 1881.

¹ *U. S. v. Craig*, 4 Wash. C. C. 729; *U. S. v. O'Meara*, 1 Cranch C. C. 165; *State v. Wagner*, 61 Me. 178; *Com. v.*

Williams, 105 Mass. 62; *Com. v. Voeburg*, 112 Mass. 419; *Russell v. Frisbie*, 19 Conn. 205; *Haight v. Haight*, 19 N. Y. 464; *Greenfield v. People*, 85 N. Y. 75; *Schnicker v. People*, 88 N. Y. 192; *Hunter v. State*, 40 N. J. L. 495; *Brown v. Com.*, 76 Penn. St. 319; *State v. Frazier*, 1 Honst. C. C. 176; *Haynes v. Com.*, 28 Grat. 942; *State v. Ridgely*, 2 Har. & McH. 120; *Robinson v. State*, 57 Md. 14; *Comfort v. People*, 34 Ill. 404; *Davison v. People*, 90 Ill. 222; *Sanders v. People*, 104 Ill. 243; *Hamilton v. State*, 36 Ind. 281; *Binns v. State*, 57 Ind. 46; *People v. Marble*, 38 Mich. 117; *State v. Porter*, 34 Iowa, 131; *Mack v. State*, 48 Wis. 271; *State v. Tilly*, 3 Ired. 424; *State v. Huntly*, 3 Ired. 418; *State v. Rawles*, 65 N. C. 334; *Mitchum v. State*, 11 Ga. 615; *Stiles v. State*, 57 Ga. 183; *Flanegan v. State*, 64 Ga. 52; *Johnson v. State*, 65 Ga. 94; *Manier v. State*, 6 Baxt. 595; *Taylor v. State*, 11 Lea, 708; *Ross v. State*, 62 Ala. 224; *Cooper v. State*, 63 Ala. 80; *Steele v. State*, 61 Ala. 213; *Allen v. State*, 60 Ala. 19; *Head v. State*, 44 Miss. 731; *Field v. State*, 57 Miss. 474; *State v. Graham*, 46 Mo. 490; *State v. Testerman*, 68 Mo. 408; *State v. Thomas*, 68 Mo. 605; *State v. Evans*, 65 Mo. 574; *State v. Thomas*, 30 La. An. 600; *Wilson v. State*, 33 Ark. 557; *State v. Winner*, 17 Kans.

us evidence in homicide trials has been received of the exclamations of the defendant at the time of the attack;¹ of the cries of the deceased and of others assaulted at the same time;² of statements of the deceased, at the time or so soon before or afterwards as to preclude the hypothesis of concoction or premeditation, charging the defendant with the act;³ in cases of robbery, of the explana-

298; *Cox v. State*, 8 Tex. Ap. 254; *Foster v. State*, id. 248; *Black v. State*, id. 329; *Tooney v. State*, id. 452; *Jeffries v. State*, 9 Tex. Ap. 598; *McPhail v. State*, 9 Tex. Ap. 164; *Means v. State*, 10 Tex. Ap. 16; *Brunet v. State*, 12 Tex. Ap. 521; *People v. Vernon*, 35 Cal. 49; *State v. Garrand*, 5 Oreg. 216. See cases *infra*, §§ 691-2.

¹ See *O'Mara v. Com.*, 75 Penn. St. 424; *Wilson v. People*, 94 Ill. 299; *Mitchum v. State*, 11 Ga. 615; *People v. Roach*, 17 Cal. 297.

In Texas the defendant has been allowed to prove exclamations of his own, made within less than a minute after killing the deceased. *Foster v. State*, 8 Tex. Ap. 248. See *Russell v. State*, 11 Tex. Ap. 288.

² *State v. Wagner*, 61 Me. 175; *Bradshaw v. Com.*, 10 Bush, 576; *People v. Murphy*, 45 Cal. 137.

³ *Infra*, § 296; *Com. v. McPike*, 3 Gush. 181; *State v. Nash*, 10 Iowa, 81. See *State v. Pomeroy*, 25 Kan. 349.

Com. v. McPike, however, as has been seen, while authority for the principle stated in the text, cannot be sustained, so far as concerns the application of that principle to the facts of the particular case. This case is rejected as authority by Cockburn, C. J., in the pamphlet hereafter noticed; and see comments, *supra*, § 262.

In *Hunter v. State*, 49 N. J. L. 495, the man afterwards murdered made statements to his son, and wrote a note to his wife, a few hours before leaving home on the night of the murder, to

the effect that he was going to the city of C. on business, and that the prisoner was going with him. It was held that such statements, both oral and written, were admissible as explanations and preparations of the act of going from home.

In *State v. Hayden*, Superior Court of New Haven, Jan. 1880 (9 Reporter, 237), it was held by Park, C. J., that declarations made by the deceased, whose murder was charged upon defendant, that she was going to see the defendant (made while in the act of going) and inform him of her pregnancy by him, and say to him that he must do something for her, are competent to characterize her act of going; and that when the act and the declaration are thus united, the whole becomes a fact in the case.

It was further ruled that declarations made by the deceased that she was going to the place, where she was subsequently found murdered, to take "quick medicine," to be given her by the defendant in order to procure an abortion, made while in the act of going, are competent to characterize her act of going. Compare, however, the limitations expressed *supra*, § 225.

How far statements of a dying person may be regarded as dying declarations is considered *infra*, § 296.

An analogous extension of the rule in the text was made in *Com. v. Piper*, 120 Mass. 185, where the issue being whether a witness saw the defendant jump from a window about the time of the commission of the murder, it was

tion of the parties immediately after the robbery;¹ of the declarations of the mother of abducted children immediately after their abduction, though in the defendant's absence;² and so, in order to rebut the presumption arising from the possession of stolen property, declarations of the parties at the time of the reception of the property are received.³ On the same principle, the cries of a mob, led by parties tried for riot and unlawful meeting, can be received against the defendants, no matter at what time during the continuance of the riot such cries were uttered.⁴ But the comments and criticisms of observers cannot be introduced as *res gestæ*. Such

held competent for the prosecution to show, for the purpose of identification, that shortly after the event the witness pointed out the window to an officer.

In *R. v. Bedingfield*, to be hereafter more fully noticed (*infra*, § 296), the defendant was indicted for killing the deceased by cutting her throat. The prosecution offered to prove that (to adopt the statement of Cockburn, C. J.) the deceased, "some ten or fifteen minutes before her death, coming from her house, at a distance of from fifteen or twenty yards from her door, holding her apron to her throat," exclaimed, "Oh, dear aunt, see what Bedingfield has done," Bedingfield not being at the time present, and the declaration having been made about a quarter of an hour after the time the blow was supposed to have been given. This was rejected by Cockburn, C. J., as admissible neither as part of the *res gestæ* nor as a dying declaration: he having in this ruling the concurrence of Field and Manisty, JJ., whom he consulted. The ruling was criticized, as we shall hereafter see, by Mr. Pitt Taylor, and defended by the chief justice in a pamphlet published in December, 1879. *Infra*, § 296; *R. v. Foster*, 6 C. & P. 325, cited to the point in the text, and criticized by Cockburn, C. J., is hereafter discussed. *Infra*, § 492.

¹ *Driscoll v. People*, 47 Mich. 413.

² *Robinson v. State*, 57 Md. 15.

³ *R. v. Abraham*, 2 C. & K. 550; *State v. Daley*, 53 Vt. 442; *Leggett v. State*, 15 Ohio, 283; *People v. Dowling*, 84 N. Y. 478; *People v. Lander*, 104 Ill. 248. *Aliter* as to past transactions, *Allen v. State* 71 Ala. 5.

In *People v. Dowling*, 84 N. Y. 478, which was an indictment for receiving stolen goods, the defendant offered to prove what was said as to the mode of obtaining the property stolen by men of whom he alleged that he purchased the same at the time of the alleged purchase. It was held by the Court of Appeals that the testimony was competent, "not as evidence to prove how the alleged vendors came by the property but as relevant as to how defendant came by the property. *Rex v. Whitehead*, 1 C. & P. 67; *Powell v. Harper*, 5 id. 590; *Hayslep v. Gymer*, 1 Ad. & El. 162. The cases to the contrary (*Willis v. People*, 3 Park. Cr. 473, and *People v. Rando*, id. 355) were doubtfully decided. It is the rule, generally speaking, that declarations accompanying acts are admissible as showing the nature, character, and objects of such acts. See *Reg. v. Wood*, 1 F. & F. 497." See *infra*, §§ 293, 691, 761.

⁴ *R. v. Gordon*, 21 How. St. Tr. 536. *Infra*, §§ 690-1.

persons must be called in court and examined as to what they saw. Their statements, made at the time, are hearsay.¹

§ 264. The rule before us, however, does not permit the introduction, under the guise of *res gestae*, of a narrative of past events, made after the events are closed by either the party injured or by bystanders.² But we must again remember that continuousness cannot always be measured by time. In this view we can understand the comments of Lord Denman,³ concurring in a prior remark of Parke, B.,⁴ "that it is impossible to tie down to time the rule as to the declarations" that may be made part of the *res gestae* in cases of bankruptcy; to which Lord Denman added, "that if there be connecting circumstances, a declaration may, even at a month's interval, form part of the whole *res gestae*."⁵

§ 265. The rule before us is not to be limited to declarations explanatory of crimes. To business relations, also, the same test is applicable—declarations which are the immediate accompaniments of an act being admissible as part of the *res gestae*; remembering that immediateness

¹ Bradshaw v. Com., 10 Bush, 576; Greenl. Ev. § 110. That is precisely this case. The declarations given in evidence were a mere statement of

² *Infra*, § 691; Hyde v. Palmer, 3 B. & S. 657; Com. v. Cooper, 5 Allen, 95; Com. v. James, 99 Mass. 438; Greenfield v. People, 85 N. Y. 73; Hays v. State, 40 Md. 633; Gardner v. People, 3 Scam. 83; Cross v. People, 47 Ill. 152; Dukes v. State, 11 Ind. 557; Binns v. State, 57 Ind. 45; Tipper v. Com., 1 Metc. (Ky.) 6; Riggs v. State, 6 Cold. 517; Hall v. State, 48 Ga. 698; Chaney v. State, 31 Ala. 342; Hall v. State, 40 Ala. 698; Steele v. State, 61 Ala. 213; Scaggs v. State, 8 Sm. & M. 722; State v. Schneider, 35 Mo. 535; State v. Brown, 64 Mo. 367; Mutoha v. Pierce, 49 Wis. 231; State v. Pomeroy, 25 Kan. 349; People v. Symonds, 19 Cal. 275. See Binns v. State, 66 Ind. 428; People v. Ah Lee, 60 Cal. 85.

³ Roush v. R. R., 1 Q. B. 51.
⁴ Rawson v. Haigh, 5 Bing. 104; S. C., 9 Moore, 217.

⁵ See Ridley v. Gyde, 9 Bing. 349; People v. Marble, 38 Mich. 117; Cox v. State, 64 Ga. 374.

"But when the declarations offered are merely narratives of past occurrences, they are incompetent. 1

is tested by closeness, not of time, but by causal relation as just explained.¹

§ 266. What is done is part of the *res gestæ* as much as is what is said;² and on this additional ground is explained a famous ruling, elsewhere noticed, that without producing flags exhibited at seditious meetings the inscriptions on such flags could be proved;³ for such inscriptions used on such occasions are the public expression of the sentiments of those who bear them, and have rather the character of speeches than of writings.⁴ Nor is the application of this rule limited to cases when the fact to be brought out is that which is the primary object of litigation. Thus (subject to the limitations hereinafter to be expressed) when an evidentiary fact is put in evidence either party is entitled to introduce as proof whatever, whether in the way of words or signs, tends to explain it.⁵ It is

What is done, said, or exhibited at the occurrence may be so proved.

¹ Whart. on Ev. § 262. But a declaration that the shooting was accidental made to a party who had not seen the affair by the defendant after he had walked two hundred yards, is not part of the *res gestæ*. *State v. Seymour*, 1 Houst. C. C. (Del.) 508. See *infra*, § 691.

That declarations coincident with torts are receivable, see fully illustrated in Whart. on Ev. § 263.

² *Savage v. State*, 18 Fla. 909.

³ *Supra*, § 81.

⁴ *R. v. Hunt*, 3 B. & Ald. 574.

⁵ *Supra*, §§ 262-3. In *Maack v. State*, 48 Wis. 271 (1880), it was ruled that "if the acts of the accused done before the commission of the crime with which she is charged are competent evidence tending to show that she committed such crime, then what was said at the time the act was done is also admissible, as explanatory of the same, and as indicative of the intent or object of the act. The reason for this rule is very forcibly stated in *Wiggins v. Plumer*, 11 Fost. (N. H.) 251-267: 'When evidence of an act done by a party is admissible, his declarations made at the time having a

tendency to elucidate or give character to the act, and which may derive a great degree of credit from the act itself, are also admissible as part of the *res gestæ*.' And the rule is substantially stated in the same way in *Gordon v. Shurtliff*, 8 N. H. 280; *Plumer v. French*, 2 Fost. 454; and *Hersom v. Henderson*, 3 id. 498. 'When a fact is offered in evidence, the whole transaction of it consists of many particulars, which may and ought to be proved. Every additional circumstance proved may vary the effect of the evidence—may neutralize it or give it point. What is then said by the parties, and what was said by others to them, relative to the subject of the transaction, is a part of the transaction itself. It is admissible on the same principle that every other part of it is, that the whole matter may be seen by the jury—upon the same principle which disallows extracts or written papers, that their effects may be materially varied by the part omitted. Contemporaneous but otherwise unconnected conversation is rejected on the same ground as other unconnected

essential, however, to the admission of declarations under this exception that they should have emanated instinctively from the act put in evidence. If they were before or after it, so as to be open to the suspicion of being self serving, they are to be excluded.¹ They are admissible because they are so wrought up in the body of the act that they cannot be separated from it. In such cases the act is part of the declaration and the declaration part of the act. The words and deeds form part of a common mass of signs which cannot, in this sense, be distinguished. A man, for instance, is wounded in an affray. His cry immediately on receiving the hurt is as much an act as his attempt to ward it off. But the admission of statements of this class does not imply an acceptance of any facts they assert. They are admissible as parts of an act, not as verifiers of an independent transaction. The act of which the statement is part may have taken place and yet the statement be in

facts. If the statement offered in evidence does not tend to elucidate or give character to the acts proved, it is to be rejected. If it is upon the same subject and relative to the act in proof, it should be received.' The case of *Wiggins v. Plumer*, *supra*, was referred to by the late learned Justice Paine in *Ranger v. Goodrich*, 17 Wis. 78-85, and approved as stating the true rule in cases of this kind. The same rule is stated in *Lund v. Tyngsborough*, 9 Cush. 36-41. This court, in the case of *Bates v. Ableman*, 13 Wis. 644-650, admits the justice of the rule as stated in the latter part of the above quotation in the following language: 'It is undoubtedly true that where intent of a party to a sale is in issue, his statements at the time, and so connected with the transaction as to be a part of the *res gestae*, are competent evidence to show such intent, even though the person is not a party to the suit.' In the case of *Sorenson v. Dundas*, 42 Wis. 642, the rule is stated very briefly: 'Declarations are verbal parts of the *res gestae* only when they are contemporaneous.' *Felt v. Amidon*, 43 Wis. 467. In

Hamilton v. State, 36 Ind. 280, it is said: 'It is well established by the authorities that in all cases, civil or criminal, where evidence of an act done by a party is admissible, his declarations made at the time, having a tendency to elucidate, explain, or give character to the act, are admissible. They are a part of the transaction, and for that reason are admissible, and it makes no difference, so far as the admissibility of the declaration is concerned, whether it be in favor of or against the party making it. If the act was one of alleged criminality, and the accompanying declaration tends to show it to be innocent, it is equally admissible as when the tendency is to show the criminality of the act; and it may be given in evidence by the defendant as well as by the State.' See, also, *Parsons v. State*, 43 Ga. 197; *Comfort v. People*, 5 Ill. 404; *Head v. State*, 44 Miss. 731; *McKee v. People*, 36 N. Y. 113; *Russell v. Frisbie*, 19 Conn. 205.' And see *infra*, § 691; *People v. Majone*, 1 N. Y. Cr. Rep. 87-94; *Wilson v. People*, 94 Ill. 209.

¹ *Infra*, § 690.

the main false.¹ Thus, to take a common case, a party assailed may exclaim, at the moment of an assault, "this was in revenge." The exclamation is evidence as part of the transaction, but it is no more proof of an old grudge than would be a statement to the same effect made a month before the assault or a month afterwards.²

§ 267. The test of secondariness does not apply in such cases. Thus a foreign proclamation, on a printed placard, is treated as an inscription or act done at such time, and may be proved by oral evidence or an examined copy.³

Test of secondariness does not apply.

§ 268. Statements concocted in advance, as part of a projected scheme of crime, are clearly not within the exception.⁴ Such statements are inadmissible as self-serving, and cannot, therefore, be introduced by the defendants on their own behalf.⁵ They may be put in evidence, however, by the prosecution, when the object is to prove premeditation and preparation on part of the defendants.⁶

Statements in preparation of crime inadmissible.

§ 269. A declaration, also, is inadmissible for the purpose of explaining an unexecuted intent, unless the subjective condition of the party's mind is at issue.⁷ And when the quality or tone of an overt act is at issue, declarations as to such act cannot be proved, unless proof of the act itself is admissible, and the act is itself proved.⁸

Declarations inadmissible to explain inadmissible acts.

§ 270. The subsequent narrative of a mere witness to a transaction is not, in any view, to be received as part of the *res gestae*, if the witness is himself obtainable on trial.⁹ The opinions of a by-stander, if admissible, must be proved by calling him as a witness.¹⁰ It does not follow, however, as we will hereafter see, that because a defend-

Narration of a witness inadmissible when the witness could himself be produced.

¹ See *People v. Ah Yute*, 53 Cal. 613.

⁴ Whart. on Ev. § 268.

² That declarations of by-standers at the time of a surgical operation are admissible to show what then took place, see *Hitchcock v. Burgett*, 38 Mich. 501; *Robinson v. State*, 57 Md. 14. Cf. *Ohio & Miss. R. R. v. Porter*, 92 Ill. 437. That the admissibility of such declarations is not affected by the party making them being incompetent as a witness, see *State v. Delwood*, 33 La. An. 1229.

⁵ *Berney v. State*, 69 Ala. 220.

⁶ *Infra*, § 753.

⁷ *Hall v. State*, 48 Ga. 607; *Caw v. People*, 3 Neb. 357. See *Hale v. Taylor*, 45 N. H. 405; *Lund v. Tyngsborough*, 9 Cush. 36.

⁸ Whart. on Ev. § 266.

⁹ Whart. on Ev. § 267. See *Kennard v. Burton*, 25 Me. 39; *Reed v. R. R.* 45 N. Y. 39.

³ *Bruce v. Nicolupolo*, 11 Ex. 129.

¹⁰ *Supra*, § 263; *Detroit R. R. v. Van Steinburg*, 17 Mich. 99.

ant may testify as a witness, therefore his declarations are inadmissible, nor, as has been already noticed, is it necessary, in proving cries at a particular moment of excitement, to call the persons by whom the cries were made.¹ Nor are such utterances conditioned on the admissibility as witnesses of the persons making them.²

X. EXCEPTION AS TO DECLARATIONS CONCERNING PARTY'S OWN HEALTH AND STATE OF MIND.

§ 271. The character of an injury may be explained by exclamations of pain and terror at the time the injury is received, and by declarations as to its cause.³ When, also, the nature of a party's sickness or hurt is in litigation, his instinctive declarations to his physician, or nurse, during such sickness, may be received as part of the testimony and as explanatory of the conclusions of such physician or nurse.⁴ Immediate groans and gestures are in like manner admissible.⁵ But declarations made after convalescence, or when there has been an opportunity to think over the matter in reference to projected litigation are inadmissible.⁶ Thus in an action for carnally knowing the plaintiff, a girl of ten years, by force, and giving her the venereal disease, the plaintiff's statements made to a physician, three months after the event, have been ruled out.⁷ But where such subsequent declarations are part of the case on which the opinion of the physician, as an expert, is based, they have been

¹ *Supra*, § 256.

² *State v. Dellwood*, 33 La. An. 1229.

³ *Aveson v. Kinnaird*, 6 East, 188; *R. v. Blandy*, 18 How. St. Tr. 1135; *R. v. Guttridge*, 9 C. & P. 472; *State v. Wagner*, 61 Me. 178; and other cases cited in Whart. on Ev. § 268. *Supra*, § 252.

⁴ *Ibid.* See *Com. v. McPike*, 3 Cush. 181; *Wilson v. Granby*, 47 Conn. 59; *People v. Williams*, 3 Parker C. R. 84; *Pierson v. People*, 79 N. Y. 424; *Edington v. Ins. Co.*, 67 N. Y. 185; *State v. Geddicke*, 43 N. J. L. 86; *Tooney v. State*, 8 Tex. Ap. 452; *State v. Glass*, 5 Oregon, 73; *Johnson v. State*, 17

Ala. 618. See, however, *Witt v. Witt*, 3 Swab. & Tr. 143, where letters written by a patient, describing his situation to his physician, were rejected. That such testimony cannot be received to prove the cause of an injury, see *Roosa v. Loan Co.*, 132 Mass. 439, and cases there cited; *Weyrich v. People*, 89 Ill. 90; *Dowlen v. State*, 13 Tex. Ap. 61.

⁵ *Bacon v. Charlton*, 7 Cush. 581; *Hyatt v. Adams*, 16 Mich. 180; *State v. Porter*, 34 Iowa, 131.

⁶ Whart. on Ev. § 268; *State v. Geddicke*, 43 N. J. L. 86.

⁷ *Morrissey v. Ingham*, 111 Mass. 63.

received.¹ Except, however, for the purpose of indicating symptoms, declarations of this class are not evidence,² though they may be received to prove the condition of a party's prior to an alleged poisoning,³ when this is involved in the statement to the physician on which his advice is given.⁴

§ 272. We have just seen⁵ that, for the purpose of exhibiting such condition of mind, statements made to such party by third persons may be admissible. We have now to recognize the position that, to determine such condition of mind, it is admissible to put in evidence such expressions of the party as may be shown to have been instinctive, and not to have been uttered for the purpose of producing a particular effect.⁶ So, when the extent of a mental or other disease is in controversy, are contemporaneous declarations of the person so affected,⁷ though not as to conditions of prior

When condition of a person's mind is at issue, his statements may be proved.

¹ *Barber v. Merriam*, 11 Allen, 322. Compare *Ashland v. Marlborough*, 99 Mass. 47; though see *Rogers v. Crain*, 30 Tex. 289.

² *Collins v. Waters*, 54 Ill. 485.

³ *R. v. Johnson*, 2 C. & K. 354; *R. v. Blandy*, 18 How. St. Tr. 1135.

See, however, *Smith v. State*, 53 Ala. 486, where it was ruled that on the trial of a husband for poisoning his wife, it was inadmissible for the prosecution to prove that the wife, the day before her decease, while suffering intense pain, stated that she was taken sick that morning after eating breakfast. And in *Field v. State*, 57 Miss. 474, such statements were held inadmissible to prove what the deceased had eaten an hour before the attack of sickness came on. For other cases see *infra*, § 296.

⁴ See other cases in next section, and see *Messner v. People*, 45 N. Y. 1. *Infra*, §§ 457-8; *supra*, § 263. See as an extreme case of admission of evidence of this class, *Edmonds v. State*, 34 Ark. 720.

⁵ *Supra*, § 256.

⁶ See cases cited in last section, and

Com. v. O'Connor, 11 Gray, 94; *Rowell v. Lowell*, 11 Gray, 420; *Liles v. State*, 30 Ala. 24; *State v. Hays*, 22 La. An. 39; *People v. Shea*, 8 Cal. 538; and other cases cited *Whart. on Ev.* § 269.

On the trial of an indictment for a conspiracy to procure large numbers of persons to assemble for the purpose of exciting terror in the minds of her Majesty's subjects, evidence was given of several meetings at which the defendants were present, and it was proposed to ask a witness, who was superintendent of the police, whether persons complained to him of being alarmed by these meetings. It was held that the evidence was receivable, and that it was not necessary to call the persons who made complaints. *R. v. Vincent*, 9 C. & P. 275.

⁷ See *supra*, § 271; 1 *Whart. & St. Med. Jur.* § 286 (3d ed.); *Perkins v. R. R.*, 44 N. H. 223; *Howe v. Howe*, 99 Mass. 88; *Ill. Cent. R. R. v. Sutton*, 42 Ill. 438; *Stone v. Watson*, 1 Ala. (Sel. Cas.) 236; *State v. Kring*, 64 Mo. 591.

In *R. v. Johnson*, 2 C. & K. 354, the prisoner was charged with having

diseases;¹ and so, when the *bona fides* of a transaction is in question, are instinctive and unpremeditated declarations of parties during the negotiations, as touching such *bona fides*.² In life insurance cases the party's views as to his condition may be thus shown.³ And as will hereafter be seen,⁴ the declarations of a deceased person may be proved to show that the defendant, charged with killing such person, acted in self-defence.

§ 273. In prosecutions for rape, where the party injured is a witness, it is material to show that she made complaint of the injury while it was yet recent.⁵ Proof of such complaint, therefore, is original evidence;⁶ but whether the statement made by the prosecutrix of details and circumstances is admissible has been doubted.⁷ And

So may declarations of prosecutrix in rape, but not in other cases.

murdered her husband, and, in order to prove the state of health of the deceased prior to the day of his death, a witness was called who had seen him a day or two before that time; and on this witness being asked in what state of health the deceased appeared to be when he last saw him, he began to state a conversation which had then taken place between the deceased and himself on this subject. This was objected to on behalf of the prisoner, but Alderson, B., said that he thought that what the deceased person said to the witness was reasonable evidence to prove his state of health at the time. *Roscoe's Crim. Ev.* 8th ed. § 31.

¹ *Chapin v. Marlborough*, 2 Gray, 244; *Redditt*, 3 Md. 67; *Ross v. State*, 62 Ala. 224.

² *Banfield v. Parker*, 36 N. H. 353; *Zabriskie v. Smith*, 13 N. Y. 322. See *State v. Daly*, 53 Vt. 442, and cases cited. As to statements of a party charged with larceny, see *supra*, § 263; *infra*, § 691.

³ *Aveson v. Kinnard*, 6 East, 188. See *Witt v. Klindworth*, 3 S. & T. 143.

⁴ *Infra*, §§ 756-7.

⁵ Immediateness is essential to their admissibility. See *Hornbeck v. State*, 35 Oh. St. 277.

⁶ *R. v. Brazier*, 1 East P. C. 444; *R. v. Clarke*, 2 Stark. 241; *R. v. Guttridge*, 9 C. & P. 471; *R. v. Megson*, 9 C. & P. 420; *R. v. Walker*, 2 M. & Rob. 212; *R. v. Osborne*, C. & M. 622; *State v. Knapp*, 45 N. H. 148; *State v. Niles*, 47 Vt. 82; *State v. Byrne*, 47 Conn. 465; *People v. McGee*, 1 Denio, 19; *Baccio v. People*, 41 N. Y. 285; *People v. Croucher*, 2 Wheel. C. C. 42; *Johnson v. State*, 17 Ohio, 593; *Laughlin v. State*, 18 Ohio, 99; *McCombs v. State*, 8 Oh. St. 643; *Maillet v. People*, 42 Mich. 252; *Oleson v. State*, 11 Neb. 276; *Phillips v. State*, 9 Humph. 246; *Nugent v. State*, 18 Ala. 521; *Lacy v. State*, 45 Ala. 80; *State v. Scott*, 48 Ala. 420; *Hogan v. State*, 46 Miss. 274; *State v. Jones*, 61 Mo. 232; *Pfefferling v. State*, 40 Tex. 486; *Pleasant v. State*, 15 Ark. 624. See *Whart. Crim. Law*, 8th ed. § 566; and criticism by Prof. Thayer in *Am. Law Rev.*, Jan. 1881. That such evidence is inadmissible in prosecutions for assaults with intent to ravish, see *Veal v. State*, 8 Tex. Ap. 474.

⁷ *Ibid.* As affirming such admissi-

this exception is not to be extended beyond cases of rape. It is not admissible to prove, for instance, that a witness as to identity spoke to third parties of having identified the party in question.¹

§ 274. Cases may arise in which it is important to determine whether an act was done with the consent of a third person. "Although at one time," says Mr. Roscoe,² "it appears to have been thought necessary to call the party himself, it is now settled that the want of consent may be proved in other ways. Where on an indictment under 6 Geo. III. c. 36 (repealed), for lopping and topping an ash timber tree without the consent of the owner, the land steward was called to prove that he himself never gave any consent, and from all he had heard his master say (who had died before the trial, having given orders for apprehending the prisoners on suspicion), he believed that he never did: Bayley, J., left it to the jury to say, whether they thought there was reasonable evidence to show that in fact no consent had been given. He adverted to the time of night when the offence was committed, and to the circumstance of the prisoners running away when detected, as evidence to show that the consent required had not in fact been given."³

So as to a person whose assent to an act has to be shown.

XI. DYING DECLARATIONS.

§ 276. The dying declarations of a person who expects to die, respecting the circumstances under which he received a mortal injury, are admissible in prosecutions for killing the person making the declarations: (1) Though the prosecution be for manslaughter;⁴ and (2) Though the accused was not present when they were made, and had no oppor-

General grounds of admissibility.

bility, see *R. v. Wood*, 14 Cox C. C. 46; (now repealed), for killing fallow-deer without consent of the owner, and on two other indictments, for taking fish out of a pond without consent, evidence was given that the offence was committed under such circumstances as to warrant the jury in finding non-consent; and the persons engaged in the management of the different properties were called, but not the owners. The judges held the convictions right. *R. v. Allen*, 1 Mood. C. C. 154.

¹ *People v. Mead*, 50 Mich. 228. *Infra*, § 492.

² *Criminal Evidence*, 8th ed. § 6.

³ The prisoners were found guilty. *R. v. Hazy*, 2 C. & P. 458. So on an indictment on 42 Geo. III. c. 107, s. 1

State v. Hanna, 10 La. An. 131.

tunity for cross-examination;¹ and they may be received either against or in favor of the party charged with the death.² For it is argued (1) that such declarations must be received on the ground of necessity, there being no other evidence attainable,³ and (2) that when an individual is in constant expectation of immediate death, all temptation to falsehood, either from interest, hope, or fear will be removed; and the awful nature of his situation will be presumed to impress him as strongly with the necessity of a strict adherence to truth as the most solemn obligation of an oath administered in a court of justice.⁴ Yet, in dealing with this kind of evidence, one or two preliminary cautions should be observed. Passions and prejudices, which in life pervert the perceptive faculties, do not always lose their power on the death-bed.⁵ The parties executed

¹ See 1 Phil. Ev. 223; 1 Stark. Ev. 101; *People v. Green*, 1 Denio, 614; 1 Park. C. R. 11; *State v. Brunetto*, 13 La. An. 45, and cases hereafter cited.

² See *infra*, § 304.

³ *Infra*, § 278.

⁴ 1 Leach, 502; 1 Gilb. Ev. 280; 1 Chit. C. L. 568, 569; *State v. Smith*, 99 Conn. 876; *People v. Grunzig*, 2 Edm. Sel. Ca. 236; *People v. Davis*, 56 N. Y. 95; *Brotherton v. People*, 75 N. Y. 154; *Com. v. Murray*, 2 Ashm. 42; *Com. v. Williams*, *ibid.* 69; *Brown v. Com.*, 73 Penn. St. 321; *Kehoe v. Com.*, 85 Penn. St. 127; *Small v. Com.*, 91 Penn. St. 304; *State v. Nash*, 7 Iowa, 347; *Donnelly v. State*, 2 Dutch. 463; *Walston v. Com.*, 16 B. Monr. 15; *State v. Scott*, 12 La. An. 274; *People v. Lee*, 17 Cal. 76; *People v. Ybarra*, 17 Cal. 166; *Benavides v. State*, 31 Tex. 579; *Hill v. State*, 41 Ga. 484; *Walker v. State*, 52 Ala. 192; *May v. State*, 55 Ala. 39; *Dunn v. State*, 2 Pike, 229; *Scott v. People*, 63 Ill. 508; *Hurd v. People*, 25 Mich. 105; *People v. Knapp*, 26 Mich. 112; *Cleveland v. Newson*, 45 Mich. 62; *State v. Oliver*, 2 Houst. 585; *Watson v. State*, 63 Ind. 548; *Campbell v. State*, 38 Ark. 498; *Thompson v. State*, 11 Tex. Ap. 51.

That a memorandum of the declarations made by a person present is inadmissible, see *State v. Wilson*, 24 Kan. 189.

⁵ "With respect to the effect of dying declarations, it is to be observed that, although there may have been an utter abandonment of all hope of recovery, it will often happen that the particulars of the violence to which the deceased has spoken were likely to have occurred under circumstances of confusion and surprise calculated to prevent their being accurately observed. The consequences, also, of the violence may occasion an injury to the mind, and an indistinctness of memory as to the particular transaction. The deceased may have stated his inferences from facts, concerning which he may have drawn a wrong conclusion, or he may have omitted important particulars, from not having his attention called to them. Such evidence, therefore, is liable to be very incomplete. He may naturally, also, be disposed to give a partial account of the occurrence, although possibly not influenced by animosity or ill-will. But it cannot be concealed, that animosity and resentment are not unlikely to be felt in

for complicity in Barclay's conspiracy to murder William III. united on the scaffold in statements whose falsity can only be explained by violent political passion, and the same criticism may be made on the conflicting statements of dying rioters. It should be remembered that cross-examination, when a witness is produced in court, gives a process, by which delusions can be dissipated. But no such process exists by the death-bed. The witnesses who catch up these statements are generally friends of and sympathizers with the dying man, eager to encourage and preserve any remarks he may drop, no matter how incoherent or feverish, which may vindicate him, or implicate a common object of hate; nor by such witnesses is it likely that questions would be asked as to the grounds of the declarant's belief. Nor can it always be said that the consciousness of the near approach of death is an equivalent to an oath administered on the witness stand. A witness sworn in court knows that he may be convicted of perjury if he testifies falsely. A dying man, if he believes in a future retribution, will speak, if his faculties are unimpaired, under a similar sanction; but all dying men do not retain their faculties unimpaired, nor do all dying men believe in a future state of retribution. Convicts on the scaffold have, as a class, as little hope of reprieve as any persons on the eve of death; yet there is no kind of evidence so unreliable as the last speeches of convicts on the scaffold. The weight, therefore, to be attached to dying declarations depend upon these conditions: (1) The trustworthiness of the reporters; (2) The capacity of the declarant at the time to remember accurately the past; and (3) His disposition truly to tell what he remembers. It is true, that by statute in most of our States, disbelief in a future retribution no longer disqualifies a witness; and that it is consequently held in such States that such disbelief does not affect the admissibility of dying declarations. It

such a situation. The passion of anger once excited may not have been entirely extinguished, even when all hope of life is lost. See *R. v. Crockett*, 4 C. & P. 544, where the declaration was, 'that damned man has poisoned me,' which may be presumed to be vindictive; and *R. v. Bonner*, 6 C. & P. 386, where the dying declaration was distinctly proved to be incorrect. Such

considerations show the necessity of caution in receiving impressions from accounts given by persons in a dying state, especially when it is considered that they cannot be subjected to the power of cross-examination—a power quite as necessary for securing the truth as the religious obligation of an oath can be." *Roscoe's Cr. Ev.* 36. See *Jones v. State*, 71 Ind. 66.

is true, also, that the law is that the court is required, as will presently be seen, to admit the declarations if the deceased would have been competent as a witness, and if he spoke under a consciousness of approaching dissolution. But when the declarations are received, their credibility and weight are for the jury; and in view of the exceptional character of the testimony, and its liability to perversion, it is proper that it should be carefully exposed to all of the tests just enumerated.¹

Evidence does not conflict with limitations of Constitution.

§ 277. The constitutional provision, that the accused shall be confronted by the witnesses against him, does not abrogate the common law principle that the declarations *in extremis* of the murdered person, in such cases, are admissible in evidence.²

But such declarations cannot be received to prove facts distinct from and prior to homicide.

§ 278. Dying declarations are admitted, from the necessity of the case, to identify the prisoner and the deceased,³ to establish the circumstances of the *res gestae*, and to show the transactions from which the death results; when they relate to former or distinct transactions they do not come within the principle of necessity.⁴ Therefore it seems that dying declarations by a party that the prisoner had, two or three times previously, attempted to kill him, are not admissible.⁵ And so when they go to show old malice or threats on the part of the prisoner to the deceased.⁶

¹ See *Walker v. State*, 37 Tex. 367; *Ala.* 103; *Reynolds v. State*, 68 Ala. 502; *Sylvester v. State*, 71 Ala. 17;

² *Robbins v. State*, 8 Oh. St. 131; *State v. Jefferson*, 77 Mo. 136; *Lieber v. State*, 9 Bush, 11; *Luby v. Com.*, 12 Bush, 1.

In Texas it has been held that dying declarations of the deceased are competent to prove his name as alleged in the indictment. *Leister v. State*, 1

³ *Lister v. Statt*, 1 Tex. Ap. 739; *Tex. Ap.* 739.

State v. Hamilton, 27 La. An. 400. ⁵ *Nelson v. State*, 7 Humph. 542; *State v. Draper*, 65 Mo. 335.

⁴ *R. v. Mead*, 2 B. & C. 605; *R. v. Hind*, Bell C. C. 253; 8 Cox C. C. 300; *R. v. Jenkins*, L. R., 1 C. C. R. 193; *State v. Wood*, 53 Vt. 560; *State v. Shelton*, 2 Jones (N. C.) 360; *Johnson v. State*, 17 Ala. 618; *Ben v. State*, 37 Dutch. 463, 601.

⁶ *Jones v. State*, 71 Md. 66; *Mose v. State*, 35 Ala. 421; see *State v. Wood*, 53 Vt. 560; *Merrill v. State*, 58 Miss. 65; though see *Donnelly v. State*, 2

§ 279. Yet it is competent to detail collateral remarks, on the part of the declarant, made at the time of the uttering of the declarations as to the homicide, when such collateral declarations tend to sustain the declarant's mental capacity. Thus, in a case in the Supreme Court of New Jersey, in 1857, Chief Justice Green said: "If it be true, as was proved by experts called by the defence, that the injury sustained by the deceased was calculated to derange the mental faculties, it was competent for the State to meet the objection *in limine*, and to show by his acts and words that he was laboring under no hallucination, and that his mental faculties were unimpaired."¹

But may be received to sustain declarant's mental capacity.

§ 280. Whether, when it is alleged that A. and B. were mortally wounded at the same time, by the same agency, the dying declarations of A. are admissible on the trial of C. for killing B. has been the subject of some conflict of opinion. The admissibility of such declarations has been affirmed by high authority,² but elsewhere, and with good reason, denied.³ For if the restriction confining such declarations to the utterances of the party whose death is charged in an indictment be removed to this extent, it would render admissible the dying declarations of all persons whose death occurred in the same general transaction as that in which the deceased died. The dying declarations of persons killed in great as well as in little riots, for instance, would become competent testimony; and, in prosecutions for riotous homicide, the case would be flooded by the last words of men who, from the participation in the common excitement, are almost the last to be received as witnesses without the solemnity of a trial, or the criticism of a cross-examination. For it should be remembered that the agonies of death, while they often bring gravity and conscientious carefulness to persons dying under an isolated and exceptional blow, tend only to intensify the partisan sympathies of

When two persons are alleged to have been killed at the same time the dying declarations of one are not admissible in a prosecution for the homicide of the other.

¹ Donnelly v. State, 2 Dutch. 496.

² R. v. Baker, 2 M. & R. 53; State v. Terrell, 12 Rich. 321; State v. Wilson, 23 La. An. 558; the first two being cases of poisoning.

³ Brown v. Com., 73 Penn. St. 321;

State v. Westfall, 49 Iowa, 328; State v. Bohan, 15 Kans. 407; State v. Fitzhugh, 2 Oreg. 227. See Hackett v. People, 54 Barb. 370; Hudson v. State, 3 Cold. 355. See *infra*, § 288.

those sacrificed with others, as they suppose, on behalf of a common cause in whose passions they are steeped. So, in cases where it is alleged that a number of persons are poisoned by the defendant's act, to admit such testimony would prejudice the case by the introduction of independent crimes, and put the defendant on his trial for two or more homicides instead of one. And even where this objection does not apply, we must remember that the dying declarations of third persons stand in a different position from the dying declarations of the deceased.¹ The latter is to such an extent a party that his statements may often be proved by parol; the statements of deceased third persons can only be received when such statements were made under oath. To remove the latter restriction would be to substitute death-beds for the witness-box, and to make the dying hours the period in which all persons knowing anything about a case should be interviewed on the subject. If such examinations are to be taken, this should be done by way of deposition before a competent officer, and not by visitors, often prejudiced, and incapable of exact and trustworthy examination.²

§ 281. The declarant, to render his declarations admissible, must have uttered them under the sense of impending dissolution,³

¹ See *Poteete v. State*, 9 Baxt. 261.

² See *Stobart v. Dryden*, 1 M. & W. 615, 626; *Best's Ev.* 5th ed. 637.

³ *R. v. Woodcock*, 1 Leach, 500; *R. v. Welburn*, 1 East P. C. 358; *R. v. Van Butchell*, 3 C. & P. 629; *R. v. Goddard*, 15 Cox C. C. 7; *Com. v. Densmore*, 12 Allen, 535; *Maine v. People*, 16 N. Y. Sup. Ct. 113; *Davis v. People*, 12 Thomp. & C. 212; *Com. v. Williams*, 2 Ashm. 69; *Kilpatrick v. Com.*, 31 Penn. St. 198; *Com. v. Britton*, 1 Leg. Gazette, 513; *Robbins v. State*, 8 Oh. St. 131; *Starkey v. People*, 17 Ill. 17; *Scott v. People*, 63 Ill. 508; *Tracy v. People*, 97 Ill. 101; *Powers v. State*, 87 Ind. 144; *Hay v. State*, 40 Md. 633; *Hill's Case*, 2 Grat. 594; *Moore v. State*, 12 Ala. 764; *Walker v. State*, 52 Ala. 192; *Faire v. State*, 58 Ala. 74; *Nettles, Ex parte*,

58 Ala. 268; *Nelson v. State*, 7 Humph. 542; *Brakefield v. State*, 1 Sneed, 215; *Brown v. State*, 32 Miss. 433; *State v. Daniel*, 31 La. An. 91; *Dixon v. State*, 13 Fla. 636; *State v. Simon*, 50 Mo. 370; *People v. Ah Dat*, 49 Cal. 652; *People v. McLanglin*, 44 Cal. 435; *People v. Hodgdon*, 55 Cal. 72; *Edmondson v. State*, 41 Tex. 496; *Fitzgerald v. State*, 11 Neb. 577; *State v. Garrand*, 5 Oreg. 216. The determination of the question whether there was such a sense of impending dissolution is primarily for the court; but when the evidence is admitted this is properly a topic for the consideration of the jury under the directions of the court. *Infra*, § 297. The relation of this topic to that of the *res gestae* is discussed *supra*, §§ 226, 254; *infra*, § 297.

and with a consciousness of the awful occasion,¹ though the principle is not affected by the fact that death did not ensue until a considerable time after the declarations were made.² Hence where a party expressed an opinion that she would not recover, and made a declaration at that time; but afterwards, on the same day, asked a person whether he thought she would "rise again;" it was held that this showed such a hope of recovery as rendered the previous declaration inadmissible, the declarations being continuous.³ But it is otherwise when, after a solemn declaration has been made under circumstances entitling it to be received as evidence, there is a subsequent fluttering hope of recovery intervening as a distinct condition.⁴

Must be a solemn sense of impending dissolution.

§ 282. But it is not necessary to prove expressions implying apprehension of immediate danger, if it be clear that the party does not expect to survive the injury,⁵ which may be collected from the general circumstances of his condition,⁶ as when the party was a member of the Roman Catholic Church, and had confessed, been absolved, and received extreme unction, before making the declaration.⁷ The same view was taken in an English case, where the evidence was that a boy between ten

Not necessary that the deceased should have declared in words his belief, if this can be inferred from facts.

¹ R. v. Pike, 3 C. & P. 598; R. v. 561; People v. Grunzig, 1 Parker C. Crockett, 4 C. & P. 544; R. v. Hay- ward, 6 C. & P. 157; R. v. Spilsbury, 7 C. & P. 187; R. v. Whitworth, 1 F. & F. 382; R. v. Forester, 4 F. & F. 857; S. C., 10 Cox C. C. 368; R. v. Mackay, 11 Cox C. C. 148; Brotherton v. People, 75 N. Y. 159; Montgomery v. State, 11 Ohio, 424; State v. Poll, 1 Hawks, 442; Dunn v. State, 2 Pike, 229; Stewart v. State, 2 Lea, 598.

² R. v. Mosely, 1 Moody, 97; 2 Russ. on Crimes, 757; Kehoe v. Com., 85 Penn. St. 127. See *infra*, § 286.

³ R. v. Fagent, 7 C. & P. 238; S. P., State v. Center, 35 Vt. 378. But see State v. Kilgore, 70 Mo. 546.

⁴ R. v. Hubbard, 14 Cox C. C. 565. *Infra*, § 284.

⁵ R. v. Bonner, 6 C. & P. 386; 1 East P. C. 385; R. v. Dingler, 2 Leach,

561; People v. Grunzig, 1 Parker C. R. 299; People v. Knickerbocker, *ibid.* 302; People v. Perry, 3 Abb. N. Y. Pr. (N. S.) 27; Hill's Case, 2 Grat. 594; Nelson v. State, 7 Humph. 542; Brakefield v. State, 1 Sneed, 215; Anthony v. State, 1 Meigs, 265; Dunn v. State, 2 Pike, 229; Morgan v. People, 31 Ind. 193; State v. Wilson, 24 Kan. 189; 2 Russ. on Crimes, 761.

⁶ Kilpatrick v. Com., 31 Penn. St. 198; Sullivan v. Com., 93 Penn. St. 284; Murphy v. People, 37 Ill. 447; People v. Gray, 61 Cal. 164; Dumas v. State, 62 Ga. 58; though see R. v. Cleary, cited *infra*, § 284, and discussion thereon.

⁷ Com. v. Williams, 2 Ashmead, 69. See R. v. Minton, 1 M'Nally, 386; Murphy v. People, 37 Ill. 447. The mere fact that a negro, after receiving

and eleven years of age was mortally wounded and died next day. On the evening of the day on which he was wounded, he was told by a surgeon that he could not recover. The boy made no reply, but appeared dejected. It appeared from his answers to questions put to him, that he was aware that he would be punished hereafter if he said what was not true; and under the circumstances his declarations were held within the rule.¹ The question of consciousness of approaching death, though determined by the court, is one of fact, in deciding which all the circumstances of the particular case are to be considered.²

§ 283. If the deceased believed he was dying, the admissibility of his declarations is not affected by the fact that his medical attendant or other friends had hope.³ Hence, in a case before the twelve English judges on a case reserved,⁴ it was held that the declarations of the deceased, made on the day he was wounded and when he believed he should not recover, were evidence, although he did not die till eleven days after, and although the surgeon did not think his case hopeless, and continued to tell him so till the day of his death.

§ 284. Where the party, being confined to his bed, said to his surgeon, "I am afraid, doctor, I shall never recover;" and where the surgeon having said, "You are in great danger," the party replied, "I fear I am;" declarations subsequently made were admitted.⁵ On the other hand, two days before the death of the deceased, the surgeon told her that she was in a very precarious state, and, on the day before her death, when she had become much worse, she said to the surgeon that she found herself growing worse, and that she had been in hopes she would have got better, but, as she was getting worse, she thought it her duty to mention what had taken place. Immediately after this she made a statement, which was considered

his mortal wound, was heard to cry out, "O my people," is not alone sufficient evidence of the expectation of immediate death, to authorize the admission of his declarations. *Lewis v. State*, 9 Sm. & M. 115.

¹ *R. v. Perkins*, 9 C. & P. 395.

² *Infra*, § 297; *Small v. Com.*, 91 Penn. St. 304; *Sullivan v. Com.*, 93

Penn. St. 284; *State v. Belcher*, 13 S. C. 459; *State v. Trivas*, 32 La. An. 1086.

³ See *People v. Simpson*, 48 Mich. 474.

⁴ *R. v. Mosley*, 1 Mood. C. C. 97; so, also, *R. v. Peel*, 2 F. & F. 21.

⁵ *R. v. Crave*, 1 Lew. C. C. 77; *R. v. Simpson*, 1 Lew. C. C. 78.

not to be competent evidence as a declaration *in articulo mortis*, as it did not sufficiently appear that, at the making of it, the deceased was without hope of recovery.¹ So in a case² where the deceased asked his surgeon if the wound was necessarily mortal, and on being told that recovery was just possible, and that there had been an instance where a person had recovered after such a wound, he said, "I am satisfied;" and after this he made a statement; the statement was held by Abbott, C. J., and Park, J., to be inadmissible as a declaration *in articulo mortis*, as it did not appear that the deceased thought himself at the point of death; for being told that the wound was not necessarily mortal, he might have still had hope of recovery. And where the only evidence that the dying man was aware of his situation consisted in his saying "he should never recover," it was held insufficient.³

The following writing made by the deceased before his death was offered in a prosecution for homicide by poisoning: "Darling: The Doctor—I mean Dr. Medlicott—gave me a quinine powder Wednesday night, April 26. The effects are these: I have a terrible sensation of a rush of blood to the head, and my skin burns and itches. I am becoming numb and blind. I can hardly hold my pencil, and I cannot keep my mind steady. Perspiration stands out all over my body and I feel terribly. The clock has just struck eleven, and I took the medicine about 10.30 P. M. I write this so that if I never see you again you may have my body examined and see what the matter is. Good-by, and ever remember my last thoughts were of you. I cannot see to write more. God bless you, and may we meet in heaven.

"Your loving Hubbie,

I. M. RUTH."

This was ruled out, as insufficient on its face; there being no extrinsic evidence as to the condition of the defendant's mind.⁴

It has been held in England that a dying declaration cannot be admitted by the judge merely from his own notion of the nature of the wound described, without any evidence that the deceased at that time believed himself about to die, unless such knowledge is necessarily to be imputed to him, and this rule was applied in a

¹ *R. v. Megson*, 9 C. & P. 418.

See, also, *People v. Robinson*, 2 Parker

² *R. v. Christie*, Car. Cr. L. 232, O. C. R. 235.

⁴ *State v. Medlicott*, 9 Kans. 257.

³ *R. v. Van Butchell*, 3 C. & P. 631.

case where the deceased received a ball in the chest, and having made a declaration charging the defendant, died in a few moments.¹

A statement concluded with these words: "I have made this statement believing I shall not recover;" at the time it was made the deceased was in such a state that his death seemed imminent; and he died seven days afterwards. But it appeared, also, that shortly before he made the declaration he had said to a constable, who asked him how he was, "I have seen Mr. Booker, the surgeon, to-day, and he has given me some little hope that I am better; but

¹ *R. v. Cleary*, 2 F. & F. 850. This case is much discussed in the controversy between Mr. Pitt Taylor and Chief Justice Cockburn, in the *Bedingfield Case*, 14 Cox, 341, *infra*, § 295. The reporter, in the syllabus, introduced qualifications which, the chief justice stated, were not part of the case as decided. To the chief justice's criticism the following reply from Mr. Finlason appeared in the *Law Times* for Feb. 21, 1880:—

"As the Lord Chief Justice in his pamphlet on dying declarations impugns the head-note to my report of *The Queen v. Cleary*, 2 F. & F., I wish to be allowed to explain it. The wound there was one by a bullet through the body—a kind of wound not necessarily mortal—and in point of fact Chief Justice Erle had elicited from a witness that, from what the wounded man said, he did not appear to think that he was dying, and had then rejected the declaration. The counsel for the prosecution then urged that the nature of the wound might be such as to show that the party must have known that he was dying. This, which had been solemnly laid down by the twelve judges in the case of *Reg. v. Johnson*, cited in *East's Pleas of the Crown*, Chief Justice Erle did not dispute, but said, 'How can I, from the fact that he was shot through the body, presume that he must have believed himself dy-

ing?' This I understood to mean that, though the general doctrine was not disputed, the nature of the wound might be such as to show that the party must have believed that he was dying, the wound must appear to have been such as to show beyond a doubt that he must have so believed, and this, with all respect to the Lord Chief Justice, I submit is the true effect of the ruling, and conveys the true doctrine on the subject. That it is so I may cite the authority of the Lord Chief Justice himself to show. For, at the Spring Assizes at Maidstone, 1875 (*Crown Court*, March 12), the Lord Chief Justice, being consulted by Justice Denman, in the case of *Reg. v. Morgan*, just like that of *Bedingfield*, agreed with him in thinking that a declaration made in such a case (i. e., a case of the party's throat being completely severed, and death ensuing in a few minutes), the declaration could not be rejected; only, on account of the supposed ruling of Chief Justice Erle in *Cleary's Case* (which was cited erroneously, not from the report, but from an incorrect statement of it in a text-book), they would think it right to reserve the point, in consequence of which the prosecution did not press it." On this point see *supra*, § 282. As doubting *R. v. Cleary*, see *R. v. Morgan*, 14 Cox C. C. 337, noticed *infra*, § 293.

I do not myself think I shall ultimately recover." Afterwards, on the same occasion, he said he could not recover. It was held that there was sufficient evidence that the statement was made under a consciousness of impending death to justify its reception in evidence.¹

"I am dead; Mr. F. has killed me," uttered a few hours before dissolution, renders a declaration admissible.²

§ 285. In New York it has been laid down in a Circuit Court that dying declarations should not be excluded in all cases where there is a faint and lingering hope of recovery.³ But such a relaxation of the rule is perilous; and though we have no right to rule out such evidence because we conjecture that the deceased may have at certain moments nourished a transient hope, yet, so far as the construction of the deceased's own utterances is concerned, it is best to take the rule without qualification, and to hold that the expression of a hope excludes.⁴ Thus in an English case a magistrate's clerk administered an oath to a dying person,

Even faint
hope ex-
cludes.

¹ *R. v. Reany*, 40 Eng. L. & Eq. 552; *Dears. & B.* 151; 7 Cox C. C. 209.

The mere fact of hopes of recovery, as we have seen, being nourished after a declaration otherwise competent, has been made, does not exclude such declaration; *supra*, § 281; *R. v. Hubbard*, 14 Cox C. C. 565.

The question whether, after a declaration, made under a consciousness of approaching death, has been received, a conflicting declaration, made when such consciousness is not apparent, is admissible, is hereafter noticed. *Infra*, § 298. See *Stewart v. State*, 2 Lea, 598.

"In *R. v. Pickersgill*, Leeds Summer Assizes, 1869, the deceased, who was suffering from the effects of poison and died the same night, said: 'I am getting worse. I am going to die.' The doctor asked her if she thought she should get better, and she said, 'No, I shall die.' *Cleasby, B.*, after consulting *Brett, J.*, said the 'evidence satisfied them that the woman was in a dying state, and that she believed it.

When she said she was going to die, she meant that death was imminent.'

Where the deceased had received a knife-stab in the neck, and the bleeding, having been stopped, had recommenced, so that his life was in danger, though not in immediate danger, and a magistrate was sent for, the deceased said, 'Be quick, or I shall die,' just before making the declaration. *Brett, J.*, after consulting *Lush, J.*, admitted the deposition. *R. v. Bernadotti*, 11 Cox C. C. 316." *Roscoe's Cr. Ev.* 35. So the words, "I cannot live," "I can give it" (a statement) "if I have time,"

"I cannot live long," are such a proof of a consciousness of dying as to admit a declaration. *Com. v. Haney*, 127 Mass. 455; see *infra*, §§ 295, 308.

² *State v. Freeman*, 1 Speers, 57.

³ *People v. Anderson*, 2 Wheel. C. C. 398.

⁴ *Jackson v. Com.*, 19 Grat. 656; *State v. Moody*, 2 Hayw. 31; *People v. Gray*, 61 Cal. 164; *People v. Hodgdon*, 55 Cal. 72; *People v. Taylor*, 59 Cal. 640.

and she made a statement. He asked her if she felt she was likely to die. She said, "I think so." He said, "Why?" She replied: "From the shortness of my breath." He said, "Is it with the fear of death before you that you make these statements?" and added, "Have you any present hope of your recovery?" She said, "None." He then proceeded to write out the deposition, and when finished read it to her, and asked her to correct any mistake that he might have made. She said, "No hope, at present, of my recovery," and he then inserted those words. It was held that the declaration was inadmissible, as the words "at present," introduced by the deceased, were a qualification of her previous statement that she had no hope of recovery.¹

Declarations need not have been made immediately before death.

§ 286. As has been seen, the fact that the declarations were not made immediately previous to death does not exclude them, provided the deceased was conscious at the time he was in a dying condition.²

Subsequent affirmation when dying may validate prior statement.

§ 287. Prior declarations, though in themselves inadmissible, may become admissible on subsequent affirmation, in cases where, although the declarant did not, at the time of first making them, believe he was about to die, he subsequently referred to them and affirmed their truth at a time when he knew he was dying.³ The affirmation may be by signs of assent,⁴ and a prior written statement, made while there was still hope of recovery, is competent as a dying declaration, if reaffirmed when the person believes himself to be *in extremis*, the statement being shown him, but not read by or to him at that time.⁵

§ 288. The declarations are only admissible where the death of the deceased is the subject of the trial, and the circumstances of

¹ R. v. Jenkins, 11 Cox C. C. 250; Daniel v. State, 8 Sm. & M. 401; Jones L. R. 1 Cr. Ca. Res. 187.

² R. v. Mosley, 1 Mood. C. C. 97; R. v. Megson, 9 C. & P. 418; R. v. Reany, *ut supra*; Com. v. Cooper, 5 Allen, 495; Com. v. Roberts, 108 Mass. 301; Com. v. Haney, 127 Mass. 455; State v. Poll, 1 Hawks, 442; State v. Oliver, 2 Houst. 585; Swisher v. Com. 26 Grat. 963; People v. Simpson, 48 Mich. 474; Reynolds v. State, 68 Ala. 502; Mc-

Daniel v. State, 8 Sm. & M. 401; Jones v. State, 71 Ind. 66; State v. Daniel, 31 La. An. 91. But see State v. Belcher, 13 S. C. 459, where the interval between the making of the declarations and the death was three months. See Com. v. Felch, 132 Mass. 22.

³ R. v. Steele, 12 Cox C. C. 168; Young v. Com., 6 Bush, 312.

⁴ *Infra*, § 293.

⁵ Mockabee v. Com., 78 Ky. 380.

the death are the subject of the declaration.¹ Thus, in a case where the prisoner was indicted for administering savin to a woman pregnant, but not quick with child, with attempt to procure abortion; evidence of the dying declarations of the woman was rejected, the judge observing that, although the declarations might relate to the cause of the death, still such declarations were admissible in those cases alone where the death of the party was the subject of inquiry.² The same rule applies to trials for producing abortion by the use of an instrument.³ We may conclude, therefore, that such declarations are limited to criminal prosecutions when the subject matter of the investigation is the declarant's death;⁴ and there is sound reason in this, for if the declarations of dying parties are introduced in all cases of physical injury, it would be difficult to exclude them from any other trial in which they should be offered.

Only admissible when death is the subject of the charge.

§ 289. On the trial of an indictment for the murder of a wife by her husband, the declarations of the deceased, made *in extremis*, as to the cause of her death, are competent evidence against the prisoner,⁵ and so are the dying declarations of a husband against his wife.⁶

Admissible from husband against wife, and vice versa.

¹ 2 Russ. on Crimes, 761; Hackett v. People, 54 Barb. 370; State v. Shelton, 2 Jones (N. C.), 360; Hudson v. State, 3 Cold. 355; Crookham v. State, 5 W. Va. 510; State v. Bohan, 15 Kans. 407; Wright v. State, 41 Tex. 246; Johnson v. State, 50 Ala. 456; Reynolds v. State, 68 Ala. 502; Leiber v. Com., 9 Bush, 11. This principle is recognized in Stobart v. Dryden, 1 M. & W. 615, 626. As also establishing this point may be consulted R. v. Jenkins, L. R. 1 C. C. 192; 11 Cox C. C. 250;—Kelly, C. B.; Anderson, *In re*, 20 Up. Can. Q. B.—McLean, J.; and R. v. Peltier, 4 Low. Can. 3.

² R. v. Hutchinson, 2 B. & C. 608, n. See, also, R. v. Hind, 8 Cox C. C. 300; R. v. Newton, 1 F. & F. 641; R. v. Mead, 2 B. & C. 605; 4 D. & R. 120; R. v. Lloyd, 4 C. & P. 233; R. v. Baker, 2 M. & Rob. 53; Aveson v. Kinnaird, 6 East, 195; Sutton v. Ridgway, 4 B. & Al. 54; Stobart v. Dryden, 1 M. & W. 615, 626; Wilson v. Boerem, 15 Johns. 286; State v. Harper, 35 Oh. St. 78; Montgomery v. State, 80 Ind. 336; Wooten v. Wilkins, 39 Ga. 223. Compare Mr. Best's remarks in his Treatise on Evidence, 6th ed. (1870) p. 637.

³ R. v. Hind, 8 Cox C. C. 300; People v. Davis, 56 N. Y. 95; State v. Harper, 35 Oh. St. 78; but see Com. v. Gumpart, 5 Luz. L. Reg. 187.

⁴ Hackett v. People, 54 Barb. 370; Waddels v. R. R., 19 Hun, 69; Hudson v. State, 3 Cold. 355; State v. Fitzhugh, 2 Oreg. 227. See *contra*, State v. Wilson, 23 La. An. 558; and *supra*, § 280.

⁵ People v. Green, 1 Denio, 614; Penns. v. Stoops, Addison, 381.

⁶ Moore v. State, 12 Ala. 764.

§ 290. The dying party, to make the declarations evidence, must have been competent as a witness; therefore, the declarations of a dying child, of only four years of age, have been held inadmissible.¹ But if the child be of intelligent mind, and fully comprehends the nature of an oath, and the consequences in a future state of telling a falsehood, his declarations, made under a sense of impending dissolution, are admissible.² Thus, the dying declarations of an intelligent child ten years old have been admitted.³ If the court is satisfied the declarant was insane the declarations should be excluded; though in a doubtful case, the question of sanity should be left to the jury.⁴

The deceased must have been competent as a witness. Infants. Insane persons.

§ 291. That the deceased was a disbeliever in a future state of rewards and punishments may, in the lowest view, be used to discredit his testimony,⁵ though it does not exclude in jurisdictions where the deceased, if a witness, would have been admissible.⁶

Infidels.

§ 292. The dying declarations of persons disqualified by conviction of an infamous offence are at common law inadmissible.⁷

Infamous persons.

§ 293. It is not essential to admissibility that the statement should be formally expressed in words. T. being at the point of death, and conscious of her condition, but unable to speak articulately in consequence of wounds inflicted upon her head, was asked whether it was C. who inflicted the wounds; and if so, she was requested to squeeze the hand of the person making the inquiry. It was held, that under all the circumstances of the case there was proper evidence against C. for the consideration of the jury; they being the judges of its credibility, and of the effect to be given to it.⁸ *A fortiori* does this

Signs may express assent.

¹ R. v. Pike, 3 C. & P. 598; 2 Russ. on Crimes, 765. *Infra*, § 366.

² 2 Russ. on Crimes, 765.

³ R. v. Perkins, 2 Mood. C. C. 135; S. C., 9 C. & P. 395.

⁴ Bolin v. State, 9 Lea, 516.

⁵ Goodall v. State, 1 Oreg. 333. *Infra*, § 366. That evidence of infidelity is competent on the issue of credibility, see State v. Elliott, 45 Iowa, 486.

⁶ State v. Elliott, 45 Iowa, 486; People v. Sanford, 43 Cal. 29; People v. Chin, 51 Cal. 597; State v. Ah Lee, 7 Or. 737; but see *supra*, § 276, as to degree of credibility to be given to such evidence.

⁷ Drummond's Case, 1 Leach, 337; 1 Russ. on Cr. 763; Walker v. State, 39 Ark. 220.

⁸ Com. v. Casey, 11 Cush. 417.

hold when the signs thus made go to affirm a prior formal statement.¹

A statement written by an attorney, during the night on which the deceased died, was held not admissible as the dying declaration of the deceased, when it appeared that the attorney propounded questions to him, which he tried to answer, but was unable to do so; that his attendant friends then "explained the questions to him, and made the answers, to which he assented only by nodding his head;" that the statement, consisting of the answers thus made, was, when finished, "read over to him by the attorney, slowly and distinctly, and he signified his assent thereto by nodding his head;" that he spoke but a few words afterwards, and had frequently to be aroused; and that he seemed, while the statement was being read to him, to be in a stupor.²

To throw light, as we have seen, on the deceased's mental state, his declarations on collateral matters are admissible;³

§ 294. Nothing can be evidence in a declaration *in articulo mortis*, that would not be so if the party were sworn.⁴ On this rule, anything the murdered person, *in articulo mortis*, says as to the facts is receivable, but not what he says as matter of opinion or belief.⁵ Hence the

Evidence must have been admissible had the deceased

¹ *Supra*, § 287. *Mockabee v. Com.*, 78 Ky. 380.

In the London Law Times for March 5, 1881, we have the following: "In *Reg. v. Morgan*, 14 Cox C. C. 337 (1879), tried before Mr. Justice Denman, at Maidstone, the prisoner was indicted for murder, and it was sought to give in evidence a declaration by the deceased written in chalk upon the wall as to the prisoner being the person who did the deed. It was proved in evidence that death was caused by cutting the throat, all the vessels and arteries having been severed, and death therefore certain to ensue, and in fact ensuing almost immediately after, and that deceased having lost the power of speech, wrote the words sought to be given in evidence, and died five minutes afterwards. The evidence was

objected to, and *Reg. v. Cleary*, 2 F. & F. 850, cited as showing that the nature of the wound was not in itself sufficient evidence to show that the party must have known he was dying. Mr. Justice Denman, after consulting Chief Justice Cockburn, said he should admit the evidence, but grant a case, and it was not then pressed."

² *McHugh v. State*, 31 Ala. 317. See, also, *Barnett v. People*, 54 Ill. 325.

³ *Donelly v. State*, 1 Dutch. 496.

⁴ See *People v. Olmstead*, 30 Mich. 431.

⁵ *R. v. Sellers*, O. B. 1796, Car. Cr. L. 233; *Shaw v. People*, 3 Hun. 272; *People v. Shaw*, 63 N. Y. 36; *Binns v. State*, 46 Ind. 311; *Montgomery v. State*, 80 Ind. 338; *Moeck v. People*, 100 Ill. 242; *McPherson v. State*, 22 Ga. 478; *Whitley v. State*, 38 Ga. 50; *Johnson*

been sworn. Matters of opinion are inadmissible.

declaration, "It was E. W. who shot me, though I did not see him," is inadmissible.¹ But where, in making a dying declaration, the declarant, in speaking of the fatal wound, said it was done without any provocation on his part, it has been held that this declaration is not incompetent, it relating to fact, not opinion;² and so, also, has it been held as to statements of identity.³ And a statement by a dying woman, that "he" (the defendant) "operated on me," is admissible against the party charged with killing her when attempting to produce an abortion.⁴

A wife may be received to prove her husband's dying declarations.⁵

§ 295. If the declaration of the deceased, at the time of his making it, be reduced into writing, and then read and approved by him as giving his deliberate view, the written document becomes primary evidence;⁶ though it is otherwise as to writings made informally by a bystander, and not adopted by the deceased as a solemn and final declaration.⁷ It has been held in England that if a declaration *in articulo mortis* be taken down in writing, and signed by the party making it, the judge will neither receive a copy of the paper in evidence, nor will he receive parol evidence of a declaration which

v. State, 17 Ala. 618; *Ben v. State*, 37 Ala. 103; *Collins v. Com.*, 12 Bush. 271; *Savage v. State*, 18 Fla. 909; *People v. Taylor*, 59 Cal. 640. That a statement as to the identity of the aggressor is admissible, see *Brotherton v. People*, 75 N. Y. 159.

¹ *State v. Williams*, 68 N. C. 62. See *Walker v. State*, 39 Ark. 220.

² *Wroe v. State*, 20 Oh. St. 460. To the same effect, see *Roberts v. State*, 5 Tex. Ap. 294. See 1 Greenl. on Ev. § 99.

When upon the trial of a prisoner for the murder of his wife, a witness for the People, who had heard cries proceeding from the house of the prisoner in the night preceding her death, was permitted, in the court below, to testify what these cries indicated,

whether the person was crying from joy or grief; this was reversed in the Supreme Court of New York, on the ground that the question called for the conjecture of the witness as to the cause of the cries, and not for a description of them. *Peckham and Allen, JJ.*, diss. *Messner v. People*, 45 N. Y. 1. See comments, *supra*, § 271.

³ *Brotherton v. People*, 75 N. Y. 154.

⁴ *Maine v. People*, 15 N. Y. Sup. Ct. 113.

⁵ *State v. Ryan*, 30 La. An. Part II. 1176.

⁶ *Vin. Ab. Evid.* 38 A. b. See *Com. v. Haney*, 127 Mass. 455; *Beets v. State*, 1 Meigs, 106; *State v. Sullivan*, 51 Iowa, 142; *Epperson v. State*, 5 Lea, 291; *Kelly v. State*, 52 Ala. 36.

⁷ *State v. Sullivan*, 51 Iowa, 142.

is not itself produced when its production is possible.¹ But where the dying person repeated his declaration three several times in the course of the same day, the fact of its having been committed to writing in the presence of a magistrate, or otherwise on the second occasion, will not exclude parol evidence of the other statements, where it is not in the power of the prosecutor, at the trial, to give that committed to writing in evidence.² And on one occasion in Ireland, in a case where the depositions of the individual, made at the time when he thought himself dying, were taken down by the magistrate, and not in the presence of the prisoner, it being objected at the trial that the depositions were not pursuant to the statute,³ the magistrate was sworn, and gave parol evidence of the declarations of the deceased.⁴ In this country, in cases where no statute exists to authorize the taking of such a deposition, it has been said that a written statement so taken is inadmissible, though it may be received as secondary evidence, or to refresh the memory of the magistrate.⁵ On the other hand, a deposition was received upon evidence that on being read to the deceased he said it was "as nigh right as he could recollect the circumstances."⁶ Where there is no statute authorizing a deposition the oath does not give the deposition any additional force.⁷ When the deposition is put in evidence, the *whole* is to be read.⁸ When lost, parol evidence of its contents can be given.⁹ It is not necessary that the written statement, when it is put in evidence, should show upon its face that it was made under the apprehension of impending death. This is a fact *dehors* the writing, and may be proved by parol evidence.¹⁰

§ 296. Where the declarations of the injured party are part of the *res gestae*, they are admissible without proof of a consciousness

¹ R. v. Gay, 7 C. & P. 230; S. P., Binns v. State, 46 Ind. 311.

⁶ State v. Ferguson, 2 Hill (S. C.), 619. See Mockabee v. Com., *supra*, §

² R. v. Reason, 1 Str. 500; Krebs v. State, 8 Tex. App. 1.

293.

⁷ State v. Frazier, 1 Houst. C. C. 176.

³ 10 Car. c. 1, Irish.

⁸ State v. Martin, 30 Wis. 216.

⁴ R. v. Callaghan, 1 M'Nally, 385; R. v. Woodcock, 2 Leach, 563.

⁹ State v. Patterson, 45 Vt. 308. And so of a copy, Merrill v. State, 58

⁵ Beets v. State, 1 Meigs, 106. So in State v. Fraunburg, 40 Iowa, 555, where the writing was rejected, not having been read to deceased, but was received to refresh witness's memory.

Miss. 65. ¹⁰ R. v. Hunt, 2 Cox C. C. 236; Com. v. Haney, 127 Mass. 455.

of approaching death;¹ but such is not the case when they relate to anything beyond the *corpus delicti*. Thus in death by wounding, they have been confined to statements necessary to give information on the subject of the wound,² and in death by poisoning, to details of the deceased's health.³ And the *res gestae* are not to be construed

Admissible without these limitations when part of the *res gestae*.

¹ *Supra*, § 263; *State v. Wagner*, 61 Me. 178; *Com. v. M'Pike*, 3 Cush. 181; *Com. v. Hackett*, 2 Allen, 136; *State v. Porter*, 34 Iowa, 131; *Burns v. State*, 61 Ga. 192; *Jackson v. State*, 52 Ala. 305; *People v. Brown*, 59 Cal. 345. See *R. v. Edwards*, 12 Cox C. C. 230. *Supra*, § 281.

Where the dying declaration and statements which are part of the *res gestae* are interwoven they may go in together. *West v. State*, 7 Tex. App. 150; *Stagner v. State*, 9 Tex. Ap. 44.

As to what is included in the *res gestae*, an animated discussion arose in England in 1879, in *R. v. Bedingfield*, 14 Cox C. C. 341, a homicide case tried before Lord Chief Justice Cockburn. See *supra*, § 263. After consulting Field, J., and Manisty, J., he rejected certain declarations of the deceased, on the ground that they were not part of the *res gestae*, and he also ruled that there was not sufficient ground to hold that they were admissible as dying declarations. A letter criticizing this ruling was published by Mr. Pitt Taylor, and this letter was answered by the chief justice in a pamphlet, to which Mr. Taylor published a formal reply. See *Law Times*, Dec. 27, 1879, and see *R. v. Cleary*, discussed *supra*, § 284.

That the declaration in this case was

admissible as part of the *res gestae* is argued in the *Law Times* on the following grounds:—

"The principal cases which have been put forward to show its applicability to the present case are *R. v. Foster*, 6 C. & P. 325, and *Thomson et ur. v. Trevanion*, *Skin*. 402. In the former case, which was tried before three judges in 1834, the prisoner was charged with manslaughter in killing A., by driving a cabriolet over him. B. saw the cabriolet drive by, but did not see the accident, and immediately afterwards on hearing A. groan went up to him, when A. made a statement as to how the accident happened. It was held that this statement was receivable in evidence on the trial of the prisoner for the manslaughter of A. In the latter case, which was an action by husband and wife for wounding the wife, Lord Chief Justice Holt allowed what the wife said immediately after the hurt received."

As sustaining admissibility in such cases, see *R. v. Lunny*, 6 Cox C. C. 477, tried in 1852 before Monahan, C. J., on the Irish Home Circuit; and see, also, *Com. v. M'Pike*, 3 Cush. 181; cited *supra*, §§ 262-3; *Field v. State*, 57 Miss. 474. *Supra*, §§ 263, 270.

Chief Justice Cockburn's definition of *res gestae* is given *supra*, § 263. See *Jones v. State*, 71 Ind. 66; *John-*

² *Denton v. State*, 1 Swan, 279. See *Donnelly v. State*, 2 Dutch. (N. J.) 463, 601, 670.

³ *R. v. Johnson*, 2 C. & K. 354.

as extending beyond the immediate emanations of the litigated act.¹

§ 297. The court is to decide as to the admissibility of the declarations,² after a full examination of the facts adduced, and which, so far as they go to the question of consciousness of death, are always relevant.³ Consequently, the truth of the facts put in evidence, to show that declarations were made in view of speedy death, is matter for the court; and its decision on the facts it finds proven is matter of law, and may be reviewed.⁴ And it has been ruled that where the prosecution offers evidence of the dying declarations of the deceased, and

Admissibility is for the court.

son v. State, 65 Ga. 94; Dumas v. State, 65 Ga. 471; Warren v. State, 9 Tex. Ap. 619.

That declarations as to present symptoms of a person under the influence of poison may be received without proof that they were dying declarations, when containing statements as to the administering of the poison, see Field v. State, 57 Miss. 474; Patterson v. State, 66 Ind. 185; *supra*, §§ 263, 270.

¹ State v. Frazier, 1 Houst. Crim. C. (Del.) 176; Jackson v. State, 52 Ala. 305; Steele v. State, 61 Ala. 213. *Supra*, §§ 262, 271.

In Crookham v. State, 5 W. Va. 510, the proof was that at the time of the attack the party assailed called for help, and to the inquiry what was the matter, he answered, "that somebody was killing him, and was cutting him with a knife," and that it was the prisoner, naming him; and that the prisoner, naming him, "has stabbed me; he has killed me; for God's sake send for the doctor." It was held not error in the court below to refuse to exclude the words which included the prisoner's name, as the declarations of the deceased were a part of the *res gestae* and admissible. But where a witness was asked, "after the deceased declared he was dying, and while he was dying, did he make any declaration as to how he received the wounds, and by

whom they were inflicted; if so, what were those declarations;" and the answer was, "None, except he said that it was hard to die by the hand of another and leave his family;" it was held error to admit such declaration in evidence as part of the *res gestae* because too remote from the transaction.

² 1 Greenl. on Evid. § 160; 1 Leach, 504; R. v. Hucks, 1 Stark. 522; R. v. Van Butchell, 3 C. & P. 629; R. v. Reany, 40 Eng. L. & Eq. 552; Dears & B. 151; 7 Cox. C. C. 209; R. v. Jenkins, L. R. 1 C. C. 187; Donnelly v. State, 2 Dutch. 601; Com. v. Murray, 2 Ashm. 41; State v. Frazier, 1 Houst. C. C. 176; Starkey v. People, 17 Ill. 17; Jones v. State, 71 Ind. 66; State v. Elliott, 45 Iowa, 486; Hill's Case, 2 Grat. 594; State v. Poll, 1 Hawks, 442; State v. Williams, 68 N. C. 62; Faire v. State, 58 Ala. 74; State v. Johnson, 76 Mo. 121; M'Daniel v. State, 8 Sm. & M. 401; Lambeth v. State, 23 Miss. 322; Owens v. State, 59 Miss. 547; Dixon v. State, 13 Fla. 636; People v. Glenn, 10 Cal. 32; *contra*, Campbell v. State, 11 Ga. 354; Jackson v. State, 56 Ga. 237; Dumas v. State, 62 Ga. 58. See State v. Ah Lee, 7 Or. 237.

³ Com. v. Dunan, 128 Mass. 422; Sullivan v. Com., 93 Penn. St. 284.

⁴ Donnelly v. State, 2 Dutch. 463, 601.

the defendant objects to their admissibility and moves to exclude them, if the court refuses to decide on the motion until all the evidence in the case is closed, and compels the defendant to proceed with his defence, and then, after the evidence in the case is closed, decides the defendant's motion and erroneously admits a part of the dying declarations objected to, and the defendant is convicted, the judgment will be reversed.¹

§ 298. The same tests are applicable to the statements of persons *in extremis*, as are applied to the statements of a witness under examination on oath.² Hence where the court below charged the jury, "if they found that the deceased in her dying declarations made contradictory statements, that they were not to be governed by the rules of evidence in relation to contradictory statements made by a witness," it was held that this charge was erroneous.³ The whole relevant context is to be admitted.⁴ If the declarations turn out to be irrelevant, the jury may be directed to disregard them.⁵

In Ohio, however, it has been ruled, though with doubtful propriety, that where dying declarations are proved in a case, a statement of the deceased made at another time, which is neither a dying declaration nor a part of the *res gestae*, is not admissible to impeach such declarations.⁶ On the other hand, it is held in North Carolina, that dying declarations, when impeached, may be corroborated by prior declarations made after the wound, though it be not shown that such declarations were made under a sense of impending dissolution.⁷

§ 299. If it be shown that the declarations were uttered by the dying man, to be connected with and qualified by other statements, and with them to form an entire complete narrative, and before the purposed disclosure was fully

¹ Johnson v. State, 47 Ala. 9.

² McPherson v. State, *ut supra*.

³ R. v. Sellers, *supra*, § 294; People v. Knapp, 1 Edm. (N. Y.) Sel. Cas. 177; Com. v. Lenox, 3 Brewst. 249; McPherson v. State, 9 Yerg. 279; People v. Lawrence, 21 Cal. 368; Hurd v. People, 25 Mich. 405; People v. Knapp, 26 Mich. 112. But see People v. Maine, 16 N. Y. Sup. Ct. 113.

⁴ West v. State, 7 Tex. Ap. 150; *infra*, § 304.

⁵ Scott v. People, 63 Ill. 508.

⁶ Wroe v. State, 20 Oh. St. 460. See Stewart v. State, 2 Lea, 598.

⁷ State v. Blackburn, 80. N. C. 474.

made, they had been interrupted and the narrative left unfinished; such partial declarations, it is said, would not be competent evidence.¹ But if it appear that the deceased stated all that he desired to say, the fact that the narrative of what occurred is not complete does not render the declaration incompetent.²

§ 300. The objection that the questions to which the answers of the dying man were given were leading questions is not properly applicable, if it appear that the deceased spoke intelligently and did not torpidly assent to what was said by his questioner.³ It is otherwise when the declaration consisted in mere passive acquiescence in such question as, "Do you think you are in bodily danger?" and are you aware that you are to die?"⁴

No objection that questions were leading, if deceased spoke intelligently.

§ 301. The substance of dying declarations may be admitted in evidence,⁵ and this may be done, if need be, through the medium of interpreters.⁶

Substance may be proved.

§ 302. It has been held that evidence is admissible, on part of the defence, to impeach the character of the deceased for truth, he standing on the same footing as a witness called into court and then examined;⁷ and in one case, where the dying declarations of the deceased were admitted to show that the defendant, with intent to produce on her an abortion, had administered to her oil of tansy, which was the cause of her death, the defendant was allowed to show that the declarant was considered a woman of loose character and light reputation.⁸ So it may be shown that the declarant was insane,⁹ or was

Character of deceased for truth may be impeached.

¹ *Vass v. Com.*, 3 Leigh, 786; *Luby v. Com.*, 12 Bush, 1.

² *State v. Patterson*, 45 Vt. 308; *State v. Nettlebush*, 20 Iowa, 257; *Vass v. Com.*, 3 Leigh, 786; *People v. Chin*, 51 Cal. 597.

³ *Ibid.*; *R. v. Fagent*, 7 C. & P. 238; *R. v. Smith*, L. & C. 607; *Com. v. Casey*, 11 Cush. 417; *Com. v. Hanly*, 127 Mass. 455; *Jones v. State*, 71 Ind. 66; *Ingram v. State*, 67 Ala. 67; *State v. Wilson*, 24 Kan. 189; *People v. Sanchez*, 24 Cal. 17; *State v. Trivas*, 32 La. An. 1086.

⁴ *R. v. Osman*, 15 Cox C. C. 1.

⁵ *Black v. State*, 1 Tex. Ap. 368.

⁶ *Montgomery v. State*, 11 Ohio, 424; *Starkey v. People*, 17 Ill. 17; *Ward v. State*, 8 Blackf. 101; *Nelms v. State*, 13 Sm. & M. 500. See *supra*, § 295.

⁷ *Donnelly v. State*, 2 Dutch. 496; *Nesbit v. State*, 43 Ga. 238. To this effect see *Roscoe's Cr. Ev.* 37; 3 Russ. on Cr. by Greaves, 4th ed. 270.

⁸ *People v. Knapp*, 1 Edm. (N. Y.) Sel. Cas. 177; see *Carter v. People*, 2 Hill (N. Y.), 317. But see *supra*, § 60.

⁹ *Donnelly v. State*, 2 Dutch. 469; see *Bolin v. State*, 9 Lea, 516; *State v. Ah Lee*, 8 Or. 314; *supra*, § 290.

an unbeliever,¹ or was in the constant habit of making mistakes as to the identity of others.² It has been held, however, that it is not competent for the prisoner to prove that, before the affray, the deceased had expressed a violent hatred to him, and a disposition to do him injury, or that he was very hostile to him.³

§ 303. Where dying declarations are inconsistent with each other, it is the duty of the jury to weigh them, and to determine which, if either, is to be believed; and if the charge of the court takes this duty from them, or if the court undertakes to determine these questions, it is error.⁴ The jury are to judge of the credit due to dying declarations, as in the case of any other testimony, by all the circumstances.⁵

§ 304. The dying declarations of the deceased may be received in favor of the defendant. Upon an indictment for manslaughter, a surgeon stated that the deceased seemed perfectly sensible of the dangerous state in which he was, and said he knew he could not get better, and afterwards said, "I don't think he" (the defendant) "would have struck me if I had not provoked him." Coleridge, J., at first expressed some doubt whether he ought to receive the statement, but afterwards admitted it, observing that it might have an influence on the grade of guilt.⁶ But such declarations must be made under a sense of impending dissolution,⁷ and they must be relevant to the immediate fact of killing.⁸ Hence unless part of the *res gestae*, they cannot be received to prove the defendant's insanity.⁹

¹ See *supra*, § 291.

² *Com. v. Cooper*, 5 Allen, 495.

³ *State v. Varney*, 8 Boston Law R. 542, *sed quaere*. *Infra*, § 376.

⁴ *Moore v. State*, 12 Ala. 764; *Starkey v. People*, 16 Ill. 17; see *supra*, § 276.

⁵ *Com. v. Casey*, 11 Cush. 417; *Donnelly v. State*, 2 Dutch. 483, 601; see *supra*, 276.

⁶ *R. v. Scaife*, 1 M. & Rob. 551; 2

Lew. C. C. 150; see *U. S. v. Taylor*, 4 Cranch C. C. 338; *Moore v. State*, 12 Ala. 764; *People v. Knapp*, 26 Mich. 112; *contra*, *Adams v. People*, 47 Ill. 376; *Moeck v. People*, 100 Ill. 242.

⁷ *Com. v. Densmore*, 12 Allen, 535; *People v. McLaughlin*, 44 Cal. 435.

⁸ *Sayres v. Com.*, 88 Penn. St. 291.

⁹ *Ibid*.

XII. THREATS OF DECEASED.

§ 305. Another exception to the rule excluding hearsay is to be found in the reception, in homicide cases, when a *prima facie* case of self-defence is set up, of proof of threats made by the deceased pointed at the defendant. This exception will be hereafter distinctively discussed.¹

Admissible
in homicide
cases.

XIII. DEPOSITIONS.

§ 306. Depositions can only be admitted in criminal cases under local statute, and in submission to the constitutional guarantees as to the personal examination of witnesses.²

Law as to
local regu-
lation.

¹ *Infra*, § 757.

102; *People v. Gannon*, 61 Cal. 476;

² See *People v. Murphy*, 1 N. Y. Cr. *supra*, § 230.

CHAPTER VI.

JUDICIAL NOTICE.

§ 308. THE law as to judicial notice being the same in criminal as in civil issues, there are no distinctive features which it is necessary here to notice. The topic in its general relations will be found discussed in my treatise on Evidence in Civil Issues.¹

Rule the same in criminal as in civil issues.

¹ See Whart. on Ev. as follows:—

I. GENERAL RULES.

Court cannot take notice of evidential facts not in evidence, § 276.

Non-evidential facts may be judicially noticed, § 277. (See *State v. Intoxicating Liquors*, 73 Me. 278.)

Reason a coördinate factor with evidence, § 278.

Judge may on his own motion interrogate witness and start points of law, § 281.

May consult other than legal literature, § 282.

May of his own motion take notice of law, § 283.

Law of God, natural and revealed, § 284.

Law of nations, § 285.

Domestic law, § 286.

II. CODES AND THEIR PROOF.

Federal laws not "foreign" to the States, nor State laws to the federal courts, § 287.

Particular States foreign to each other, § 288.

State laws may be proved from printed volume, § 289.

Court may determine whether statute has passed, § 290.

Judicial notice taken of laws of prior sovereign, § 291.

Private laws not noticed by court, § 292.

Distinction between public and private laws, § 293.

Court takes notice of mode of authenticating laws; and herein of legislative action generally, § 295.

Subsidiary systems noticed, § 296.

Equity, § 296.

Military law, § 297.

Law merchant and maritime, § 298.

Ecclesiastical law, 299.

Foreign law must be proved, § 300.

Proof must be by parol, § 302.

Experts admissible for this purpose, § 305.

Experts may verify books and authorities, § 308.

Foreign statutes may be proved by exemplification, § 309.

Printed volumes are *prima facie* proof, § 310.

Judicial construction of one State is adopted by another, § 311.

Statute must be put in evidence, § 312.

Foreign elementary jurisprudence can be noticed, § 313.

Foreign law presumed not to differ from *lex fori*, § 314.

But not so as to local peculiarities, § 315.

Lex fori determines rules of evidence, § 316.

III. EXECUTIVE AND JUDICIAL DOCUMENTS.

Court takes notice of executive documents, § 317.

Public seal of State self-proving, § 318.

So of seals of notaries, § 320.

So of seals of courts, § 321.

So of handwriting of executive, § 322.

So of existence of foreign sovereignties, § 323.

So of judicial officers, and practice, § 324.

So of proceedings in particular case, § 325.

So of records of court, § 326.

IV. NOTORIETY.

Notoriety in Roman law, § 327.

Canon law, § 328.

General characteristics of notoriety, § 329.

Of notoriety no proof need be offered, § 330.

Notorious customs need not be proved, § 331.

INSTANCES :

Course of seasons, § 332.

Limitations of human life as to age, § 333.

Limitations of human life as to gestation, § 334.

Conclusions of science and political economy, § 335.

Ordinary psychological and physical laws, § 336.

Leading domestic political appointments, § 337.

Leading public events, § 339. See as to "Sherman's march to the sea," *Williams v. State*, 67 Ga. 260.

Leading features of geography, § 340.

CHAPTER VII.

INSPECTION.

Inspection is evidence to eye and touch, § 311.	Not to be accepted when better evidence is to be had, § 313.
Is valuable when an ingredient of circumstantial evidence, § 312.	Instruments may be tested in court, § 314.

§ 311. THE mode of inspection to be first noticed is that which is incidental to persons or things already before the court. Inspection is evidence to eye and touch. The appearance of a defendant, for instance, so as to make up a basis of comparison in cases of identity, need not be proved by testimony, when the defendant is present in person at the trial. By the Romans this method of proof is frequently noticed.¹ By the glossarists the *evidentia facti* is spoken of as a *species probationis adeo clara, ut nihil magis, nec judex aliud quam illam requirat*.² Under the title “probatio per aspectum,” it is mentioned as one of the most effective modes of conviction.³ Nor is it only the immediate object presented to the eye that is thus proved. Inferences naturally springing from such appearances are to be accepted: age and bodily strength being thus inferred.⁴ Yet the inference is not to be regarded as certain, *nam aspectus facile decipit*.⁵ But a foot-print, when duly proved, is an *indicium*.⁶ Whether the court, at its own motion, could direct an inspection, or, as we call it, a view, was much discussed, and by the later practice conceded.⁷

Inspection, it will be therefore seen, is of three kinds: (1)

¹ See Cic. top. c. 2, § 29; L. 32 de minor. iv. 4; L. 3. Cod. fin. reg. iii. 39; Endemann, 82.

² See Masc. i. qu. 8.

³ Durant, ii. 2, de prob. § 4, nr. 9, who extends proof by inspection to include the logical consequences of inspection—e. g., ex eo quod clericus par-

vam habet filiam, probatur non diu continuisse. See Endemann, 83.

⁴ Alciat. De praes. ii. 14, nr. 3; Menoch. De praes. ii. 50, nr. 38, 39.

⁵ Bart. Const. i. 92, nr. 3; Menoch. ii. 51, nr. 61; Endemann, 83.

⁶ Masc. i. c. nr. 21.

⁷ See Endemann, 84; Schmid, p. 309, note 5; Seuffer, Arch. iv. nr. 88.

That which is incidental to the reception of proof, as when a witness when testifying is inspected with reference to his credibility, and when a document is inspected after it has been put in evidence for other purposes;¹ (2) When a party is inspected with reference to capacity (*e. g.*, age, strength),² this being incidental to his presence in court; and (3) Where a thing is offered primarily for inspection, which is the sense usually applied to the term in this chapter. It is also to be observed that inspection includes perception by any of the senses: *quae cerni tangive possunt*,³ as where a weapon is exhibited to a jury in order that its weight may be felt.

§ 312. The inspection of documents already in evidence for other purposes has been elsewhere discussed.⁴ Another illustration is to be found in cases in which, under statute, juries are taken to view the place where the events in litigation occurred, when such a visit shall be deemed by the court important for an elucidation of the testimony, the presence of the parties on both sides, however, being a prerequisite in such cases to the validity of the procedure.⁵ The remains of a deceased person may be produced, when in a fit condition, for the purpose of showing the nature of an injury.⁶ So all

Inspection
valuable as
an ingre-
dient of
circum-
stantial
evidence.

¹ For inspection in cases of forgery see *infra*, § 845; in cases of comparison of hands, *infra*, §§ 557 *et seq.*

² See as to proof of age, 3 Whart. & St. Med. Jur. 4 ed. (1884) §§ 665-6. See *supra*, § 236; *infra*, § 459.

³ Cic. top. c. 2, § 27. As to force of proof by inspection, see *Ingram v. Plasket*, 3 Blackf. 450.

⁴ See *Ingram v. Plasket*, 3 Blackf. 450. As to inspection of documents by jury, see *Howell v. Ins. Co.*, 6 Biss. 436. See Whart. on Ev. § 81; *infra*, § 845.

⁵ See Whart. Cr. Pl. & Pr. § 707; *R. v. Martin*, L. R. 1 C. C. 78; *Mossam v. Ivy*, 10 How. St. Tr. 562; *State v. Knapp*, 45 N. H. 148; *Ruloff v. People*, 18 N. Y. 179; *Eastward v. People*, 3 Parker C. R. 25; *Fleming v. State*, 11 Ind. 234; *Chute v. State*, 19 Minn. 271; *State v. Bertin*, 24 La. An. 46. Under the English statutes, see *Stones v. Menhem*, 2 Exch. 382; *Morely v.*

Gaz. Co., 2 F. & F. 373. In *Bostock v. State*, 61 Ga. 635, a proposition by the court that a view should be taken was held error. It is clearly error to permit the jury to go out by themselves, in the defendant's absence, to view a disputed object. *State v. Bertin*, 24 La. An. 46; *Smith v. State*, 42 Tex. 444. It has, however, been held not error to permit this when the defendant or his counsel, knowing of the application, do not apply to be present. *State v. Adams*, 20 Kan. 311; *People v. Bonney*, 19 Cal. 426; *State v. Ah Lee*, 8 Or. 224. In *Dowd v. Guthrie*, 13 Bradw. 659, it was held that a view could only (at least in a civil suit) be ordered in cases where authorized by statute. See *Brightly's Troub. & Haly's Prac.* § 639; *Tidd's Prac.* 795.

⁶ *U. S. v. Guiteau*, Dist. of Col. 1882, 10 Fed. Rep. 161; *Com. v. Brown*, 14 Gray, 419; *Wiener v. State*, 66 Mo. 13;

instruments by which an offence is alleged to have been committed;¹ all clothes of parties concerned, from which inference may be drawn; all materials in any way part of the *res gestae*, may be produced at the trial of the case.² Injury to the person may also be proved by

State v. Garrett, 71 N. C. 85; *State v. Vincent*, 24 Iowa, 570.

¹ *Wynne v. State*, 56 Ga. 113.

² See *infra*, §§ 795 *et seq.* See, also, *Com. v. Brown*, 121 Mass. 69; *La Beau v. People*, 34 N. Y. 223; *People v. Gonzales*, 35 N. Y. 49; *Gardner v. People*, 6 Parker C. R. 155; *State v. Mordecai*, 68 N. C. 207; *State v. Graham*, 74 N. C. 646.

In *State v. Blair*, tried at Newark, N. J., October 1879, before Depue, J., where the question was whether Blair, the defendant, shot Armstrong, his coachman, in self-defence, we have the following:—

“Albert Honvidtz, of the sheriff’s office (called for the prosecution), testified that he had tried a number of experiments with a pistol on the same kind of stuff as that of which Armstrong’s outer garments was made.

“The witness spread a piece of checked gingham before him and produced a pistol.

“‘I tried the experiments,’ said the witness, ‘with the same kind of a pistol as that of Blair’s in the court-house cellar. At nine different distances—close, and at $\frac{1}{2}$ an inch, 1, 2, 3, 4, 5, 6, and 12 inches.’

“The witness exhibited a cloth with a large ragged hole and a scorch of powder around it, and the others in succession. On each the mark of the powder-burn became less distinct as the distance of the range was increased. On the twelve-inch rag, as it may be termed, the powder burn was scarcely perceptible.

“The purpose of this testimony was quickly appreciated by the defence. It was offered in anticipation of Blair’s

statement that he was engaged in a struggle with Armstrong at the time of the shooting, and wrested the rusty pistol from the coachman’s grasp.”

For the defence, Mr. Marsh, a lawyer in court, was called, and at the request of the counsel for the defence “personated Armstrong reaching forward for the pistol, one foot forward, and his back half turned to Mr. Blair. Judge Titworth held the lawyer by the left shoulder as Blair is supposed to have held Armstrong, and, with a pistol pressed against the lawyer’s body, showed how Blair had shot him then in the back or the side.” N. Y. Evening Post, Oct. 9, 1879. See *Brown v. Foster*, 213 Mass. 136.

Even an article proved to be of the same pattern of one the subject of litigation can be produced before the jury, to illustrate the nature of an injury by or to such article. *American Express Co. v. Spellman*, 90 Ill. 455.

In *State v. McCafferty*, 64 Me. 223, the jury were permitted to take with them a bottle of ale which was part of the same manufacture as that which was the subject of the trial.

But experiments by a jury, on articles not committed to them, and in the absence of the parties, vitiate the verdict. *State v. Sanders*, 68 Mo. 202. See *infra*, § 314.

Magnifying glasses may be used in the inspection of documents; *Hatch v. State*, 6 Tex. Ap. 84; and of jewelry; *Shoot v. State*, 63 Ind. 376.

As to reproduction of sounds, see 26 Alb. L. J. 61, where it is said that, on a suit for the infringement of a copyright of a song, Chief Justice Taney permitted the two airs to be sung to the jury.

inspection. Thus in an action to recover damages for an injury to a limb, the injured limb may be exhibited on trial, to be inspected by the court and jury, while the surgeon who was employed to set it testifies as to the injury.¹ When the issue is infancy, on an indictment, the court and jury may decide by inspection,² and so when the question arises as to the color of a person.³ On an issue of bastardy, the jury may judge of likenesses by inspection;⁴ and so on an issue of adultery, for the purpose of connecting a child with a putative father.⁵ It is inadmissible, however, to resort, on such

¹ *Mulhado v. R. R.*, 30 N. Y. 470. In *Wiener v. State*, 66 Mo. 13, the bones of the deceased were exhibited in court for the purpose of illustrating his position at the encounter. As to inspection of remains in alcohol see *State v. Vincent*, 24 Iowa, 570. *Infra*, § 326; *State v. Garrett*, 71 N. C. 85. As to exhibiting a ferretotype showing the injuries received by plaintiff, see *Reddin v. Gates*, 52 Iowa, 210; *infra*, § 544.

² *State v. Arnold*, 13 Ired. 184. See, however, *Ihinger v. State*, 53 Ind. 251, in which it was held error, on an indictment for selling liquor to a minor, to permit the jury to determine age by inspection.

³ *Warlick v. White*, 76 N. C. 89; *Garvin v. State*, 52 Miss. 207.

⁴ *State v. Woodruff*, 67 N. C. 89. See *State v. Britt*, 78 N. C. 439.

⁵ *Stumm v. Hummel*, 39 Iowa, 478; but not on an issue of seduction as part of proof against the alleged seducer. *State v. Danforth*, 48 Iowa, 43; citing *Keniston v. Rowe*, 16 Me. 38; *Rink v. State*, 19 Ind. 152.

In *State v. Smith*, 54 Iowa, 104, it was held admissible on a prosecution for bastardy to exhibit a child of ten years and a half to the jury to show likeness to the defendant; and the reason of the refusal of inspection in *State v. Danforth*, 48 Iowa, 43, is stated to be that in that case the child was only three months old, and conse-

quently had the "peculiar immaturity of features" of that age.

In Sergeant Ballantyne's "Experiences of a Barrister" he tells the following of Mr. Broderip, a magistrate: "I was then in some criminal practice, and appeared before him for a client who was suggested to be the father of an infant, and about which there was inquiry. Mr. Broderip very patiently heard the evidence, and notwithstanding my endeavors, determined the case against my client. Afterward, calling me to him, he was pleased to say: 'You made a very good speech, and I was inclined to decide in your favor, but you know I am a bit of a naturalist, and while you were speaking I was comparing the child with your client, and there could be no mistake, the likeness was most striking.' 'Why, good heavens!' said I, 'my client was not in court. The person you saw was the attorney's clerk.' And such truly was the case."

In the same volume we have the following:—

"I had the honor of having him (Sir Edwin Landseer) upon one occasion as a client; it is as far back as 1862; the question involved was undoubtedly one of art, although not of such a character as might have been expected. The plaintiff's profession was that of a tailor, a very eminent one at the west end of London; and he sued

issues, to the inspection of pictures.¹ On an issue of pregnancy, a jury of matrons is empanelled to decide the issue by inspection.²

But while identity is frequently an inference from inspection, it has been ruled that a defendant not under oath is not entitled to repeat something in the presence of the jury, to rebut evidence of a witness for the government who testified that he identified the defendant by his voice.³

Animals may be brought into court for inspection, when their size or other qualities are at issue.⁴

Sir Edwin for the payment for a work that he had executed by that gentleman's order. It was a coat which Sir Edwin declared violated every principle of high art, and he refused to countenance such a deviation from its true principles. The case was tried in the Exchequer, before (I believe) Mr. Baron Martin. The plaintiff entered the witness-box, and a very distinguished looking personage he was. The coat was produced, and the judge suggested that Sir Edwin should try it on; he made a wry face, but consented, and took off his own upper garment. He then put an arm into one of the sleeves of that in dispute, and made an apparently ineffectual endeavor to reach the other, following it round amidst roars of laughter from all parts of the court. It was a common jury, and I was told that there was a tailor upon it, upon which I suggested that there was a gentleman of the same profession as the plaintiff in court who might assist Sir Edwin. This was acceded to, and out hopped a little Hebrew slop-seller from the Minories, to whom the defendant submitted his body. With difficulty he got it into the coat, and then stood as if spitted, his back one mass of wrinkles. The tableau was truly amusing; the indignant plaintiff looking at the performance with mingled horror and disgust; Sir Edwin, as if he were choking; whilst the jurymen, with the air of a

connoisseur, was examining him and the coat with profound gravity. At last the judge, when able to stifle his laughter, addressing the little Hebrew, said: 'Well, Mr. Moses, what do you say?' 'Oh!' cried he, holding up a pair of hands not over clean, and very different from those incased in lavender gloves which graced the plaintiff. 'It ish positively shocking, my lord; I should have been ashamed to turn out such a thing from my establishment.' The rest of the jury accepted his view, and Sir Edwin, apparently relieved from suffocation, entered his own coat with a look of relief, which again convulsed the court, bowed and departed."

¹ *Beers v. Jackman*, 103 Mass. 192.

² *Baynton's Case*, 14 How. St. Tr. 630; *R. v. Wycherly*, 8 C. & P. 262.

³ *Com. v. Scott*, 123 Mass. 222.

⁴ *Line v. Taylor*, 3 F. & F. 731; *Wood v. Peel*, cited *Taylor's Ev.* § 500; *Lewis v. Hartley*, 7 C. & P. 405. In an English case passing through the English daily papers in the spring of 1876, it is stated that "Mrs. Priscilla Wolfe, a widow lady of independent means, residing at Kilsby, near Rugby, sued Richard Jones, butcher, of the same place, for £5 damages, for illegally killing a cockatoo parrot belonging to the plaintiff. The defence was that the defendant shot the cockatoo mistaking it for an owl. The fellow-bird of the deceased cockatoo was brought into court, and afforded great

§ 313. When, however, more exact proof can be produced, inspection does not afford a sufficient basis on which to rest a judgment. Thus in Indiana, where, under a statute, it was necessary to prove that the defendant was fourteen years old, it was held that in a case open to doubt this proof must be, if possible, supplied by witnesses or records, and cannot be determined by inspection alone.¹

Inspection not to be accepted when better evidence could be had.

§ 314. As we have seen, it is one of the necessary incidents of bringing into court instruments by which an act is alleged to have been done, that such instruments should be tested in open court.² It is only where this is done by

Instruments may be tested in court.

amusement by strongly recommending the parties to 'Shake hands,' 'Shut up,' and asking for 'sugar.'"

In *Thurman v. Bertram*, before the Exchequer Division, on July 21, 1879, a "baby elephant" was produced in evidence. The report in the *London Mall*, reprinted in 20 Alb. L. J. 151, says: "The baby elephant walked into court, with bells on his head, following his keeper in the most perfect way. He threaded his way through the 'mazes of the law,' in the body of a crowded court, in the most wonderful and clever fashion, like the most accomplished Q. C., and caused some consternation by making his exit at the other side, where no passage had been cleared in the crowd." For notice to produce a dog in court see *Lewis v. Hartley*, 7 C. & P. 405. In 20 Alb. L. J. 104, will be found an interesting article on litigation as to animals.

It is said in North Carolina that the qualities of a stallion for foal-getting cannot be judged by inspection, but may be proved by reputation. *McMillan v. Davis*, 66 N. C. 539.

¹ *Stephenson v. State*, 28 Ind. 272; *Ihinger v. State*, 53 Ind. 251.

In a suit for injury to chattels, the plaintiff, it has been ruled in Maryland, is not entitled to produce the chattel in court. The injury, it has

been said, must be proved by witnesses. *Jacobs v. Davis*, 34 Md. 204.

Experiments not applicable to conditions existing on the trial cannot be proved by experts. *Hawks v. Charlemont*, 110 Mass. 110; *Com. v. Piper*, 120 Mass. 185. See *infra*, § 796.

In patent cases, it should be remembered, experiments before the jury are constantly resorted to.

In *Belt v. Lawes*, in London, 1883, the question being as to the plaintiff's capacity as a sculptor, he was permitted to mould a bust in court before the jury.

Whether a witness can be called upon to write his name in court, on questions of identity of hands, is elsewhere considered. *Infra*, § 550.

² In *Jumpertz v. People*, 21 Ill. 375, a series of experiments were made by the jury for the purpose of determining the strength of certain screws and other instruments. The court held that though this might be objectionable, it was no ground for a new trial. But see *Bouldin v. State*, 8 Tex. Ap. 332, where the court held it to be error to permit the jury to take with them into their room when they retired to consider of their findings, the rifle gun and balls which had been exhibited and testified about by the witnesses. As was said in *Smith v. State*, 42 Tex.

the jury, after retiring, when the parties have no opportunity of revising the process, that objection can be made.¹ When the process is conducted openly, as part of the trial of the case, it is a valuable auxiliary in the discovery of truth.²

444 : "If, by this means, they, the jury, or either of them, did obtain a personal knowledge of a material fact in the cause before finding their verdict, and it was considered by them in finding their verdict, then they acted upon a fact known to themselves, not developed publicly on the trial as to how they understood it, concerning which defendant has had no opportunity to cross-examine them as witnesses, and upon which, being unknown, the defendant or his counsel have not been heard, and of which the judge, trying the cause, had no information either on the trial, in giving his charge, or on motion for a new trial."

¹ *Hope v. State*, 62 Cal. 291; see *Moon v. State*, 68 Ga. 687.

² The late Rev. F. W. Robertson, in a letter printed by his biographer (*Life and Letters of F. W. Robertson*, ii. 139), gives the following vivid sketch of a trial before Sir John Jervis: "One was a very curious one, in which a young man of large property had been fleeced by gang of blacklegs on the turf, and at cards. Nothing could exceed the masterly way in which Sir John Jervis untwined the web of sophistries with which a very clever counsel had bewildered the jury. A private note-book, with initials for names, and complicated gambling accounts, was found on one of the prisoners. No one seemed to be able to make head or tail of it. The chief justice looked it over and most ingeniously explained it all to the jury. Then there was a pack of cards which had been pronounced by the London detectives to be a perfectly fair pack. They were examined in court; every

one thought them to be so, and no stress was laid upon the circumstance. However, they were handed to the chief justice. I saw his keen eye glance very inquiringly over them while the evidence was going on. However, he said nothing, and quietly put them aside. When the trial was over, and the charge began, he went over all the circumstances till he got to the objects found upon the prisoners. 'Gentlemen,' said he, 'I will engage to tell you without looking at the faces, the name of every card upon this pack!' A strong exclamation of surprise went through the court. The prisoners looked aghast. He then pointed out that on the backs, which were figured with wreaths and flowers in dotted lines all over, there was a small flower in the right-hand corner of each :: like this :

"The number of dots in this flower was the same on all the kings, and so on, in every card through the pack. A knave would be perhaps marked thus: An ace thus: . . and so on; the difference being so slight, and the flowers on the back so many, that even if you had been told the general principle, it would have taken a considerable time to find out which was the particular flower which differed. He told me afterwards that he recollected a similar expedient in Lord De Ros's Case, and, therefore, set to work to discover the trick. But he did it while the evidence was going on, which he himself had to take down in writing."

Whether a rule will be granted to exhume a body is discussed in *Grangers' Ins. Co. v. Brown*, 57 Miss. 308; 10 Cent. L. J. 356.

§ 315. Whether when the defendant is compelled to render evidence of this class against himself the result can be proved on trial, has been much discussed. In New York, in a case where a woman was charged with the murder of her illegitimate child, it was held that the results of a medical examination to which she was compelled when in prison to submit could not be given on trial.¹

Results of compulsory exhibition of person may be given.

In North Carolina it has been held that where a defendant was compelled to exhibit himself to a jury so as to see whether he was within the prohibited degree as to color, a new trial should be given.²

In Georgia it was held inadmissible for the prosecution to prove that the defendant's feet, when forced against his will into a track, fitted the track.³ It was held, also, to be error to compel the defendant to exhibit his leg to the jury when the condition of such leg was at issue.⁴

On the other hand, it has been held in North Carolina (in a case subsequent to that giving a new trial after a compulsory exhibition of the person), admissible when the defendant had been compelled before the trial to show the condition of her hand, that being material to the issue, for the parties compelling to testify as to the results of their examination.⁵

In Louisiana it has been ruled that a defendant on trial can be forced to take his feet from under a chair, so that they could be

¹ *People v. McCoy*, 45 How. Pr. 216.

² *State v. Jacobs*, 5 Jones L. 259; App. Johnson's Case, 67 N. C. 58.

³ *Day v. State*, 63 Ga. 67; 11 Cent. L. J. 219.

⁴ *Blackwell v. State*, 67 Ga. 76. In *Gordon v. State*, 68 Ga. 814, however, it was held that where the defendant exhibited a scar as part of his case, he would be required to submit such scar on cross-examination to medical inspection.

In *Stokes v. State*, 5 Baxt. 619, a pan of soft mud was brought into court, and the defendant was asked to put his foot into it, which he declined. It was held error to permit the request to be made in the presence of the jury.

⁵ *Garrett's Case*, 71 N. C. 85. "The distinction," said the court, "between that and our case is, that in *Jacobs' Case*, the prisoner himself, on trial, was compelled to exhibit himself to the jury, that they might see that he was within the prohibited degree of color, thus he was forced to become a witness against himself. This was held to be error. In our case, not the prisoner, but the witnesses, were called to prove what they saw upon inspecting the prisoner's hand, although that inspection was obtained by intimidation." See to same effect *State v. Graham*, 74 N. C. 646, cited *infra*, § 661.

inspected by a witness, for the purpose of determining whether they were about the same size as foot-prints on the soil at the place of a guilty deed.¹

In Nevada a defendant was compelled to exhibit his arm in order to show a tattoo mark.²

It is agreed on all sides that, where a defendant voluntarily makes certain foot-prints, at the request of arresting parties, they can be afterwards described by these parties.³ Undoubtedly, if torture is applied to compel a party thus to give evidence against himself, the evidence thus produced should be excluded as obtained by a proceeding against the policy of the law. But if the defendant's person is simply uncovered, or his hand or foot moved, without any injury to himself, this must be regarded in the same light as is the disclosure of any material fact by means of a confession induced by force or fraud. The confession itself is inadmissible, but not the fact to which the confession leads; *e. g.*, stolen property, or other marks of guilt discovered. If the admissibility of such facts is not excluded by the constitutional provision that no one shall be compelled to be a witness against himself, it is hard to see why peculiarities in his person which are brought to light by an inadmissible confession should not be admitted in evidence against him. We might go still further, and hold with the Nevada court that an order of a judge, sitting as a justice of the peace, to examine the person of an accused party, stands on the same ground and may be justified by the same reasons as a search warrant issued against the same party. But waiving this position, as inconsistent with the rule that the production of criminatory documents will not be compelled,⁴ and conceding at all events, that so far as concerns a compulsory exhibition of the defendant's person to the jury under trial is concerned he is protected by the constitutional guarantee that self-criminatory evidence is not to be compelled, it does not follow that when facts material to the issue are thus disclosed, they should be excluded.⁵

¹ *State v. Proudhomme*, 25 La. An. 523. See to same effect, *Blackwell v. State*, 67 Ga. 76, and cases *infra*, § 796.

² *Ah Chuey v. State*, 11 Cent. L. J. 111; 14 Nev. 79.

³ *Walker v. State*, 7 Tex. Ap. 245; *infra*, § 796.

⁴ See *supra*, § 213; *infra*, § 560.

⁵ That a woman setting up pregnancy will be compelled to exhibit her person, see *supra*, § 312. In *People v. Mead*, 50 Mich. 328, it was held to be error to compel a prisoner to put his foot in a shoe to see if his foot in such shoe

would fit a track. See to the same general effect, *Day v. State*, 63 Ga. 667. See *infra*, § 796. That the refusal of the court to compel a party to submit himself to medical inspection on trial in order to test the injury for which he brings suit, is not error, see *Parker v. Enslow*, 102 Ill. 272; *Schroeder v. R. R.*, 47 Iowa, 375. On this topic may be consulted interesting articles in 22 Alb. L. J. 145, and 15 Central Law J. 2207.

CHAPTER VIII.

BURDEN OF PROOF.

Prevalent theory is that burden of proof is on affirmative, § 319.	Distinction between burden and presumption of innocence, § 330.
True view is that burden is on party undertaking to prove a point, § 320.	Burden on defendant of defences purely extrinsic, § 331.
Negatives are susceptible of proof, § 321.	So of licenses and <i>autrefois acquit</i> , § 332.
In criminal cases burden on prosecution, § 322.	<i>Alibi</i> not an extrinsic defence, § 333.
Party who sets up another's tort must prove it, § 323.	Otherwise as to provocation, § 334.
Burden on prosecution to prove <i>corpus delicti</i> , § 324.	Necessity must be substantively proved, § 335.
<i>Corpus delicti</i> consists of criminal act, § 325.	Discussion as to insanity, § 336.
Identification of body after death not essential, § 326.	When sanity is of essence it must be proved beyond reasonable doubt, § 340.
In infanticide, burden on prosecution to prove prior life of child, § 327.	Burden is on party to prove what it is his duty to prove, § 341.
Death must be connected with injury, § 328.	License to be proved by party to whom such proof is essential, § 342.
Burden as to all essential ingredients of offence is on prosecution, § 329.	Burden of proving formalities is on him to whom it is essential, § 343.
	Court may instruct jury that a presumption of fact makes a <i>prima facie</i> case, § 344.

§ 319. THE same controversy that is agitated in civil issues in reference to the burden of proof is agitated in criminal issues; and in criminal as well as in civil practice the prevalent opinion, backed by high authorities, is, that the question is to be determined by the test of the quality of the proposition to be established. An *affirmative* proposition is to be proved by the party advancing it; not so a *negative* proposition. Among the most authoritative exponents of this view is Mr. Best, in his treatise on Evidence.¹ "The general rule," he declares, "is, that the burden of proof lies on the party who asserts the affirmative of the issue, or question in dispute, according to the maxim, *Ei incumbit probatio qui dicit, non qui negat*;" and to this effect he cites Mr. Starkie and Mr. Phillipps, sustaining his views by

Prevalent theory is that the burden is on the affirmative.

¹ Best's Evidence, 5th ed., 369; Whart. on Ev. § 353.

a copious exposition. The negative, it is argued, is not susceptible of proof. An affirmative proposition, therefore, is the only kind of proposition which a party can be called upon to prove.

§ 320. But to this it has been well replied,¹ that there is no proposition which does not blend negation with affirmation, and in which affirmation of one side does not involve a denial of the other side. An *alibi*, for instance, is at once a negation of the defendant's presence at a particular spot at a particular time, and an affirmation of his presence at another place at the same time. Or the defence of insanity is in like manner both an affirmation and a negation—an affirmation of the existence of disturbing mental conditions, a negation of sanity. Nor is this all. In many cases each party unites, with an affirmation on his part of his own rights, a denial of the rights of his opponent; and the affirmation and denial are so mixed as to be incapable of severance in proof. We may take as illustrating the position cases in which the defendant set up as a bar the maxim *volenti non fit injuria*. You cannot prosecute me, he says, because you consented to my taking the article; and this assertion involves two incidents: (1) An affirmation of the prosecutor's assent; and (2) A negation of his right to maintain a prosecution. And in like manner the prosecution's case in rape involves an affirmation and negation. The affirmation is "force," the negation is, "without her consent." These are logically distinguishable elements of the case, but practically the two are so blended that one cannot be put in evidence without the other. If the prosecution, in such cases, is not to prove a negative, then it is not to prove anything. If the prosecution is bound to prove the affirmative, then it must necessarily prove the negative which is bound up, as a matter of fact, in the affirmative.

Correct view is that the burden is on a party undertaking to prove a point.

§ 321. It is asserted, in defence of the rule here contested, that a negative cannot be proved, and hence, as only an affirmative is provable, on the affirming party alone can rest the burden of proving.² To this, aside from the objection already made that all affirmations involve negations of their contradictory opposites,³ the following answer is to be

Negatives are susceptible of proof.

¹ Hefter, Appendix to Weber, 259.

² See Whately's Logic, book ii. c. ii.

³ As to the relations of negative to § 3; State v. Wilbourne, 87 N. C. 529. affirmative testimony, see *infra*, § 382.

made: High probability, as has been already seen,¹ is the best we can obtain in any case; high probability may be reached as to the non-existence of many things which are claimed to exist. It may be difficult for me to prove that a thing does not exist in all space, or that certain occult intents may not lurk in the undisclosed recesses of a particular person's heart. But jurisprudence has to do with no such vague domains. Its territory is limited. It inquires whether in a particular spot, at a particular time, open to human observation, a particular thing existed; or whether by the small range of witnesses, to whom a party at a particular time was visible, he gave signs of the suspected intent. It is possible, within such limited range, to call all witnesses who were likely to have been at the given spot, or observed the given person, at the particular time, and so to approach a negative by gradually exhausting the affirmative. And in many cases, *e. g.*, when the disappearance of a party is to be proved, or the absence of a particular thing from a particular place, a negative is the highest kind of proof procurable. The same remark applies to what is often called the highest proof of good character—*i. e.*, that the witness has never heard the character of the person in question discussed.²

§ 322. Aside, therefore, from the rule we have elsewhere considered, that the defendant's guilt, in a criminal prosecution, is to be shown beyond reasonable doubt, it may be stated generally that in criminal as well as in civil trials, whether the proposition be affirmative or negative, the party against whom judgment would be given, as to a particular issue, supposing no further proof to be offered, has on him, at that particular period, the burden of proof, which he must satisfactorily sustain.³ In criminal cases, it may be stated, as a general rule, that the burden at the outset is on the prosecution to make out the defendant's guilt beyond reasonable doubt. If it succeeds in doing this, then the burden is on the defendant to establish reasonable doubt of his guilt, either by contradictory proof, or by proof in con-

¹ *Supra*, § 7; *infra*, § 809. As to licenses, see *infra*, § 342. And see *Goodwin v. Smith*, 72 Ind. 113; S. C., 37 Am. Rep. 141, in which latter volume is an elaborate note examining the authorities.

² *Supra*, §§ 58 *et seq.*

³ *Infra*, § 439, where the cases are given. See Whart. on Ev. § 357, for authorities.

fession and avoidance.¹ We must remember, at the same time, that the rule imposing the burden of proof on the party advancing a proposition is a very different thing from the presumption of innocence, to be hereafter discussed.² A defendant has the presumption of innocence with him through the whole case. The advantage he derives, however, from the fact that the burden is on the prosecution to make out the points it advances, is only temporary. As soon as this is done to such an effect as to sustain a verdict of guilty, then, should the proof close at that point, the case goes to the jury free from any presumptions arising from the prior imposition of this burden.³ In other words, the rule requiring the *actor* to take on him the burden of proof is one merely of practice, adopted for the proper development of the case, and ceases to operate when the evidence is in. The rule requiring guilt to be made out beyond reasonable doubt is a fundamental sanction of the law, applicable at all stages of a trial. The first rule concerns the *order*, the second, the *weight* of testimony.

§ 323. From the rules settled in respect to torts in their civil relations we may obtain aid in considering the burden of proof in criminal prosecutions. And with respect to torts, according to the Roman law, he who charges *dolus* or *culpa* on another must prove such *dolus* or *culpa*; while he who, on such case being made out, sets up *casus*, or the contributory agency of the plaintiff, must prove such *casus*, or contributory agency.⁴ In our own law, it is an elementary principle that a party setting up a tort has the burden on him to prove such tort.⁵ Thus, as is elsewhere more fully seen, when the cause of action is negligence, the plaintiff must prove the negligence;⁶ when it is deceit, the plaintiff must prove the deceit;⁷ when deceit is set up as a defence, the deceit must be proved by the defendant.⁸ If,

Burden is on party setting up tort.

¹ *Infra*, § 330. See *Neveling v. Com.*, 98 Penn. St. 322; *People v. Cheong Foon*, 61 Cal. 527; *Jones v. State*, 13 Tex. Ap. 1.

² *Infra*, §§ 330, 718.

³ See *Case v. People*, 76 N. Y. 242.

⁴ *Weber*, Heffter's ed. 173.

⁵ See Whart. on Ev. § 357, for authorities.

⁶ Whart. on Ev. § 359.

⁷ *Huchberger v. Ins. Co.*, 5 Biss. 106; *Holbrook v. Burt*, 22 Pick. 546; *Strong v. Place*, 4 Rob. N. Y. 385; *Mutual Ins. Co. v. Wager*, 27 Barb. 354; *Grimmell v. Warner*, 21 Iowa, 11; *Oaks v. Harrison*, 24 Iowa, 179; *Robinson v. Quarles*, 1 La. An. 460. See *Bigelow's Cases on Torts*, 1-59.

⁸ *Huchberger v. Ins. Co.*, 5 Biss. 106; *Trenton Ins. Co. v. Johnson*, 4

to a tort, justification is set up by the defendant, the burden is on him to prove such justification. And so when the defendant, to an action for trespass, sets up probable cause on his part to believe that the land belonged to himself, he must prove such probable cause.¹

§ 324. It used to be said that in cases of circumstantial evidence the *corpus delicti* is to be proved by the prosecution; but that it is otherwise in cases where the evidence is direct. This distinction, however, cannot, as we have seen, be sustained.² In all criminal prosecutions, no matter what may be the kind of evidence on which they rest, the burden is on the prosecution to prove the *corpus delicti*. "I would never," says Lord Hale, "convict any person for stealing the goods of a person unknown, merely because he would not give an account how he came by them, unless there were due proof made that a felony had been committed. I would never convict any person of murder or manslaughter, unless the fact were proved to be done, or at least, the body found dead."³ Equally emphatic is the language of another great judge: "To take presumptions, in order to swell an equivocal and ambiguous fact into a criminal fact, would, I take it, be an entire misapplication of the doctrine of presumptions."⁴ And the Roman law is the same: "*Diligenter cavendum est judici, ne supplicium praecepitet, antequam de crimine constiterit.*"⁵ "*De corpore interfecti necesse est ut constet.*"⁶ The death in homicide should be distinctly proved, either by inspection of the body,⁷ or by other evidence strong enough to leave no ground for reasonable doubt.⁸ The test is applicable to all crimes.⁹ Thus, in a case of

Zabr. 576; New York Ins. Co. v. Graham, 2 Duv. 506.

¹ See cases cited in Whart. on Ev. § 359. The general rule is that, with the exception of matters peculiarly within the knowledge of the other side, the party making a point is bound to prove it. Com. v. Whittaker, 131 Mass. 224, cited *infra*, §§ 329, 343.

² See *supra*, § 11. But see State v. Taylor, 1 Houst. C. C. 436; People v. Alviso, 55 Cal. 230.

³ 2 Hale P. C. 290; People v. Bennett, 49 N. Y. 137; Smith v. Com., 21 Grat. 809; State v. Keeler, 28 Iowa,

553; Brown v. State, 1 Tex. Ap. 154; Black v. State, 1 Tex. Ap. 368; Tyner v. State, 5 Humph. 383; and see, for an interesting case on the *corpus delicti* in larceny, R. v. Burton, 24 Eng. Law & Eq. 551; 6 Cox C. C. 293.

⁴ Lord Stowell, in Evans v. Evans, 1 Hagg. C. R. 105.

⁵ Matth. de Crim. in Dig. lib. 48, tit. 16, c. 1.

⁶ Matth. Probat. c. 1, n. 4, p. 9.

⁷ 1 Stark. Evid. 575, 3d ed. c. 5.

⁸ People v. Ruloff, 3 Parker C. R. 401.

⁹ See Garcia v. State, 12 Tex. Ap. 335.

horse-stealing, a mere declaration in evidence that the horse had been stolen is not sufficient to prove theft. The facts must appear, so that the judge and jury may see whether such facts in point of law amounted to a felonious taking and carrying away of the property in question.¹ In rape, it is essential to prove, as far as this is practicable, that violence was actually committed on the woman;² in burglary, that the house was actually entered;³ in arson, that burning, to some appreciable extent, actually took place;⁴ in riot, that there was an actual disturbance of the public peace.⁵

§ 325. The *corpus delicti*, the proof of which is essential to sustain a conviction, consists of a criminal act; and to sustain a conviction there must be proof of the defendant's guilty agency in the production of such act.⁶ With respect to the former of these, it is the established rule that the facts which are the basis of the *corpus delicti* form a distinct ingredient in the case of the prosecution, to be established beyond reasonable doubt. In homicide,

Corpus delicti consists: (1) of a criminal act; and (2) of the defendant's agency in such act.

¹ *Tyner v. State*, 5 Humph. 383. See *Mitchum v. State*, 11 Ga. 615. The reference to facts, which, having in themselves no bearing upon the guilt or innocence of the party, is important as leading to inferences in regard to it, is called in Germany "indicatory evidence." See, also, Wills's Essay on the Rationale of Circumstantial Evidence. Indications in this relation are divided by Mittermaier into: 1st. Those which are drawn from the *particular* relation of the circumstance to the fact in issue, so as to implicate a particular person either as a participant in the crime, or as a possessor of information in regard to it; *e. g.*, where a knife, the possessor of which is known, is found at the *locus in quo*. 2d. Those which set out from general observations of human nature, inducing suspicion against particular individuals, by reason of particular moral qualities, motives, information, skill, or demeanor; *e. g.*, suspicions on the grounds of enmity towards the deceased, or in-

terest. See, also, *Archiv. des Criminels* xiv. p. 587. There is also a distinction between *immediate* indications (*Bayl Beitrage zum Criminale*, p. 215; *Bentham, traité i.* p. 313), which authorize the inference in regard to the fact, without the intervention of other circumstances, and *mediate* ones, which only prove such facts from which a further inference can be drawn, in regard to the very matter at issue; *e. g.*, approval of the crime, which leads to the inference of a disposition to commit it.

² *Whart. Crim. Law*, 8th ed. §§ 551 *et seq.*

³ *Ibid.* §§ 759 *et seq.*

⁴ *Ibid.* §§ 825 *et seq.*

⁵ *Ibid.* §§ 1533 *et seq.*

⁶ *R. v. Burdett*, 4 B. & Ald. 1, 95; *U. S. v. McGlue*, 1 Curtis C. C. 1; *Com. v. McKie*, 1 Gray, 61; *People v. Kennedy*, 32 N. Y. 141; *People v. Bennett*, 49 N. Y. 137; *Maher v. People*, 10 Mich. 212; *Com. v. Johnson*, 29 Grat. 811. See this illustrated in

for instance, the fact of death should be shown, either by witnesses who were present when the murderous act was done, or by proof of the body having been seen dead;¹ or, at all events, that fragments of it, if in a state of decomposition or disintegration, should be identified.² Lord Coke illustrates the policy of this rule by citing a trial, where an uncle being unable to account for the disappearance of a niece of whom he had the bringing up, was executed for her murder, though it afterwards appeared that she had fled from home, to which, in fact, after a lapse of some years, she returned; and Doctor Hitzig gives several illustrations to the same effect.³ Lord Hale tells us that in his own time, after the party charged was convicted and executed, the "deceased" returned from sea, where he had been sent against his will by the accused, who, though innocent of the murder, was not entirely blameless.⁴ In our own country the alleged victim in a conspicuous case made his appearance just in time to save a person who had been indicted for murdering him, and who actually had made a confession of guilt, from being hung.⁵

Pitts v. State, 43 Miss. 472; and see further *infra*, §§ 329, 633. (As to presumption of continuance of life, see *infra*, § 810.) The latter feature, namely, criminal agency, is often lost sight of, but is as essential as is the object itself of crime. *Acts*, in some shape, are essential to the *corpus delicti*, so far as concerns the guilt of the party accused. A. may have designed the death of the deceased, yet if that death has been caused by another, A., no matter how morally guilty, is not amenable, if he has done and advised nothing in respect to the death, to the penalties of the law. Gellius vii. 3.

¹ See *Ruloff v. People*, 53 N. Y. 179; *State v. Williams*, 7 Jones N. C. 446; and see further *Whart. & St. Med. Jur.* §§ 776 *et seq.* 783.

² This was done, as will presently be seen, in the Webster Case, where cremation had been attempted by the defendant, by identification of teeth by a dentist. To the same point may

be cited, *R. v. Clewes*, 4 C. & P. 221; 2 Wh. & St. Med. J. § 1237; *Udderzook v. Com.*, 76 Penn. St. 340.

In *McCulloch v. State*, 48 Ind. 109, it was held a sufficient *prima facie* case of identification that a skeleton, corresponding in age and sex with the deceased, had been found on a spot where the deceased may have been placed. As to identification see further *supra*, § 20; *infra*, § 806. Compare *Com. v. Costley*, 118 Mass. 1; *Wilson v. State*, 43 Tex. 472.

³ *Der neue Pitaval*, etc.

⁴ 2 Hale P. C. 230. See, also, *Best's Theory*, App. Case 5.

⁵ *Boorn's Case*, 1 Greenl. Ev. § 214. *Infra*, §§ 634, 804; 3 Wh. & St. Med. Jur. 4th ed. § 780.

The New York Sun of March 23, 1884, gives a statement of a similar case which may be condensed as follows: Early in 1826, Dorsey Viers, of Northfield Township, Ohio, received in his cabin an Englishman named Rupert

§ 326. Should the decease be satisfactorily proved, the identification of the body after death may be dispensed with.¹ Thus, in a

Charlesworth. "He was a jolly fellow, with plenty of money, and he became very popular in the neighborhood. Suddenly he dropped out of sight. He was known to have gone to Viers's cabin on the night of July 23, but the constable who went there early the next morning, to arrest him for passing counterfeit money, could not find him. One day, a good while after, a hunter found a human skeleton under a log in the woods near Viers's farm. The discovery helped to jog the memory of a man who had heard a rifle report at Viers's cabin on the night of Charlesworth's disappearance. Another suddenly remembered that he had seen blood on the bars in Viers's lane, near the woods. Viers was questioned. At one time he said that the Englishman had jumped from a window and ran away; at another time he said he knew nothing about the man's departure, as he was asleep at the time. The constable who had gone early in the morning to Viers's cabin to arrest Charlesworth, remembered that at that unusual hour Mrs. Viers was mopping the floor. For five years the gossips talked, but nothing was done." Finally, on Jan. 8, 1831, Viers was arrested on a charge of murdering Rupert Charlesworth. The proof was strong. "A hired girl who was working at Viers's cabin when Charlesworth disappeared said that a bed blanket used by the Englishman was missing on the morning he left, and that it was afterward found concealed under a haystack, with large spots on it resembling clotted blood. A dozen neighbors testified to Charlesworth's reputed wealth, and others told of the sudden evidences of prosperity that had been seen about Viers's premises in the shape of a new house, and in the purchase of some blooded stock. Viers and his pioneer wife grew sick at the prospect. But an unexpected deliverance came in the last two days. Two men from northwest Ohio took the stand, and gave positive evidence that they had seen Charlesworth subsequent to his disappearance from Northfield. This turned the scale in Viers's favor, and he was discharged. As there was still a strong popular feeling against Viers, however, he began a search for Charlesworth, which led to his discovery in Detroit." Even then, however, the identity of the person so discovered with Charlesworth was disputed. To settle the question Charlesworth agreed to come back to Ohio, and Viers "put up handbills in Northfield, Boston, and adjoining townships saying that on a certain day Rupert Charlesworth would exhibit himself at one of the churches, and all persons who had known him were invited to be present. The meeting attracted a great crowd. Charlesworth took the platform, from which through the day he responded to interrogatories. The examination was chiefly conducted by one of the shrewdest attorneys at the bar of Akron. Not only did Charlesworth readily recognize and name

¹ *R. v. Burton*, 1 Dears. C. C. 284; discussing the topic in the text will be *R. v. Douglass*, 1 Mood. C. C. 480; *State v. Patterson*, 73 Mo. 695; and cases cited *infra*, § 804. An article

case in England,¹ the prisoner, a seaman on board of the ship *Eolus*, was charged with the murder of his captain. The first count of the indictment alleged the murder to have been committed by a blow from a large piece of wood, and the second by throwing the deceased into the sea. It appeared in evidence that while the ship was lying off the coast of Africa, where there were several other vessels near, the prisoner was seen one night to take the captain up in his arms and throw him into the sea, after which he was never seen or heard of; but that near the place on the deck where the captain was seen was found a billet of wood, and the deck and part of the prisoner's dress were stained with blood. On this, it was objected by the prisoner's counsel that the *corpus delicti* was not proved, as the captain might have been taken up by some of the neighboring vessels; but the court, although they admitted the general rule of law, left it to the jury to say upon the evidence, whether the deceased was not killed before the body was cast into the sea, and the jury being of that opinion, the prisoner was convicted and executed.² But something more than mere disappearance must be shown. In an English case a woman was tried for the murder of her child, aged sixteen days, the evidence being that she was proceeding from Bristol to Llandogo, and was seen near Tintern, with the child in her arms, at six P. M.; that she arrived at Llandogo between eight and nine P. M., without the child, which was not afterwards heard from. It was held that she must be acquitted, as she could not by law either be called upon to account for her child, or to say where it was, unless there was evidence to show that the child was actually dead.³ On the other hand, in a remarkable case in Missouri, tried in 1859, the prisoner's confession that he drowned

persons he had not seen for sixteen years, but he related incidents known only to individual questioners and himself. He refreshed the memory of an old farmer with regard to a spree in which they had been partners, recalling the curious circumstance of their having boiled their whiskey. Late in the afternoon a vote was taken as to whether the man before them was Rupert Charlesworth. The audience

affirmed with one voice that that man stood before them."

¹ R. v. Hindmarsh, 2 Leach, 648.

² See U. S. v. Williams, 1 Clifford, 5. See, also, Stocking v. State, 7 Ind. 326.

³ R. v. Hopkins, 8 C. & P. 591—Abinger. See, as to proof of abortion and infanticide, 3 Whart. & St. Med. Jur. 4th ed. (1884), §§ 84, 861.

his wife was held sufficient proof of her death, without any evidence that the body was seen after death; but in this case there were other facts from which a killing could be inferred.¹

¹ *State v. Lamb*, 28 Mo. 218. See *U. S. v. Williams*, 1 Clifford, 5.

A brother of the deceased, on a trial for murder, testified that, five months after the alleged murder, he saw a body claimed to be the body of the deceased, and examined it; and he testified to several points of resemblance. He was asked by the prosecution whether it was, in his opinion, the body of the murdered man. It was held that the question was incompetent, the matter being for the jury, the body having been much decomposed, and he having stated all the points of resemblance. *People v. Wilson*, 3 Parker C. R. 199.

When the head of the murdered man having been found severed from the body, and taken by a physician, was preserved in alcohol and exhibited at the trial, it was held competent, to rebut this evidence, for an expert to state the character of the changes produced by death, and to explain how far such changes had acted on the head in question, but not to answer whether it was possible to identify the head. *State v. Vincent*, 24 Iowa, 570. *Supra*, § 312.

Mr. Bentham suggests the illustration of the decomposition of the body in lime, or by any other of the known chemical menstrua, or of its being submerged in an unfathomable part of the sea, and asks whether in such a case, when the homicide is proved *aliunde*, the defendant is to be acquitted. Bentham, *Jud. Ev.* 234.

On the trial of Dr. Webster for the murder of Dr. Parkman, the evidence was that in the furnace attached to the defendant's laboratory were found

portions of lime and blocks of mineral teeth. These fragments, together with others elsewhere found, having been collected, were identified as those of Dr. Parkman, the teeth having been declared by a dentist to be parts of a set made for the deceased. It was evident that an attempt had been made to destroy the body by fire or other chemical agency, and the testimony of experienced medical gentlemen was taken with reference to this point. Dr. Strong testified that he had frequently found it necessary to get rid of the remains of a subject by fire; and that upon one occasion, wishing to consume the flesh of a body of a pirate, he had placed it upon a large wood fire, and succeeded in concluding the operation in the course of one night, and the forenoon of the next day, although called upon during that time by the police to know what made such a smell in the street. Bemis's Report on Webster Case, 69. Dr. Jackson says "that the flesh of a human body, if cut up into small pieces and boiled in potash, might be dissolved in two or three hours. Next to this, the best substance used in dissolving or disposing of a human body would, I should think, be nitric acid; and the difficulty or danger attendant upon its use, so far as the evolution of noxious vapor is concerned, would depend upon the degree of heat applied. If a gentle heat were used, very little nitrous acid would be given off; but if the acid were boiled there would be a great deal, though the dissolution of the body would be most rapid at a boiling temperature." Bemis's Report of Webster Case, 75-6. It is

§ 327. The weight of authority now clearly is that, in cases of alleged infanticide, it must be established that the child had acquired an independent circulation and existence, and it is not enough that it had breathed in the course of its birth;¹ and an eminent and humane American judge extended the rule requiring proof of life at the time of the act to the case of a child some months old, whom the mother, during an attack of puerperal fever, had thrown out of the window of a steamboat.² If, however, a child has been wholly born and is alive, it is not essential that it should have breathed at the time it was killed; as many children are born alive, and yet do not breathe for some time after birth.³

Life must be proved or inferred in infanticide.

§ 328. It does not follow that because a person is wounded and dies, the death is necessarily caused by the wound; and the burden in such cases is on the prosecution to show beyond reasonable doubt that the wound in question produced the death.⁴ It may happen, also, where poison has been administered, that death resulted from natural causes.⁵ The presence of poison may be ascertained from the symptoms during life, the *post-mortem* appearances, the moral circumstances, and the discovery of the existence of poison in the body, in the matter ejected from the stomach, or in the food or drink of which the sufferer has partaken.⁶ And to this should be added proof that the poison thus received into the system was the cause of death.⁷

Death must be connected with injury.

§ 329. When the defence consists, not in confession and avoidance, but in the traverse of some essential fact relied on by the prosecution, the burden of proof, as has already been noticed, is on the prosecution to satisfy the jury that its case is made out.⁸ Thus on an indictment for assault and battery, when malice or wantonness is set up

Burden as to all essential ingredients of offence is on prosecution.

clear that in such cases the *corpus delicti* may be proved inferentially. *Ibid.*; *State v. Williams*, 7 Jones (N. C.), 446.

¹ *Wills*, p. 205; *R. v. Poulton*, 5 C. & P. 329; 2 Wh. & St. Med. Jur. § 128; *Whart. Crim. Law*, 8th ed. § 445.

² *U. S. v. Hewson*, 7 Bost. Law Rep. 361, Story, J.; though see *Com. v. Harman*, 4 Barr, 269.

³ See *R. v. Brain*, 6 C. & P. 350.

⁴ As to causal relation, see *Whart. Crim. Law*, 8th ed. §§ 152 *et seq.*

⁵ *Infra*, § 790; *Wills on Circum. Ev.* 209.

⁶ 2 Wh. & St. Med. J. §§ 321, 1022.

⁷ *Infra*, §§ 787-92.

⁸ *Starkie on Ev.* 436; *R. v. Burdett*, 4 B. & Ald. 1, 95; *Case v. People*, 76 N. Y. 242; *Turner v. Com.*, 86 Penn.

by the prosecution, the burden is on the prosecution to show that the assault was unjustifiable.¹ So where a particular intent is in dispute, in similar cases, it must be proved by the prosecution,² and the inference of intent is to be made from the facts in evidence in the whole case.³ The same duty is incumbent on the prosecution when identity is at issue.⁴ On an indictment for seduction, the chastity of the prosecutrix being at issue must be shown by the prosecution;⁵ and in like manner the burden of malice in cases of murder is on the prosecution;⁶ and the burden of proving time is on the prosecution, in all cases in which time is essential, as for instance, when a question arises as to the statute of limitations.⁷ The principle is, that the burden is on a party to prove all matters which bear such a relation to his case that, if he should omit to prove them, the verdict, if the trial stopped at that particular point, would go against him.⁸

As will be hereafter seen, when there is doubt as to malice, on a trial of an indictment containing a non-malicious as well as malicious offence, the proper course is to find for the non-malicious offence.⁹

St. 54; *Neveling v. State*, 98 Penn. St. 322; *Pauli v. Com.*, 89 Penn. St. 432; 7 Weekly Notes, 396; *Com. v. Johnson*, 29 Grat. 817; *Farris v. Com.*, 14 Bush, 362; *Algheri v. State*, 25 Miss. 584; *Bowler v. State*, 41 Miss. 570; but see *State v. Vincent*, 24 Iowa, 750.

¹ *Supra*, § 325; *Com. v. McKie*, 1 Gray, 61. See *R. v. Allen*, 1 Mood. C. C. 154; *Com. v. Kimball*, 24 Pick. 366; *Com. v. Dana*, 2 Met. 340; *People v. Kennedy*, 32 N. Y. 141; *People v. Bennett*, 49 N. Y. 137; *State v. Fowler*, 52 Iowa, 103; *Bennett & Heard Lead. Cas.* 356.

² *U. S. v. McGhie*, 1 Curtis C. C. 1.

³ *Infra*, § 734.

⁴ *State v. Morris*, 47 Conn. 179.

⁵ *West v. State*, 1 Wis. 209. See *Crilley v. State*, 20 Wis. 231; but see *Slocum v. People*, 90 Ill. 274. In *Com. v. Whittaker*, 131 Mass. 224—

323 (1881), it was held that on an indictment under the statute for enticing to a house of ill-fame for purposes of prostitution two women of chaste life and conversation, the chastity of the women must be proved by the government in the same manner as any other material allegation in the indictment. See *infra*, §§ 341, 343.

⁶ *Infra*, § 721; *Farris v. Com.*, 14 Bush, 362.

⁷ *Gove v. State*, 58 Ala. 391.

As to contributory negligence see *Com. v. Boston R. R.*, 126 Mass. 66.

⁸ *State v. Flye*, 26 Me. 316; *People v. Stokes*, 53 N. Y. 164; *Turner v. Com.*, 86 Penn. St. 54; *State v. Wingo*, 66 Mo. 181; *Henderson v. State*, 14 Tex. 503; *State v. McCluer*, 5 Nev. 132; and cases cited in prior notes to this section.

⁹ *Infra*, § 721; *supra*, § 130.

§ 330. We are sometimes told that after a *prima facie* case on part of the prosecution the burden of proof shifts to the defence. But this involves two errors: (1) the defence is not required to take up any burden until the prosecution has made out a case sufficient to support a verdict. The prosecution cannot say, "I have made out an imperfect case; the defendant must now go on and fill up the gaps I have left." When the prosecution is through its case, then the defendant is entitled to an acquittal if the case of the prosecution is not made out beyond reasonable doubt. When this is done, then, but not before, can the defendant be called upon for his defence. (2) "Burden of proof" is here confounded with the presumption of innocence, which it requires proof beyond reasonable doubt to overcome. But "burden of proof" is a very different thing, as we have just seen, from the presumption of innocence.¹ The first, to state once more this important distinction, is a formal rule confined to determining the order in which the proofs are to be brought forward; a rule which ceases to apply as soon as a party has introduced proof sufficient to entitle him to a verdict. The second is a substantial rule, operating during the whole trial, and continuing to operate until the case is finally determined.²

§ 331. Where the prosecution makes out such a case as would sustain a verdict of guilty, and the defendant offers evidence, the

¹ *Supra*, § 322.

² *R. v. Allen*, 1 Moed. C. C. 154; *Com. v. Kimball*, 24 Pick. 366; *Com. v. Clark*, 2 Met. (Mass.) 24; *Com. v. Dana*, 2 Met. (Mass.) 340. Compare *Bennett & Heard Lead. Cas.* 356; *Densmore v. State*, 67 Ind. 306; *People v. Niles*, 44 Mich. 806; *West v. State*, 1 Wis. 209; *Crilley v. State*, 20 Wis. 209; *Henderson v. State*, 14 Tex. 503; *Fury v. State*, 8 Tex. Ap. 471; *Dubose v. State*, 10 Tex. Ap. 230; *State v. McCluer*, 5 Nev. 132. *Supra*, § 325.

The question is discussed in an article in the *Forum* for April, 1875. In *Com. v. Knapp*, 10 Pick. 477, *Com. v. Stow*, 1 Mass. 54, it is intimated that when a principal's conviction is averred

by record, the accessory must show the principal's innocence beyond reasonable doubt. Compare *State v. Holme*, 54 Mo. 153; *Kingen v. State*, 45 Ind. 518. On the general question of reasonable doubt see *supra*, § 1; and see, also, remarks of Bigelow, J., in *Com. v. McKie*, 1 Gray, 61, and Judge Wells's charge in *Com. v. Sturdevant*, Appendix Whart. on Hom.

It has been held on a trial for murder in the first degree that an instruction that the presumption of innocence is overthrown by proof of the *corpus delicti*, the venue, and the slaying of the deceased by the prisoner, is misleading. *Bryant v. State*, 7 Baxt. 67.

burden is on him to make out the defence, whatever it may be, that he presents. He becomes the *actor*, and the duty is on him to make good by proof the points he asserts. When, however, his proof has been adduced, a new and complicated question arises. Is it sufficient for him if he raises a reasonable doubt as to the defence he advances?

Extrinsic defence to be made out by preponderance of proof.

Or must he establish this defence by a preponderance of proof in order to entitle him to an acquittal? And in answer to this question we may say, in the first place, that when the case of the prosecution is admitted, and the defence is one exclusively of avoidance, then this defence must be made out by the defendant by a preponderance of proof.¹

§ 332. What defences, however, are so extrinsic as to require to support them a preponderance of proof, as distinguished from those defences as to which it will be sufficient for an acquittal to throw a reasonable doubt on the case of the prosecution? And the first answer is that the principal illustrations of the first class, i. e., defences which the defendant must establish by preponderance of proof, are licenses or authorizations from the State,² and pleas of *autrefois acquit*.³

So of licenses and *autrefois acquit*.

§ 333. It has been said that an *alibi* is so far a confession and avoidance that it must be proved by a preponderance of proof.⁴ But an *alibi* not only goes to the essence of guilt, but it traverses one of the material averments of the indictment, that the defendant did then and there the particular

Alibi not an extrinsic defence.

¹ R. v. Turner, 5 M. & S. 206; R. v. 374, qualified in Com. v. Boyer, 7 Allen. Burdett, 4 B. & Ald. 95; Blatch v. 306; People v. Bodine, 1 Edm. Sel. Cas. Archer, Cowper, 66; R. v. Brannan, 36. Compare Barrett, *In re*, 28 Up. Can. 6 C. & P. 328; Smith v. Jeffries, 9 Q. B. 561.

Price, 257; U. S. v. Hayward, 2 Gall. 485; State v. Crowell, 25 Me. 171; § 342.

Sheldon v. Clark, 1 Johns. 513; Sawyer v. People, 1 N. Y. Cr. Rep. 249; State v. Morrison, 3 Dev. 299; Gening v. State, 1 McCord, 573; State v. Paulk, 18 S. C. 514; Farrell v. State, 32 Ala. 557; Wheat v. State, 6 Mo. 455; State v. Lipscomb, 52 Mo. 32; Black v. State, 1 Tex. Ap. 368; Jones v. State, 13 Tex. Ap. 1; Hopper v. State, 19 Ark. 143. *Contra*, Mehan v. State, 7 Wis. 670; Com. v. Thurlow, 24 Pick. 58 N. H. 535.

² See cases cited to § 331. *Infra*, § 342.
³ *Infra*, §§ 570-593. That to sustain this plea there must be proof of final judgment, see State v. Sherburne, 58 N. H. 535.
⁴ See State v. Davidson, 30 Vt. 377; Com. v. Webster, 5 Cush. 124; Fife v. Com., 20 Penn. St. 429; Creed v. People, 81 Ill. 565; State v. Vincent, 24 Iowa, 570; State v. Hamilton, 57 Iowa, 596; State v. Krewson, 57 Iowa, 588; Ware v. State, 67 Ga. 349.

act charged. To hold that though the defendant casts reasonable doubt on the averment of his coöperation in the guilty act, he must be convicted unless he establishes such non-coöperation by a preponderance of proof, is to fall into the error above noticed of confounding burden of proof with presumption of innocence. Undoubtedly, if the prosecution makes out a case sufficient to secure a verdict of conviction, then the burden is on the defendant to prove his defence. But when his proof is in, then the final question is, are the essential averments of the indictment proved beyond reasonable doubt? And among these essential averments is the defendant's participation in the act charged.¹

¹ *Turner v. State*, 86 Penn. St. 54; *Watson v. Com.*, 95 Penn. St. 418; *Toler v. State*, 16 Oh. St. 583; *Binns v. State*, 46 Ind. 311; *Howard v. State*, 50 Ind. 190; *Stuart v. People*, 42 Mich. 255; *People v. Pearsall*, 50 Mich. 233; *Wade v. State*, 65 Ga. 756; *State v. Hardin*, 46 Iowa, 623; *State v. Henry*, 48 Iowa, 403; *State v. Lewis*, 69 Mo. 92; *Pollard v. State*, 53 Miss. 410; *Thompson v. State*, 5 Humph. 138; *State v. Waterman*, 1 Nev. 593.

The argument in the text is strengthened by *R. v. Hilditch*, 5 C. & P. 299, where it was held that when an *alibi* was set up the prosecution could not rebut by disputing the *alibi*, since proof that the defendant was at the spot at the time was part of the prosecution's case. But the prosecution can rebut by proving a confession to the contrary by defendant. *R. v. Findon*, 6 C. & P. 132.

Chief Justice Shaw, in his charge in the Webster Case (*Bemis's ed.* p. 429; 5 Cush. 124), while using language frequently quoted to sustain the position that an *alibi* must be proved by a preponderance of proof, says nothing inconsistent with the rule that when the evidence is all in, every essential element of the case is to be made out

beyond reasonable doubt. The following is the passage referred to:—

"This is a defence often attempted by contrivance, subornation, and perjury. The proof, therefore, offered to sustain it is to be subjected to a rigid scrutiny, because, without attempting to control or rebut the evidence of facts sustaining the charge, it attempts to prove affirmatively another fact wholly inconsistent with it; and this defence is equally available, if satisfactorily established, to avoid the force of position, as of circumstantial evidence. In considering the strength of the evidence necessary to sustain this defence, it is obvious that all testimony tending to show that the accused was in another place at the time of the offence is in direct conflict with that which tends to prove that he was at the place where the crime was committed, and actually committed it. In this conflict of evidence whatever tends to support the one tends, in the same degree, to rebut and overthrow the other; and it is for the jury to decide where the truth lies."

But this may be held to amount to no more than that such testimony should be rigidly scrutinized to see whether it establishes reasonable doubt.

On this topic much valuable informa-

§ 334. Provocation, also, as a defence which goes to negative premeditation and malice, must be regarded as traversing ^{so of prov-} essential ingredients of all offences which require proof ^{ocation.} of premeditation and malice. Hence, while, according to the distinction just stated, the burden is on the defendant to prove provo-

tion will be found in Ram on Facts, 3d Am. ed., Int.; Burrill's Circum. Ev., pp. 517 *et seq.*

In *Com. v. Costley*, 118 Mass. 1, the defendant requested the judge to instruct the jury that he was not bound to show by evidence where he was from six o'clock in the afternoon of the alleged day of the murder, to two o'clock the next morning, and that the jury should draw no inference from any failure so to do. The judge declined to give this instruction, but ruled that the question was entirely for the jury; that if a prisoner was shown to be in any connection with the transaction which seemed to them to put into his possession facts, which, if innocent, he would use, which he could use without going upon the stand himself, the withholding of those means to explain the circumstances might be considered by the jury, in connection with the other testimony, in determining how far he was responsible for the occurrence. The Supreme Court held that the defendant had no ground for exception to this charge. See *Walker v. State*, 37 Tex. 366.

In *People v. Larned*, 7 N. Y. 448, Judge Mason charged the jury as follows:—

“That the defence interposed by the prisoner was what was in law denominated an *alibi*, and if the *three* witnesses called by him to sustain it had testified truly, the prisoner should be acquitted; that it was however insisted by the prosecution that the defence was a fabricated one and sustained by per-

jury; that this issue the jury were to determine; that it was undoubtedly true that the defence of an *alibi* is not unfrequently the felon's plea; that when a prisoner finds himself surrounded by facts and circumstances which threaten to overwhelm him and establish his guilt, he not unfrequently resorts to this defence, and seeks to maintain it by perjured witnesses; and that it was the remark of an eminent judge in England that ‘in his opinion more perjury had been committed in defences of this description than in all other defences interposed in criminal trials.’”

This is no doubt a proper line of remark in cases where the *alibi* is evidently false. It should be remembered, however, that to throw discredit on this line of evidence is to throw discredit on a defence which is one of the chief safeguards of innocence. *Albin v. State*, 63 Ind. 598; *Sullivan v. People*, 31 Mich. 1; *Spencer v. State*, 50 Ala. 124; *State v. Jaynes*, 78 N. C. 504; *State v. Byers*, 80 N. C. 426; *State v. Watson*, 7 S. C. 63. That a fraudulent *alibi* reacts see *Porter v. State*, 55 Ala. 95. *Infra*, § 742. That it must cover the whole time see *Brice-land v. Com.*, 74 Penn. St. 463; *Donnelly v. Com.*, 6 Weekly Notes, 104; *Johnson v. State*, 57 Ga. 14. But it is error to charge a jury that a failure to establish an *alibi* when attempted raises by itself a presumption against a defendant. *Turner v. Com.*, 86 Penn. St. 54. See *State v. Williams*, 1 Williams, Vt. 724.

cation, in all cases when he opens this defence,¹ yet when the evidence on both sides is closed, he is entitled to a verdict if he has offered proof enough to cast a reasonable doubt on the averments of malice and premeditation when thus essential. It is otherwise, however,² as we have seen, when the defence does not traverse any averment of the indictment.

¹ *Sawyer v. People*, 91 N. Y. 667; *State v. Jones*, 20 W. Va. 764.

² In New York, in 1866, it was declared by the Supreme Court that where the fact of homicide is made out, and the defendant sets up justification, the burden is on him to make out this defence beyond reasonable doubt. *Patterson v. People*, 46 Barb. 626. But in 1870 this was expressly overruled, and the law announced to be that the facts of provocation and of necessity, when offered to prove an extrinsic defence, and not to negative the essential averments of the indictment, must be established by preponderance of testimony, by the rules that obtain in civil actions. *People v. Schryver*, 42 N. Y. 1.

In the Court of Appeals, in June, 1873, in the same case, Judge Rapallo adopted the same view. See *Stokes v. People*, 53 N. Y. 164. S. P., *State v. Jones*, 20 W. Va. 764; see *Sawyer v. People*, 91 N. Y. 667.

On the other hand, when the defence traverses malice, or other material averment, if in such case such averment is not, on the whole evidence, proved beyond reasonable doubt, it has been held in numerous cases that the charge is not sustained. *Com. v. Drum*, 58 Penn. St. 9; *O'Mara v. Com.*, 75 Penn. St. 424; *State v. Willis*, 63 N. C. 26; *State v. Haywood*, Phill. (N. C.) 376; *State v. Vincent*, 24 Iowa, 570. In Iowa, in 1871, in a prosecution for murder, wherein the plea of self-defence was relied upon, the court, after instructing the jury

that if they found that the prisoner killed the deceased in self-defence, they should acquit, further charged: "If, however, you find that the defendant inflicted the blow upon the deceased that caused his death, then the burden of proof is upon the defendant to show that he did it in self-defence." It was held that the instruction was erroneous, on the ground that, in effect, it required the defendant to establish, by a preponderance of evidence, that he acted in self-defence, and excluded him from the benefit of an acquittal, if, under the facts shown, there existed a reasonable doubt that his act was wilful. *State v. Porter*, 34 Iowa, 131; *State v. Hill*, 69 Mo. 451. "The rule is different when the matter of defence is wholly disconnected from the body of the offence." *Day, J.*, 34 Iowa, 131, citing *Tweedy v. State*, 5 Iowa, 434, and cases cited; *State v. Morphy*, 33 *ibid.* 270; *State v. Felter*, 32 *ibid.* 49.

"To give the homicide the legal character of murder, all the authorities agree that it must have been perpetrated with malice prepense or aforethought. This malice is just as essential an ingredient of the offence as the act which causes the death. Without the concurrence of both the crime cannot exist; and, as every man is presumed to be innocent of the offence of which he is charged till he is proved to be guilty, this presumption must apply equally to both ingredients of the offence—to the malice as well as to the killing. Hence, though the principle seems to have been sometimes over-

§ 335. When the defendant sets up that he acted under necessity, *e. g.*, under command of a superior officer in time of war; or under compulsion of any kind, the burden is on him, in such cases, to prove the defence he sets up, Necessity to be substantially proved.

looked, the burden of proof as to each rests equally upon the prosecution, though the one may admit and require more proof than the other; malice in most cases not being susceptible of direct proof, but to be established by inferences more or less strong, to be drawn from the facts and circumstances connected with the killing, and which indicate the disposition or state of mind with which it was done." *Christiancy, J., Maher v. People*, 10 Mich. 212, as adopted by *Fancher, J., Stokes v. People*, N. Y. Sup. Ct., May, 1873.

The view expressed in *Silvus v. State*, 22 Oh. St. 90, that the burden of self-defence is on the defendant, and to be established by preponderance of proof, is affirmed in *Weaver v. State*, 24 Oh. St. 584.

That upon doubt as to malice jury may convict of manslaughter, see *infra*, § 721. See further, as to burden in provocation, *People v. Ah Kong*, 49 Cal. 7; *People v. West*, 49 Cal. 610.

In Massachusetts, much confusion has been caused on this difficult question by the Supreme Court, in its earlier rulings, adopting the now obsolete distinction between "facts" and "inferences." See *supra*, § 11. Thus, in a much disputed case of homicide, *Hubbard, J.*, charged the jury, in language said to have been drawn up by *Shaw, C. J.*, in answer to the question, "Were the jury instructed by the court that the prisoner was to prove provocation, or mutual combat, and was he to have the benefit of any doubts upon the subject?" as follows: "It is hardly possible to give a direct answer, affirmative or negative, to the

question of the jury, without some explanation. The rule of law is, when the fact of killing is proved to have been committed by the accused, and nothing further is shown, the presumption of law" (of fact?) "is that it is malicious, and an act of murder. It follows, therefore, that in such cases the proof of matter of excuse or extenuation lies on the accused, and this may appear either from evidence adduced by the prosecution, or evidence offered by the defendant. But where there is any evidence tending to show excuse or extenuation, it is for the jury to draw the proper inferences of fact from the whole evidence, and decide the *fact upon which the excuse or extenuation depends according to the preponderance of evidence*. Where there is evidence on both sides, it is hardly possible to imagine a case in which there will not be a preponderance of proof on one side or the other. But if the case or the evidence should be in *equilibrium*, the presumption of innocence will turn the scale in favor of the accused, that is, in a case like the present, in favor of the lesser offence. *But if the evidence, in the opinion of the jury, does not leave the case equally balanced, then it is to be decided according to its preponderance.*" The jury returned a verdict of guilty of murder, and on motion for a new trial, *Shaw, C. J.*, in 1856, delivered the opinion of a majority of the court, sustaining the charge; *Wilde, J.*, dissenting. *Com. v. York*, 9 Met. 93. See this case reported and reviewed in 2 Benn. & Heard's Lead. Cases, 504. No doubt the last passage in italics, if taken by

and he must establish this by preponderance of proof—it being an extrinsic defence.¹ At the same time, if the defence goes to negative malice, and malice is an essential part of the case of the pro-

itself, would indicate that malice (i. e., the antithesis of hot blood) is to be decided by a preponderance of testimony. But malice, so it seems to be argued, is not a fact, but an inference, from facts; the *facts* from which hot blood, as negating malice, is inferred, are to be established by a preponderance of testimony; so it is maintained in the passage last italicized, which must be taken as explaining the passage first italicized. Yet it seems to be conceded that if there is a reasonable doubt as to malice, the defendant must be acquitted of murder.

In Webster's Case, Shaw, C. J., said: "The implication of malice arises in every case of intentional homicide; and the fact of killing being first proved, all the circumstances of accident, necessity, or infirmity are to be satisfactorily established by the party charged, unless they arise out of the evidence produced against him to prove the homicide, and the circumstances attending it. If there are in fact circumstances of justification, excuse, or palliation, such proof will naturally indicate them. But where the fact of killing is proved by satisfactory evidence, *and there are no circumstances disclosed tending to show justification or excuse*, there is nothing to rebut the natural presumption of malice." *Com. v. Webster*, 5 Cush. 316. (See *Com. v. Hardiman*, 9 Gray, 136; *State v. M'Allister*, 11 Shepley, 139; *State v. Upham*, 38 Me. 261; *Satterwhite v. State*, 28 Ala. 65.) This simply states that an un rebutted presumption of malice remains in full force. It does not touch the question of conflicting presumptions.

In 1855, in the same court, in a case

where the deceased was struck down in a fight by the defendant, both being at the time much intoxicated, and where the defendant a few minutes after struck the deceased on the head when he was down, the defendant's counsel proceeded to argue to the court in support of the dissenting opinion of Wilde, J., in *York's Case*, "when he was interrupted by the chief justice, who remarked that the decision of *York's Case* was, that when the killing is proved to have been committed by the defendant, *and nothing further is shown*, the presumption of law is that it was malicious and an act of murder; and that this was inapplicable to the present case, where the circumstances attending the homicide were fully shown by the evidence." And on this point the chief justice instructed the jury as follows: "The murder charged must be proved; the burden of proof is on the Commonwealth to prove the case; all the evidence, on both sides, which the jury find true, is to be taken into consideration; and if, the homicide being conceded, no excuses or justification is shown, it is either murder or manslaughter; and if the jury, upon all the circumstances, are satisfied beyond a reasonable doubt that it was done with malice, they will return a verdict of murder; otherwise, they will find the defendant guilty of manslaughter." *Com. v. Hawkins*, 3 Gray, 463. See, also, *Com. v. Heath*, 11 Gray, 303; *State v. Knight*, 43 Me. 11; *State v. Patterson*, 45 Vt. 308; *Tweedy v. State*, 5 Iowa, 434; *State v. Bertrand*, 3 Oreg. 61.

¹ Whart. Crim. Law, 8th ed. §§ 95 *et seq.*

secution, then, if on the whole evidence there be reasonable doubt as to malice, there should be an acquittal.¹

§ 336. By the common law every man is presumed to be sane until the contrary be proved; and when insanity is set up by a party, it must be proved as a substantive fact by the party alleging it, on whom lies the burden of proof.²

Discussion
as to in-
sanity.

Three distinct theories have been propounded as to the degree of evidence requisite to justify a conviction on the issue of insanity.³

§ 337. The first is, that insanity, as a defence of confession and avoidance, must be proved beyond reasonable doubt; and that, unless this be done, the jury, the case of the prosecution being otherwise proved, are to convict. This is expressed in New Jersey by Hornblower, C. J., as follows: "The proof of insanity at the time of committing the act ought to be as clear and satisfactory, in order to acquit him on the ground of insanity, as the proof of committing the act ought to be to find a sane man guilty."⁴ To the same effect several English authorities may be cited.⁵ In New Jersey, however, the Supreme Court now accepts the position that a preponderance of evidence will be sufficient to sustain an acquittal.

§ 338. The second is, that the jury (at least to find an affirmative verdict of lunacy) are to be governed by the *preponderance* of evidence; and are not to require insanity to be made out beyond reasonable doubt. This is the prevalent opinion in England;⁷

¹ This has been affirmed in *Webb v. State*, 9 Tex. Ap. 490; *King v. State*, 9 Tex. Ap. 515.

² See Lawson's *Insanity in Crim. Cases*, pp. 11 *et seq.*

³ See *infra*, § 729; *R. v. Stokes*, 3 C. & K. 188; *R. v. Taylor*, 4 Cox C. C. 84; *R. v. Layton*, 4 Cox C. C. 149; *U. S. v. Lawrence*, 4 Cranch C. C. 514; *Atty.-Gen. v. Parnter*, 3 Brown C. C. 441; *U. S. v. McGlue*, 1 Curtis, 1; *Com. v. Eddy*, 7 Gray, 583; *State v. Spencer*, 1 Zab. 202; *State v. West*, 1 Houst. C. C. 371; *State v. Brandon*, 8 Jones (N. C.), 463; *State v. Starke*, 1 Strobb. 479; *State v. Brinyea*, 5 Ala. 244; *People v. Myers*, 20 Cal. 518; *Boswell v. Com.*, 20 Grat. 860; *Loeffner v. State*, 10 Oh. St. 599.

⁴ *State v. Spencer*, 21 N. J. L. 196.

See, as countenancing this view, *State v. Hoyt*, 46 Conn. 330; see, also, *State v. Hurley*, 1 Houst. 28; *State v. Danby*, id. 166; *State v. Pratt*, id. 249; *Clark v. State*, 12 Ohio, 495; *Bonfante v. State*, 2 Minn. 123.

⁵ 1 W. & St. Med. J. §§ 117, 246; *McNaghten's Case*, 10 Cl. & Fin. 200; *R. v. Stokes*, 3 C. & K. 188; *R. v. Taylor*, 3 Cox C. C. 84.

⁶ *Graves v. State*, 16 Vroom, 203.

⁷ *R. v. Layton*, 4 Cox C. C. 149; *R. v. Higginson*, 1 C. & K. 130.

in Maine;¹ in Massachusetts;² in Ohio;³ in Virginia;⁴ in West Virginia;⁵ in North Carolina;⁶ in South Carolina;⁷ in Alabama;⁸ in Georgia;⁹ in Louisiana;¹⁰ in Missouri, it being there now held that "preponderance," but not "*clear* preponderance," is required;¹¹ in Texas;¹² in California;¹³ in Michigan;¹⁴ in Iowa;¹⁵ in Minnesota;¹⁶ in Arkansas;¹⁷ and in Pennsylvania, though in the latter State the "preponderance" must be "satisfactory."¹⁸

¹ *State v. Lawrence*, 57 Me. 574.

² *Com. v. Eddy*, 7 Gray, 583; *Com. v. Rogers*, 7 Met. 500; *Com. v. Heath*, 11 Gray, 303. See *Com. v. Pomeroy*, in Appendix to Whart. on Hom., where the older doctrine is much and justly modified.

³ *Loeffner v. State*, 10 Oh. St. 599; *Bond v. State*, 23 Oh. St. 349. See *Bergin v. State*, 31 Oh. St. 111.

⁴ *Baccigalupo v. Com.*, 33 Grat. 807. This view was taken by Judge Cox in *Guiteau's Case*, 1882.

⁵ *State v. Strauder*, 11 W. Va. 747.

⁶ *State v. Starling*, 6 Jones, 366; *State v. Brandon*, 8 Jones, 468. But see *State v. Vann*, 82 N. C. 631. In *State v. Payne*, 86 N. C. 609, it was held that when sanity was part of the case of the prosecution this must be made out beyond reasonable doubt, but it was held that although the court charged that the defence of insanity was to be made out by a preponderance of proof, this was not ground for a new trial when it appeared that the defendant was not injured thereby.

⁷ *State v. Stark*, 1 Strobb. L. 479.

⁸ See *Boswell v. State*, 63 Ala. 307; *Ford v. State*, 71 Ala. 385.

⁹ *Carter v. State*, 56 Ga. 463.

¹⁰ *State v. Coleman*, 27 La. An. 691.

¹¹ *State v. Hundley*, 46 Mo. 414 (1870), somewhat qualifying *State v. Klingler*, 43 Mo. 127. But in *State v. Smith*, 53 Mo. 267, the tendency of the argument of the court is to require sanity to be proved beyond reasonable

doubt. "Insanity is a simple question of fact, to be proved like any other fact, and any evidence, which reasonably satisfies the jury that the accused was insane at the time the act was committed, should be deemed sufficient." *Vories, J., State v. Smith*, 53 Mo. 270, citing *State v. Hundley*, 46 Mo. 414; *State v. Kingler*, 43 Mo. 127; *State v. McCoy*, 34 Mo. 531. See *State v. Smith*, 53 Mo. 267; *State v. Simms*, 68 Mo. 305; *State v. Redemeier*, 71 Mo. 173.

¹² *Jones v. State*, 13 Tex. Ap. 1. See *Clark v. State*, 8 Tex. Ap. 350; *Johnson v. State*, 10 id. 571.

¹³ *People v. Coffman*, 24 Cal. 230; *People v. Wilson*, 49 Cal. 13; *People v. Bell*, 49 Cal. 486; *People v. Messersmith*, 61 Cal. 246.

¹⁴ *People v. Finley*, 38 Mich. 482.

¹⁵ *State v. Felter*, 32 Iowa, 50; *State v. Bruce*, 48 Iowa, 336.

¹⁶ *State v. Gut*, 13 Minn. 543; *State v. Gear*, 28 Minn. 426.

¹⁷ *McKenzie v. State*, 26 Ark. 334.

¹⁸ "The judge instructed the jury that they must be satisfied *beyond a reasonable doubt* that the prisoner was insane at the time the act was committed. This statement is too stringent, and throws the prisoner upon a degree of proof beyond the legal measure of his defence. That measure is simply proof which is satisfactory—such as flows fairly from a preponderance of the evidence. It need not be beyond doubt. A reasonable doubt

§ 339. A third view, sustained by several authoritative courts, is that in such an issue the *prosecution* must prove *sanity* beyond

of the fact of insanity, on the other hand, is not sufficient to acquit upon a defence of insanity. This has been held in several cases. *Ortwein v. Com.*, 26 P. F. Smith, 414; *Lynch v. Com.*, 27 P. F. Smith, 205; *Brann v. Com.*, 28 P. F. Smith, 122. Sanity being the normal condition of men, and insanity a defence set up to an act which otherwise would be a crime, the burden rests upon the prisoner of proving his abnormal condition. But the evidence of this need be only satisfactory, and the conclusion such as fairly results from the evidence. Where the evidence raises a balancing question, and the mind is brought to determine its preponderance, there may be a doubt still existing in the mind, yet the actual weight may be with the prisoner; and this proof should be considered satisfactory. In cases of conflicting evidence, the preponderance must govern, there being no other rational means of decision. But if we say, in such a case, it must be satisfactory beyond a reasonable doubt, it is evident the expression implies more than a mere preponderance. It is difficult to define the precise difference between the two measures, yet we are conscious in our own minds that to be convinced beyond a reasonable doubt is a severer test of belief than to be satisfied that the preponderance falls on that side." *Agnew, C. J., Meyers v. Com.*, 83 Penn. St. 131. See further *Pannell v. Com.*, 86 Penn. St. 260, to the same general effect.

In *Sayres v. Com.*, 88 Penn. St. 290, the trial judge charged the jury as follows:—

"As the law presumes sanity to be the normal condition of the prisoner, and insanity an abnormal condition,

the burden rests on him to prove his insanity as an excuse. . . . The evidence, therefore, which is intended to establish this defence, must be satisfactory to the jury, and the conclusion such as fairly results from the evidence." This was held to give no ground for exception. See further *Neveling v. Com.*, 98 Penn. St. 322. The view in the text was sustained by Judge Cox, in *Guiteau's Case*.

The New York authorities have wavered on this topic, nor can it be said that any settled rule has been reached in that State. In *Ferris v. People*, 35 N. Y. 125, *Walter v. People*, 32 N. Y. 147, the rule (modifying *People v. McCann*, 16 N. Y. 58) seems to be accepted that preponderance of proof of insanity is required in order to acquit on that ground. This, however, is not explicitly sustained in *Brotherton v. People*, 75 N. Y. 154; *O'Connell v. People*, 87 N. Y. 377; and *Walker v. People*, 88 N. Y. 81. In *O'Connell v. People*, *Danforth, J.*, (1882) said:—

"The questions upon the trial were: First, were the acts charged committed by the prisoner? and second, at the time of their commission was he in such condition of mind as to be responsible for them? If answered in the affirmative the acts constituted a crime and the conviction was proper. As to each, therefore, the burden was upon the prosecutor, for upon the existence of both the guilt of the prisoner depended. This result follows the general rule of evidence which requires him who asserts a fact to prove it. That the first proposition is established is not denied. The legal presumption that every man is sane was sufficient to sustain the other until repelled, and

reasonable doubt.¹ The apparent conflict, however, between this position and that which makes a preponderance of proof requisite to establish insanity, may be reduced, as we will next see, by the en-

the charge of the judge, criticized in the first point made by the appellant, goes no further. If the prisoner gave no evidence the fact stood; if he gave evidence tending to overthrow it the prosecution might produce answering testimony; but in any event he must satisfy the jury upon the whole evidence that the prisoner was mentally responsible; for the affirmative issue tendered by the indictment remained with the prosecutor to the end of the trial. Without going to other authorities, these observations are warranted by *Brotherton v. People*, 75 N. Y. 159, where the general rule above stated was applied to questions similar to those before us. It was not violated by the trial court. After referring to the acts constituting the offence charged and the rules of law applicable thereto, the learned judge called attention to the fact alleged in behalf of the prisoner, that he was an insane man at the time they were committed, and so

not responsible therefor, and directed them 'to determine from the evidence whether or not such is the fact.' 'He is presumed,' the court said, 'to be a sane man until he convinces you by evidence that he is insane;' defined insanity in a manner not objected to, and said, 'If such was the prisoner's condition he was relieved from the responsibility; otherwise he was responsible for that which he does,' and in conclusion, said, 'If you have a reasonable doubt from the evidence that the prisoner is guilty of this crime then you should give him the benefit of that doubt.' These words related to and covered the whole issue tendered by the indictment. It is quite impossible that the jury should have misapprehended them. The prosecutor had conducted the case upon the theory that the burden was upon him of maintaining as part of that issue the sanity of the prisoner; this further appears from his request; when anticipating

¹ As inclining to this view see *State v. Bartlett*, 43 N. H. 224; *State v. Patterson*, 85 Vt. 308; *State v. Johnson*, 40 Conn. 139; *People v. Garbutt*, 17 Mich. 9; *Underwood v. People*, 32 Mich. 1. But see *People v. Finley*, 38 Mich. 482; *Hopps v. People*, 31 Ill. 385, qualifying *Fisher v. People*, 23 Ill. 283; *Chase v. People*, 40 Ill. 352; *McDougall v. State*, 88 Ind. 24; *State v. Crawford*, 11 Kans. 32; *Dove v. State*, 8 Heisk. 348, cited *infra*; *Lawless v. State*, 4 Lea, 179; *Smith v. Com.*, 1 Duv. 224 (though in a subsequent case this was qualified by saying that a mere doubt was not enough; the doubt must be truly reasonable; *Kriel v. Com.*, 2 Bush, 362). See also *State*

v. Jones, 50 N. H. 370; *Polk v. State*, 19 Ind. 170; *Stevens v. State*, 31 Ind. 485; *Bradley v. State*, 31 Ind. 492; *Greenley v. State*, 60 Ind. 641; *Guetig v. State*, 66 Ind. 94; *Cunningham v. State*, 56 Miss. 269; *Webb v. State*, 9 Tex. Ap. 490; *Wright v. People*, 4 Neb. 407; *People v. Waterman*, 1 Neb. 343; and see a learned note in *Am. Law Reg.* for Jan. 1875, p. 25; *People v. McCann*, 16 N. Y. 58. (The meaning of the latter case is examined in *Mr. H. L. Clinton's* argument in the N. Y. Senate, April 15, 1873.) See as criticizing text, 9 Tex. Ap. 542. As to the rule in case of a deaf-mute, see *State v. Draper*, 1 Houst. C. C. 291. Cf. *Lawson*, *Insanity in Cr. Ca.* 11.

grafting on the last stated proposition the qualification that when insanity enters into the question of intent, then it is part of the prosecution's case to prove sanity beyond reasonable doubt.¹

§ 340. The conflict which has just been noticed has arisen from the habit of viewing the statutory plea of insanity as a defence of the nature of confession and avoidance. Such, however, is not the case. It is rather in the nature of a plea to the jurisdiction, or a motion to change the venue. The defendant, through his counsel and friends, comes in and says that he is not amenable to penal jurisdiction. He is not a moral agent; he is *insane*; he is not the object of penal discipline. Such a plea may be regarded, when it is set up for the purpose of showing entire unamenability to penal process, as a purely extrinsic application, to be made out by a preponderance of proof. Otherwise the law approaches those charged with crime as a wolf in sheep's clothing. To hold that a reasonable doubt as to a defendant's sanity should require his permanent imprisonment as a dangerous lunatic would be to turn a maxim, apparently benignant, into an instrument of gross oppression. A man is tried for an assault. The jury have a reasonable doubt of his sanity, and find him, under the statutes, a dangerous lunatic;

When sanity is of essence of offence reasonable doubt should acquit.

that the jury might fail to find the greater offence, the district-attorney asked the court to charge that 'if the jury find the wounds were inflicted by the prisoner, and that he was sane, etc., they would convict of an offence lesser in degree,' and the court complied. Here, again, as well as in the preceding part of the charge, the sanity of the prisoner is made the necessary element in the definition of the crime. It, therefore, was not necessary to comply with the request of the prisoner's counsel."

It is worthy of notice that in this case the trial court refused to charge that "if from the evidence in the case a reasonable doubt arose in the minds of the jury as to the sanity or insanity [*sic in orig.*] of the defendant, that he should be entitled to the benefit of the doubt." This refusal was sustained

by the Court of Appeals without noticing the singular terms in which the request was couched. In *Walker v. People*, decided a few months later than *O'Connell v. People*, and reported in 88 N. Y. 81; 1 N. Y. Cr. L. Rep. 22, the Court of Appeals sustained a charge to the effect that to establish a defence of insanity "it must be clearly proved," being the language of Tindal, C. J., in *McNaghton's Case*. (See, also, *People v. Coleman*, 1 N. Y. Cr. Rep. 1.) And it was held in *Walker's Case* not to be error for the trial judge to refuse to charge the jury that "the defendant in a criminal case is not required to prove his insanity in order to avail himself of that defence, but merely to create a reasonable doubt on this point, whereupon the burden of proving his sanity falls on the people."

¹ *Supra*, § 335.

and this is a necessary consequence of the doctrine here criticized. Yet from such a consequence we revolt. To extinguish a man's civil existence,—to place him under close confinement for life,—to deprive him of the control of his estate, and of access to his family, something more than reasonable doubt should be required. For so total an extinction, not only of liberty but of civil and social capacity, we should at least exact a preponderance of proof. The difficulty is attributable to the fact that most cases in which insanity comes up as a defence are those of murder; and to be decreed to be *civiliter mortuus*, and to be imprisoned as a dangerous lunatic, is better than to be hung. But the principle we are here discussing applies to all criminal prosecutions; and if a reasonable doubt as to sanity requires a verdict of dangerous lunacy, under the statutes, in a homicide case, it requires such a verdict in a case of assault. If in the former case the court must instruct the jury to give a verdict of dangerous lunacy if they have a reasonable doubt of sanity, the same instruction must be given in the latter case.

But supposing insanity is set up, not for the purpose of transferring the defendant to the category of non-responsible agents, but for the purpose of meeting the allegation of malice in the indictment, does the same rule apply? Supposing, in other words, the defence is,—“We do not say that the defendant is a maniac, or an idiot, who is to be put in custody as permanently and dangerously insane, and is to have his civil existence terminated; but we say that he is predisposed to insanity, and that when excited his reason is so swept away by the current of this insane tendency, that he is incapable of deliberate intent.” Are we here to concede that reasonable doubt as to the defendant's capacity in this respect is to acquit; or must we here also, in order to acquit, require that such incapacity should be made out by a preponderance of proof? Falling back on the reasoning heretofore expressed,¹ we must hold that when a defendant is charged with a deliberate homicide, and he offers evidence to show that the condition of his mind was such (by reason of insane predisposition) that he was incapable at the time of deliberation, then, if the jury have a reasonable doubt as to such capacity, he is to be acquitted of the higher grade and convicted of a lower grade of the offence. And this is conceded even by those courts who

¹ See Whart. on Hom. §§ 34, 194, 660. *Infra*, § 721.

hold that on the question of insanity, as an absolute bar, there must be a preponderance of proof.¹ Indeed, when we examine the reasoning of the courts of Pennsylvania and Massachusetts in the group of cases which relate to the question of reasonable doubt, we find that the distinction here expressed lies at the basis of their adjudications. To find a defendant irresponsible requires a preponderance of proof. But whenever there are various grades in an offence, then a reasonable doubt as to whether the higher grade exists requires a finding for the lower grade. And whenever intent is a necessary constituent of the offence, then a reasonable doubt as to intent requires an acquittal. If there be a logical inconsistency in the views just expressed, such inconsistency might be defended by an appeal to the maxim *in dubio mitius*.² If, on an indictment for an assault, insanity is suspected by the jury, and if a verdict of insanity would subject the defendant to far more rigorous penalties than a conviction of assault, then there can be no verdict of insanity, if there is only a reasonable doubt of sanity. On the other hand, on an indictment for murder, where a conviction would impose severer penalties than a verdict of insanity, doubts must tell in favor of the more benignant application of the law. But there is no logical inconsistency between the two positions. On the one side, a preponderance of proof is required to sustain a verdict finding insanity as a basis for personal sequestration and confinement. On the other side, when sanity is essential to intent, the sanity must be proved beyond reasonable doubt.

§ 341. As a rule for regulating the time and mode of producing evidence (not, it will be remembered, for the purpose of adding any presumption to affect the merits), we may hold that when a fact is peculiarly within the knowledge of a party, the burden is on him to prove such fact, whether the proposition be affirmative or negative.³

Burden is on party to prove what it is his duty to prove.

¹ This distinction is ably put by Church, C. J., in *Brotherton v. People*, 75 N. Y. 162-3. This topic is discussed by me in the *Central Law Journal* for May, 1884.

² This is emphatically affirmed in the Roman law. "In poenalibus causis benignius interpretandum est." L. 155. § 2. D. 50. 17.

³ *Apoth. Co. v. Bentley*, R. & M. 159; *U. S. v. Wright*, 16 Fed. Rep. 112; *Great West. R. R. v. Bacon*, 30 Ill. 347; *State v. McGlynn*, 34 N. H. 422; *State v. Keggan*, 55 N. H. 19; *State v. Wilbourne*, 87 N. C. 529; *Ford v. Simmons*, 13 La. An. 397; *Jones v. State*, 13 Tex. Ap. 1. See limitations of above in *Chaffee v. U. S.* quoted *infra*, § 344.

Thus where the defendant's whereabouts at the time of the crime is in question, the burden is on him to show where he was, as evidence to this effect is supposed to be peculiarly in his power; though the inference is purely one of fact, not of law.¹ So where proceedings

Com. v. Whittaker, 131 Mass. 224, cited *supra*, §§ 323, 329, was a prosecution on an indictment for enticing women into a house of ill-fame, for the purpose of prostitution. In this case the Supreme Court said: "The defendant is presumed to be innocent until every material allegation necessary to constitute the offence charged is beyond a reasonable doubt. To allow the proof of such an allegation to rest merely on the legal presumption that the women were chaste, would be to permit the presumption in favor of the defendant's innocence of the offence charged to be overborne by another legal presumption in favor of the innocence of other persons not parties to the proceedings. We are, therefore, of opinion that the ruling was erroneous; and that under this statute, the chastity of the women must be proved by the government in the same manner as any other material allegation in the indictment."

¹ *Toler v. State*, 16 Oh. St. 583. See *White v. State*, 31 Ind. 262; *State v. Josey*, 64 N. C. 56.

In a case that came before the New York Court of Appeals in 1865, it appeared that the plaintiff in error had been indicted for the murder of Owen Thompson, and tried and convicted in the lower court, after which the case came before the Court of Appeals on exceptions to the judge's charge.

The evidence against the prisoner went to prove that T., the deceased, was killed opposite a cattle yard, leased by the prisoner only the day previous, and the abstraction from T.'s person of his pocket-book and a large sum of money; that the last time T. was seen

alive was in company with the prisoner; that the day following the murder the prisoner disappeared from the place where the murder was committed; that he was poor and destitute for a long time previous and up to the time of the murder, and that he was possessed of a large sum of money the night after the murder. Other circumstances appeared in evidence against the prisoner, such as having made false representations, as to the facts.

The prisoner introduced no evidence to prove his whereabouts on the day of the murder, or how he came into possession of the money. The judge charged the jury "that when it is in the power of a party, if he is not the man, to show where he was on that day, at some time of the whole day, and he living in a place where he is well known, that which before may have been regarded as highly probable ripens into certainty." The charge proceeded: "He has had abundant opportunity, also, of showing where he got that money, but he has not done it. Circumstantial evidence of this sort, when left unexplained, if in the power of the prisoner to explain if not true, becomes of a *conclusive* character."

The Court of Appeals held this charge to be erroneous; "that it was unnatural and illogical, and fatal alike to innocence and guilt;" and it was held that the true rule of law in such cases is, that an absence of an attempt to account for the person's whereabouts, when it appears to be in his power to do so, is not, in law, conclusive of the facts in dispute, though it is strong inferential evidence against him. *Gordon v. People*, 33 N. Y. 501. And this

were taken for the contravention of an order of the English privy council under the Contagious Diseases (animals) Act of 1869, ordering that a person having in his possession animals affected with any contagious disease should with all practicable speed give notice of the fact to a police constable, it has been held that, on proof of the existence of the disease to the defendant's knowledge, the *onus* lay upon him of showing that he gave the necessary notice.¹ A court may therefore properly hold, without in any way touching the question of degree of proof, that so far as concerns the mode of offering proof, it is incumbent on a party who has particular proof in his exclusive possession to produce such proof, or suffer the consequence. It is otherwise, however, as to matters which the prosecution might establish by secondary evidence.²

§ 342. We have already seen that, as a general rule, a license to do a particular thing, when a purely extrinsic defence, is to be proved by the defendant by a preponderance of proof.³ Whether a license is so extrinsic depends upon the concrete case. When the non-existence of the license is not averred in the indictment, and when the license is particularly within the knowledge of the party holding it, the burden is on him to produce such license, in all cases in which the existence of the license is in question.⁴ On the other hand, when the non-existence of the license is averred in the indictment, and is essential to the case of the prosecution, it is proper, if we

License to be proved by the party to whom such proof is essential.

must be taken subject to what is above stated, that reasonable doubt as to any essential to the case should acquit.

¹ *Huggins v. Ward*, 21 W. R. 914; *Powell's Ev.* 4th ed. 293.

² See *State v. Wilborne*, 87 N. C. 529; *infra*, § 749.

³ *Supra*, § 331. As to pleading in such cases see *Whart. Cr. Pl. & Pr.* §§ 238-9; *Whart. Crim. Law*, 8th ed. § 1499. As to proof in liquor prosecutions see *Whart. Crim. Law*, 8th ed. § 1500. And see *Goodwin v. Smith*, 72 Ind. 113; *S. C.*, 37 Am. Rep. 141, where the authorities are examined.

⁴ *Smith v. Jeffries*, 9 Price, 257; *Morton v. Copeland*, 16 C. B. 517; *Bluck v. Rackman*, 5 Moo. P. B. 305,

314; *R. v. Turner*, 5 M. & S. 205; *Apothecaries' Co. v. Bentley*, 1 C. & P. 538; *R. & M.* 159; *U. S. v. Hayward*, 2 Gall. 485; *State v. Crowell*, 25 Me. 174; *State v. Whittier*, 21 Me. 341; *State v. Woodward*, 34 Me. 293; *State v. McGlynn*, 34 N. H. 422; *Bliss v. Brainerd*, 41 N. H. 256; *Garland v. Lane*, 46 N. H. 245; *State v. Keggon*, 55 N. H. 19; *Gening v. State*, 1 McCord, 573; *State v. Morrison*, 3 Dev. 299; *Wheat. v. State*, 6 Mo. 455; *Medlock v. Brown*, 4 Mo. 379; *State v. Edwards*, 60 Mo. 490; *State v. Lipscomb*, 52 Mo. 32. See note in 1 *Bennett & Heard's Lead. Cas.* 347, discussion in *State v. Perkins*, 53 N. H. 435.

follow the rules already announced, to hold that non-license must be proved by the party to whose case such proof is essential.¹ In many jurisdictions the doubt has been removed by statute.² At common law it would seem that where licenses are rare and exceptional, we may hold that the improbability of a license in each particular case, taken in connection with the rule that a party must produce all evidence peculiarly within his own knowledge, may throw on the defendant the burden of proving license. But when the prosecution has the burden of proving the negative, full proof "is not required, but even vague proof, or such as renders the existence of the negative probable, is in some cases sufficient to change the burden to the other party."³ And the want of authority may be inferred from circumstances.⁴

§ 343. When the law makes the validity of a document depend upon certain formalities, then these formalities must be duly proved by the party offering the document. If a statute, for instance, makes a document inoperative unless duly registered or stamped, then the document cannot be put in evidence without proof of such registry or stamp. But a *prima facie* compliance with the law in

Burden of proving formalities on him to whom they are essential.

¹ Com. v. Thurlow, 24 Pick. 374; Com. v. Locke, 114 Mass. 288; Kane v. Johnston, 9 Bows. 154; State v. Evans, 5 Jones (N. C.), 250; Mehan v. State, 7 Wis. 670; State v. Hirsch, 45 Mo. 429; State v. Richeson, 45 Mo. 575.

In Conyers v. State, 50 Ga. 103, it was held that on an indictment against a keeper of a billiard table for permitting a minor to play without consent of parents, the burden of proving non-consent of parents was on the prosecution.

The topic in the text is further discussed *infra*, §§ 719-20.

² In 1859, the following statute was enacted in Massachusetts:—

Burden of Proof on Defendant relying on Written License.—In all criminal prosecutions in which the defendant shall rely for his justification upon any written license, appointment, or certi-

ficate of authority, he shall prove the same; and until such proof, the presumption shall be that he is not so authorized. Supplement to Revised Statutes, 1859, c. 160, p. 625; Gen. Stat. c. 172, § 10. An analogous statute was enacted in 1864. Stat. 1864, p. 79. This act is constitutional. Com. v. Curran, 119 Mass. 206.

"If the defendant was proved to have kept intoxicating liquors for sale, the burden of proving that he had a license or authority so to do was upon him." Gray, C. J., Com. v. Curran, 119 Mass. 206; citing Com. v. Kennedy, 108 Mass. 292; Com. v. Leo, 110 Mass. 414; Com. v. Shea, 115 Mass. 102.

³ See Whart. Crim. Law, 8th ed. § 1500; People v. Pease, 27 N. Y. 45; Com. v. Bradford, 9 Met. 268; Beards-town v. Virginia, 76 Ill. 44.

⁴ Com. v. Locke, 114 Mass. 288.

this respect is sufficient to make out the case.¹ If the document is on its face duly executed, then it will be presumed² that the execution was regular, and the burden of contesting the execution falls on the party assailing the document.

§ 344. At common law, when a presumption of fact exists against a party, the court may instruct the jury that the burden is on the party to remove the presumption, and that if he does not, then the case must go against him on such point,³ though in some States this is prohibited by statute,⁴ and in all jurisdictions an erroneous charge in this respect is ground for reversal.⁵ It may be, however, here generally noticed that in penal prosecutions of all classes the doctrine just stated, however applicable, is not permitted to interfere with the cardinal principle that the jury must acquit when they have a reasonable doubt of guilt.⁶

Court may instruct jury that a presumption of fact makes a *prima facie* case by which they are bound.

¹ Weber, Heffter's ed. 192.

² *Infra*, § 832.

³ Whart. Cr. Pl. & Pr. § 708; *Crane v. Morris*, 6 Pet. 598; *Kelly v. Jackson*, 6 Pet. 622; *U. S. v. Wiggins*, 14 Pet. 334.

⁴ Whart. Cr. Pl. & Pr. § 798.

⁵ *Ibid.* § 794.

⁶ In *Chaffee v. U. S.*, 18 Wall. 516, which was an action of debt for a penalty, the question of burden of proof, in cases of this class, is thus discussed:—

“The purport of all this was to tell the jury that, although the defendants must be proved guilty beyond a reasonable doubt, yet if the government had made out a *prima facie* case against them, not one free from all doubt, but one which disclosed circumstances requiring explanation, and the defendants did not explain, the perplexing question of their guilt need not disturb the minds of the jurors; their silence supplied in the presumptions of the law that full proof which should dispel all reasonable doubt. In other words, the court instructed the jury, in substance, that the government need only prove that the defendants

were presumptively guilty, and the duty thereupon devolved upon them to establish their innocence; and if they did not, they were guilty beyond a reasonable doubt.

“We do not think it at all necessary to go into any argument to show the error of this instruction. The error is palpable on its statement. All the authorities condemn it. *Doty v. State*, 7 Blackford, 427; *State v. Flye*, 26 Me. 312; *Com. v. McKie*, 1 Gray, 61. The case of *Clifton v. U. S.*, in 4 Howard, cited by the court below, was decided upon a statute which cast the burden of proof upon the claimant in seizure cases, after probable cause was shown for the prosecution, and, therefore, has no application. 1 Sts. at Large, 678; *Locke v. W. G.*, 7 Cranch, 339. The instructions set at nought established principles, and justifies the criticism of counsel, that it substantially withdrew from the defendants their constitutional right of trial by jury, and converted what at law was intended for their protection—the right to refuse to testify—into the machinery for their sure destruction.” Field, J.

CHAPTER IX.

WITNESSES.

I. PROCURING ATTENDANCE.

Subpoena the usual mode of enforcing attendance, § 345.

Subpoena must be personally served, § 346.

Fees allowable to witness, § 347.

In felonies expenses need not be prepaid, § 348.

Witness refusing to attend is in contempt, § 349.

Attachment granted on rule, § 350.

Habeas corpus may issue to bring in imprisoned witness, § 351.

Witness may be required to find bail for appearance, § 352.

II. OATH AND ITS INCIDENTS.

Oath is an appeal to a higher sanction, § 353.

Witness is to be sworn by the form he deems most obligatory, § 354.

Affirmation may be substituted for oath, § 355.

III. PRIVILEGE FROM ARREST.

Witness not privileged as to criminal arrest, but otherwise as to civil, § 356.

IV. COMPETENCY AND CREDIBILITY.

Competency is for court, § 357.

Competency is presumed, § 358.

Ordinary competency should be excepted to before oath, § 359.

Distinction between primary and secondary does not apply to witnesses, § 360.

Statutes regulating admissibility constitutional, § 360 a.

Atheism at common law disqualified, § 361.

Evidence may be taken as to religious belief, § 362.

Infamy at common law disqualifies, § 363.

Removal of disability by statute, § 363 a.

Excepted cases where convict may testify, § 364.

Removal of disability by pardon, § 365.

Admissibility of infants depends on intelligence, § 366.

No absolute presumption from infancy, § 367.

Court may examine witness or continue trial, § 368.

Deficiency of percipient powers if total excludes, § 369.

In insanity the same tests are applicable, § 370.

Witness may be examined by judge as to capacity, § 371.

Inquisition only *prima facie* proof, § 372.

Capacity to perceive a condition of credibility, § 373.

And so of capacity to narrate, § 374.

Deaf and dumb witnesses not incompetent, § 375.

Bias to be taken into account in estimating credibility, § 376.

And so of want of familiarity with topic, § 377.

And so of capacity to remember, § 378.

Want of circumstantiality a ground for discredit, § 379.

Falsum in uno, falsum in omnibus, not universally applicable, § 380.

Literal coincidence in oral statements suspicious, § 381.

Affirmative testimony stronger than negative, § 382.

When credit is equal, preponderance to be given to numbers, § 383.

Credibility of witnesses is for jury, § 384.

Intoxicated witnesses may be excluded, § 384 a.

Counsel may be witnesses, § 385.

V. NUMBER OF WITNESSES.

In treason two witnesses are required, § 386.

Rule in perjury, § 387.
in bastardy and seduction, § 388.

in divorce cases, § 389.

VI. HUSBAND AND WIFE.

Husband and wife cannot testify for or against each other, § 390.

And so for or against each other's co-defendants, § 391.

Rule does not apply where acquittal of one co-defendant does not affect the other, § 392.

Exception in case of violence, § 393.

Exception in case of abduction and rape, § 394.

When admissible against, admissible for, § 394 a.

But may be a witness to prove marriage collaterally, § 395.

Cannot be compelled to criminate each other, § 396.

Distinctive rules as to bigamy, § 397.

Cannot testify as to confidential relations, § 398.

Effect of death and divorce on admissibility, § 399.

General statutes do not remove disability, § 400.

Otherwise as to special enabling statutes, § 401.

Husband and wife admitted to contradict each other, § 402.

VII. DISTINCTIVE RULES AS TO EXPERTS.

Expert testifies as a specialist, § 403.

May be examined as to laws other than the *lex fori*, § 404.

But cannot be examined as to matters non-professional, or of common knowledge, § 405.

Whether conclusion belongs to specialty is for court, § 406.

Expert may be examined as to scientific authorities, § 407.

Expert must be skilled in his specialty, § 408.

Court decides as to impeaching or sustaining, § 409.

Limits to be defined by court, § 410.

But not to include matters of ordinary observation, § 411.

Medical man if an expert in his school may be examined as such, § 412.

So of scientists, § 413.

So of practitioners in a business specialty, § 414.

So of artists, § 415.

So of persons familiar with a market, § 416.

On questions of sanity not only experts but friends and attendants may be examined, § 417.

Expert may be examined as to hypothetical case, § 418.

May explain his opinion, § 419.

His testimony to be jealously scrutinized, § 420.

Especially when *ex parte*, § 421.

Post-mortem observations, § 422.

Examination of blood stains, § 423.

Examination of handwriting, § 424.

As to terms of art, opinions on conceded facts, obscure terms, etc., § 425.

He may be specially feed, § 426.

VIII. DEFENDANTS AS WITNESSES.

Defendant at common law may make statement, § 427.

By statute may be sworn as witness, § 428.

Party is subject to the ordinary limitation of witnesses, § 429.

May be cross-examined to the same extent, § 430.

May be examined as to his motives, § 431.

Cannot avoid relevant questions on the ground of self-crimination, § 432.

May be contradicted on material points, § 433.

May be re-examined, § 434.

No presumption against defendant for not testifying, § 435.

Counsel not to allude to non-testifying, § 435 a.

Distinctive provisions in particular States, § 436.

Husband and wife not affected by statute, § 437.

Otherwise as to co-defendants, § 438.

IX. ACCOMPLICES AND CO-DEFENDANTS.

Accomplices competent for prosecution, § 439.

An accomplice is a voluntary co-worker, § 440.

Corroboration required to sustain, § 441.

To what corroboration must extend, § 442.

Right of, to pardon, § 443.

Latitude allowed in cross-examining, § 444.

Co-defendants at common law not admissible for each other, § 445.

X. EXAMINATION OF WITNESSES.

Judge may order separation of witnesses, § 446.

Voir dire a preliminary examination, § 447.

All witnesses on back of indictment must be produced, and so of all witnesses to transaction, § 448.

Interpreter to be sworn, § 449.

Witnesses refusing to answer punishable by attachment, § 450.

Witness is no judge of the materiality of his testimony, § 451.

Court may examine witness, § 452.

Witness is protected as to answers, § 453.

Examination and cross-examination governed by same rules as in civil suits, § 454.

Leading questions excluded, § 454 a.

Witness cannot be asked as to conclusion of law, § 455.

Nor as to motives of other persons, § 456.

Nor can opinion ordinarily be given, § 457.

Otherwise when opinion is fact at short-hand, § 458.

So as to noises, smells, and identifications, § 459.

So as to facts which cannot be expressed in concrete, § 460.

Witness may give substance of conversation, § 461.

Vague impressions are inadmissible, § 462.

Witness cannot be compelled to criminate himself, § 463.

Nor to expose himself to fine or forfeiture, § 464.

Privilege in this respect can only be claimed by witness, § 465.

Danger of prosecution must be real, § 466.

Exposure to civil liability no excuse, § 467.

Nor to police or liquor prosecutions, § 468.

Court determines as to danger, § 469.

Waiver of part waives all, § 470.

Pardon and indemnity do away with protection, § 471.

For the purpose of discrediting witness, answers will not be compelled to questions imputing disgrace, § 472.

Otherwise when such questions are material, § 473.

Witness may be asked whether he has been in prison, § 474.

Questions may be asked as to religious belief, § 475.

And so as to questions of motive, or veracity, or *res gestae*, § 476.

And so as to bias, § 477.

Presumption from refusing to answer, § 478.

Witness's answers as to prior conduct conclusive, § 479.

Compelled answers cannot be used against witness, § 480.

XI. IMPEACHING AND SUSTAINING WITNESS.

Rules in criminal the same as in civil issues, § 481.

Opposing witness can be impeached by proving that he formerly stated differently, § 482.

Witness must first be asked as to such statements, § 483.

Witness cannot be contradicted on matters collateral, § 484.

Witness's answer as to motives may be contradicted, § 485.

His character for truth may be attacked, § 486.

Questions to be limited by time and place, § 487.

Bias may be shown, § 488.

Infamy may be shown to impeach credibility, § 489.

Impeaching witness may be attacked and sustained, § 490.

Impeached witness may be sustained, § 491.

But not by proof of former statements, § 492.

XI. RE-EXAMINATION.

Party may re-examine witness, § 493.

Witness may be recalled, § 494.

Witness may be re-cross-examined, § 495.

XIII. PRIVILEGED COMMUNICATIONS.

Lawyer not permitted to disclose communications of client, § 496.

Not necessary that relationship should be formally instituted, § 497.

Nor is privilege lost by termination of relationship, § 498.

Client cannot be compelled to disclose communications made by him to his lawyer, § 499.

Privilege must be claimed in order to be applied, and may be waived, § 500.

Communications, to be privileged, must be made to party's exclusive adviser, § 501.

Lawyer not privileged as to information received by him extra-professionally, § 502.

Information received out of scope of professional duty not privileged, § 503.

Privilege does not extend to communications in view of breaking the law, § 504.

Communications between party and witnesses privileged, § 505.

Telegraphic communications not privileged, § 506.

Priests not privileged at common law as to confessional, § 507.

Judges cannot be compelled to disclose grounds of judgment, § 509.

Nor jurors to disclose their deliberations, § 510.

Juror if knowing facts must testify as witness, § 511.

Prosecuting attorney privileged as to confidential matter, § 512.

State secrets are privileged, § 513.

And consultations of legislature and executive, § 514.

Police secrets privileged, § 515.

Medical attendants not privileged, § 516.

No privilege to ties of blood or friendship, § 517.

Parent cannot be examined as to access in cases involving legitimacy, § 518.

I. PROCURING ATTENDANCE.

§ 345. To secure the attendance of a witness in a criminal prosecution, a *subpoena ad testificandum* is issued from the tribunal

before whom the case is to be tried.¹ When the witness is required to produce papers, these must ordinarily be specified in the subpoena, which is then styled a *subpoena duces tecum*,² and a sweeping description for fishing purposes will not be sustained.³ The clerk or custodian of public records cannot, indeed, be compelled by subpoena to bring such records, they not being within his power. But it is enough, in other cases, if the papers are in the possession of the witness, though the right to them belongs to other persons. If he possess them, he may be compelled by subpoena to bring them into court. Whether he will be compelled to produce such papers is a matter to be subsequently determined by the court. To sustain an order to this effect, it is necessary that they should be duly designated,—a notice to produce all papers relative to the issue not being enough,—and they must be under the witness's control. A witness neglecting to obey the writ is liable not merely to attachment but to a suit for damages.

§ 346. It is ordinarily sufficient to leave a copy of the substance of a subpoena, which is called a subpoena ticket, with the witness. This, however, must be done personally;⁴ and the original writ must be shown to the witness at the time the copy or the ticket is left with him.⁵ Any substantial variance between the ticket and the subpoena precludes the summoning party from obtaining an attachment.⁶

§ 347. The costs and charges of a witness are settled in many States by statute. In England the common law courts have adopted a graduated scale, suitable to the sacrifices of time made by witnesses in obeying the summons.⁷ And even without a special statute, where foreign witnesses, or witnesses in any way out of the jurisdiction of the court, are brought in, proper allowances to them will be sustained by the court as part of the taxable costs. This has been held proper in

¹ Whart. on Ev. § 377. See *Nayland v. State*, 13 Tex. Ap. 536. 319; *Wadsworth v. Marshall*, 1 C. & M. 87; *Marshall v. R. R.*, 11 C. B. 398.

² *Ibid.*

³ *Infra*, § 505.

⁴ *Pyne, In re*, 1 Dow. & L. 703; *Doe v. Andrews*, 2 Cow. 846.

⁵ *Garden v. Creswell*, 2 M. & W.

⁶ *Chapman v. Davis*, 4 Scott N. R. 319; *S. C.*, 3 M. & Gr. 609; *Doe v. Thomson*, 9 Dowl. 948.

⁷ See *Taylor on Evidence*, § 1126.

cases where witnesses have been detained in the country, at great inconvenience to themselves, but great benefit to public justice, in order to give evidence on trial. Extraordinary causes, also, it has been held, justify extraordinary costs, and in several important prosecutions large sums have recently (1879) been paid in several States to obtain proper expert testimony.¹ Even a party's fees as a witness may, under peculiar circumstances, be allowed.²

§ 348. In civil cases, as is elsewhere seen,³ an attachment will not issue to compel attendance unless the reasonable expenses of the witness, as such expenses are legally defined, have been paid, or at least tendered to him in advance of trial.⁴ It is otherwise at common law in criminal prosecutions.

In felonies
expenses
need not be
prepaid.

¹ *Infra*, § 426. Grave exception may be taken to the practice existing in some States, of paying for expert testimony for the prosecution, and refusing to pay for it when offered for the defence. Experts have been paid large sums for their service when testifying for the prosecution, and in this way the ablest experts, holding the view called for, have been obtained; while the defence has been obliged to confine itself to such witnesses as it can afford specially to pay, and in most cases, from want of means, to accept the services of mere volunteers sometimes without experience, sometimes without common sense. Good defences, in this way, have been wrecked, and bad prosecutions established; and not only grievous wrong has been thus done to the defendant, but a shock given to the public sense of justice. The way to avoid such catastrophes is, if special fees are to be given to experts, to give them to all experts whom the court should judge it proper specially to employ and remunerate. See cases *infra*, § 426.

² See authorities for this section cited in Whart. on Ev. § 380, and *infra*, § 426.

³ Whart. on Ev. § 381.

⁴ "In England," to adopt Mr. Roscoe's exposition (Roscoe's Crim. Ev. 8th ed. § 110), "where a subpoena is served on a person in one part of the United Kingdom for his appearance in another, under the 45 Geo. III. c. 92, it is provided that the witness shall not be punishable for default, unless a sufficient sum of money has been tendered to him, on the service of the subpoena, for defraying the expenses of coming, attending, and returning. In this case, therefore, in order that the subpoena may be effectual, the expenses must be tendered. But this only applies to a witness brought from one great division of the United Kingdom, as England, or Ireland, to another. It has, indeed, been doubted whether in other criminal cases a witness may not, unless a tender of his expenses has been made, lawfully refuse to obey a subpoena, and the doubt is founded upon the provision of the above statute. 1 Chitty Cr. Law, 613. The better opinion, however, seems to be, and it is so laid down in books of authority, that witnesses making default on the trial of criminal prosecutions (whether felo-

§ 349. To sustain an attachment¹ it must appear that the summons was properly drawn and was regularly served, with due time to prepare for attendance.² Due service also requires, as we have seen, that the writ should be exhibited to the witness, and either a copy, or a ticket giving its substance, left with him. It has been said that it is essential, in order to obtain an attachment, to prove that the witness wilfully refused to attend. But wilfulness is to be assumed from the very fact of non-attendance after summons;³ and ordinarily it is enough, in criminal cases, for a party to prove such summons, in

Witnesses
refusing to
attend are
in con-
tempt.

nies or misdemeanors) are not exempted from attachment, on the ground that their expenses were not tendered at the time of the service of the subpoena, although the court would have good reason to excuse them for not obeying the summons, if, in fact, they had not the means of defraying the necessary expenses of the journey. 2 Phill. Ev. 383, 9th ed.; 2 Russ. by Greaves, 947. 'It is,' says Mr. Starkie, 'the common practice in criminal cases, for the court to direct the witness to give his evidence, notwithstanding his demurrer on the ground that his expenses have not been paid.' 1 Ry. 83 (a), 2d ed. And, accordingly, at the York Summer Assizes, 1820, Bayley, J., ruled, that an unwilling witness, who required to be paid before he gave evidence, had no right to demand such payment. His lordship said, 'I fear I have not the power to order you your expenses;' and on asking the Bar if any one recollected an instance in point, Scarlett answered, 'It is not done in criminal cases.' 1 Anon. Cht. Burn. 1001; 2 Russ. by Greaves, 948 (a). So on the trial of an indictment which had been removed into the Queen's Bench by *certiorari*, a witness for the defendant stated, before he was examined, that at the time he was served with the subpoena no money was paid him,

and asked the judge to order the defendant to pay his expenses before he was examined. Park, J., having conferred with Garrow, B., said, 'We are of opinion that I have no authority in a criminal case to order a defendant to pay a witness his expenses, though he has been subpoenaed by such defendant; nor is the case altered by the indictment being removed by *certiorari*, and coming here as a civil cause.' R. v. Cooke, 1 C. & P. 321. In R. v. Cozen, Glouc. Spr. Ass. 1843, 2 Russ. by Greaves, 948 (a), Wightman, J., directed an officer of the Ecclesiastical Court, who had brought a will from London under a *subpoena duces tecum*, to go before the grand jury, although he objected, on the ground that his expenses had not been paid. But the court might refuse to grant an attachment in the case of a poor witness, if his expenses were not paid.'

In New York the same rule is applied to felonies, but not to misdemeanors. Andrews v. Andrews, 2 Johns. Cas. 109; Chamberlain's Case, 4 Cow. 49.

¹ As to practice in contempt, see Whart. Crim. Pl. & Pr. § 954.

² This was ruled in Spencer's Case by Judge Wylie, Washington, 1884.

³ See Walker v. State, 13 Tex. Ap. 618; State v. Thomas, 11 Lea, 113.

order to obtain a rule to show cause why an attachment should not issue. If otherwise, there would be no way of bringing negligent witnesses into court. If the testimony of the witness, however, is immaterial, and there be no contempt shown, the attachment may be refused.¹

§ 350. The English practice is for the summoning party to apply first for a rule to show cause, which is granted on *ex parte* proof. Yet where the delay incident on such a rule would be pernicious to the case of the summoning party, the rule, if not dispensed with, may be shaped in such a way as to secure almost immediate attendance; and in many jurisdictions in this country the attachment issues without a rule, on proof of service and of refusal to attend. If it appear upon a rule to show cause that the witness is too ill to attend, or is in any other way incapacitated,² or has been led to believe that his attendance was not really required,³ the rule will be discharged. But in other cases it may be granted at the discretion of the court upon due proof of service, and of its disregard.⁴ An attachment may be granted even though the jury is not sworn;⁵ though the witness's name be not called,⁶ and though the case be not reached.⁷ But there should be an affidavit that the witness is material.⁸

Attachment granted on rule to show cause.

§ 351. The attendance of a witness in prison may be secured by a *habeas corpus ad testificandum*.⁹ To this writ it is ordinarily a prerequisite that the party desiring the attendance of the witness should make affidavit before a judge at chambers that the witness in question is material to the case, but is in custody, whether on criminal or civil process.¹⁰ A party to the record, who is entitled to testify

Habeas corpus may issue to bring in an imprisoned witness.

¹ Whart. on Ev. § 383.

² *State v. Benjamin*, 7 La. An. 47.

³ *R. v. Sloman*, 7 Dowl. 693; *State v. Nixon, Wright (Ohio)*, 763; *Beaulieu v. Parsons*, 2 Minn. 37.

⁴ *Judson, Ex parte*, 3 Blatch. 89; *Stephens v. People*, 19 N. Y. 549; *State v. Trumbull*, 1 South. 139; *West v. State*, 1 Wis. 209. See more fully Whart. Crim. Pl. & Pr. §§ 967-68; Whart. on Ev. § 383.

⁵ *Mullett v. Hunt*, 1 Cr. & M. 752.

⁶ *R. v. Stretch*, 5 A. & E. 503; *Dixon v. Lee*, 5 Tyrw. 180.

⁷ *Barrow v. Humphreys*, 3 B. & A. 598.

⁸ *Tinley v. Porter*, 2 M. & W. 822.

⁹ See *R. v. Roddam, Cowp.* 672; *State v. Kennedy*, 20 Iowa, 569.

¹⁰ Chitty, Forms, 60; *Marsden v. Overbury*, 18 C. B. 34; *Gordon's Case*, 2 M. & S. 580; *Browne v. Gisborne*, 2 Dowl. N. S. 263; *Graham v. Clover*, 5 E. & B. 591.

in the case, if he be in prison, is entitled to use this writ in order that he himself may be brought into court.¹ The same writ has been issued to secure the presence in court of a person confined as a lunatic.²

§ 352. Where there is ground to suspect that a material witness may abscond or secrete himself before trial, he may, on due ground laid, be held to bail to appear at the trial, and be committed on failure to procure bail.³ Such imprisonment does not violate the sanctions of the federal or state constitutions.⁴

Witness
may be re-
quired to
find bail
for appear-
ance.

¹ Cobbett, *Ex parte*, 4 Jur. N. S. 145.

² Fennell v. Tait, 1 C., M. & R. 584.

³ Evans v. Rees, 12 Ad. & El. 55; Ashton's Case, 7 Q. B. 169; U. S. v. Butler, 1 Cranch C. C. 422; State v. Zellers, 2 Halst. 220. See, however, Bickley v. Com., 2 J. J. Marsh. 572, where it is said that the court cannot compel the witness to give surety.

"The power to bind witnesses by recognizance to appear and give evidence was originally given by the 1 and 2 P. & M. c. 13, and 2 and 3 P. & M. c. 10. It was further extended by the 7 Geo. IV. c. 64, which repealed the prior statutes; and is now regulated by the 11 & 12 Vict. c. 42, s. 20, by which power is given in all cases, whether of felony or misdemeanor, to bind by recognizance the prosecutor and witnesses to appear and give evidence at the next court of oyer and terminer and general jail delivery, or the next court of quarter sessions, as the case may be. The same power is exercised by coroners under the 7 Geo. IV. c. 64, s. 4, in cases of murder and manslaughter. So also witnesses for the defence may now be bound over to appear. See 30 & 31 Vict. c. 35, s. 3, incorporated with the 11 & 12 Vict. c. 42.

"When a trial is postponed, the presiding judge, exercising the ordinary functions of a justice of the peace,

usually binds over the prosecutor and witnesses to appear and give evidence at the next assizes or the next quarter sessions, as the case may be.

"If a witness, on his examination before a magistrate, refuse to be bound over, he may, by the express provisions of the 11 & 12 Vict. c. 42, s. 20, be committed. It seems doubtful whether, in any case, a witness can be compelled to find sureties for his or her appearance. Per Graham, B., Bodmin Summ. Ass. 1827; 2 Stark. Ev. 82, 2d ed.; per Lord Denman, Evans v. Rees, 2 A. & E. 59. It was once thought that an infant was bound to find sureties in such a case, and could be committed in default, on the ground that his own recognizance would be invalid; but it has been since held that infancy is no ground for discharging a forfeited recognizance to appear at the assizes and prosecute for felony. *Ex parte Williams*, 13 Price, 670. It is still the practice generally not to take the recognizance of a married woman, but that of her husband, or some person willing to be bound for her, if any such there be; but if no such person be at hand, she herself is frequently bound; and there seems no reason why her recognizance should not be binding." Roscoe's Cr. Ev. 8th ed. 106.

⁴ State v. Grace, 18 Minn. 398.

II. OATH AND ITS INCIDENTS.

§ 353. An oath is the assurance of the truth of an assertion by an appeal to a superior sanction. Mr. Best¹ gives a narrower definition, holding that "an oath is an application of the religious sanction;" and that it is "calling the Deity to witness in aid of a declaration by man."

An appeal
to a superior
sanction.

To this effect he quotes Lord Coke,² and Bonnier,³ who declares "Le serment est l'attestation de la Divinité à l'appui d'une déclaration de l'homme." Yet if we are now to regard an affirmation as equivalent, when given under the same sanction, to an oath, and if we accept the rulings which permit atheists to testify under affirmation, we must extend the definition to cases where the witness appeals to his own sense of right as a voucher. But in any view, an appeal of this class solemnly made, apart from the fact that falsehood, uttered after such an appeal, is indictable as perjury, gives an assurance amounting to *prima facie* proof, that the assertion made by the witness corresponds with his consciousness of right and truth: "Est enim jusjurandum affirmatio religiosa."⁴ It is final, so far as the case is concerned, for an oath is administered to a witness but once in a cause, no matter how often he may be recalled.⁵

§ 354. While the common and regular way of swearing by a Christian is on the four evangelists, or on the New Testament,⁶ the general rule is that witnesses are to be sworn after a form the obligation of which they acknowledge: A Jew, for instance, may be sworn on the Pentateuch or Old Testament, with his head covered;⁷ a Mahometan, on the Koran;⁸ a Gentoo, touching with his hand the foot of a

Witness to
be sworn
in form he
deems most
obligatory.

¹ Evidence, § 57. See 29 Alb. L. J. Str. 1114. The adjuration oath was 344. "on the true faith of a Christian," till

² 3 Inst. 165.

³ Traité des Preuves, § 340.

⁴ L. 5. pr. § 1. 3; De jur. xii. 2. See Com. v. Winnemore, 2 Brewst. 378; Savigny, *ut supra*; Whart. on Ev. § 386. Compare Mr. Livingston's remarks, Livingston's Works, ed. of 1873, i. 398.

⁵ Bulloch v. Koon, 3 Cow. 30.

⁶ See, per Lee, C. S., R. v. Bosworth,

altered for the Jews by 10 Geo. I. c. 10. The swearing on a common prayer-book, with the four gospels in the same cover, will suffice in order to an indictment for perjury. Rokeby v. Langston, 2 Keb. 314. See McAdams v. Weaver, 2 Kerr (N. B.), 176.

⁷ Gomez Serra v. Munoz, Stra. 821. See Stra. 1113.

⁸ R. v. Morgan, 1 Leach, 54.

Brahmin or priest of his religion; a Brahmin, by touching the hand of another such priest;¹ a Chinese, by breaking a china saucer;² a Scotch Covenanter, or member of the kirk, by holding up the hand without kissing the book.³ But if a witness declares that he acknowledges the sanctity of the oath in the usual form, it is not usual to address to him further questions. It is true that in whatever form he consents to be sworn, *e. g.*, if though a Christian he declines to be sworn on the New but consents to be sworn on the Old Testament,⁴ he may be afterwards asked whether he holds such oath binding on his conscience; but he cannot be asked whether he considers any other form of oath more binding.⁵ The fact that a witness permits himself, without objection on his part, to be sworn by an oath he does not deem binding, does not relieve him from a prosecution for perjury, if his testimony be wilfully false.⁶

§ 355. By statutes now adopted in all jurisdictions in this country, persons who are conscientiously opposed to taking an oath may testify under the form of a solemn affirmation. If false testimony be given under an affirmation, the witness is as much exposed to a prosecution for perjury

Affirmation may be substituted for oath.

¹ *Omichund v. Barker*, Will. 545.

² *R. v. Entrehman*, 1 C. & M. 248.

In this country a Chinaman who stated that he did not know the name of the book he was sworn on, but that he believed that if he should state anything untrue the court would punish, and that after his death, he would "go down there," making an emphatic gesture downward with his hand, was held to be a competent witness. *The Merrimac*, 1 Ben. 490; and see generally *Fuller v. Fuller*, 17 Cal. 605. As to Indians, see *Priest v. State*, 10 Neb. 393, cited *infra*, § 361. In 25 Alb. Law J. 301, we have the following:—

"A few days ago, in England, a Parsee, being called as a witness, and refusing to be sworn either upon the Old or New Testament or the Koran, was permitted to bind his conscience by holding openly in his hand a sacred

relic, which he was accustomed to carry about his person, and thus taking the oath. The judge at the same time remarked that strictly speaking a Parsee should be sworn holding the tail of a cow. Tyler in his *History of Oaths* says, that Sir James Macintosh told him that at Bombay he once had a cow brought into court for this purpose."

³ *R. v. Mildrone*, Leach, 412; *R. v. Walker*, 2 Sid. 6, cited Cowp. 390; *Mee v. Reid*, Peake, 23; 1 Leach, 498.

⁴ *Edmonds v. Rowe*, R. & M. 77.

⁵ *Sells v. Hoare*, 3 B. & B. 232.

⁶ *Sells v. Hoare*, 3 B. & B. 232; S. C., 7 Moore, 36; *State v. Keene*, 26 Me. 33; *Com. v. Knight*, 12 Mass. 274; *Campbell v. People*, 8 Wend. 636; *Thomas v. Com.*, 2 Rob. 795; *State v. Witherow*, 3 Murph. 153; *McKinney v. People*, 7 Ill. 540. See Whart. Crim. Law, 8th ed. § 1251. As to abolition of oaths see 19 Alb. L. J. 344.

as if he had been formally sworn.¹ But the right to be affirmed, in those States which make conscientious objection the test, cannot be granted to a witness who has no conscientious objection to an oath.²

III. PRIVILEGE FROM ARREST.

§ 356. A witness, when on attendance on a court of justice, is not protected from arrest on a criminal prosecution,³ no matter how surreptitious and improper may have been the process by which he was brought within the range of the arrest.⁴ From arrest on civil process a witness is protected, not only when in attendance on the court, but when going to and returning from it; in other words, *eundo, morando, et redeundo*. The rule is the same whether the witness attends voluntarily or on compulsion, and whether the tribunal he attends be a court and jury, or a commissioner or other officer authorized to take testimony.⁵ And the better opinion is that a witness from another State is privileged from even a summons.⁶

Witness not privileged from criminal arrest, but otherwise as to civil.

IV. WHO ARE COMPETENT WITNESSES.

§ 357. While credibility is for the jury, under the instructions of the court, competency is exclusively for the court.⁷ Whatever may be the objection to the competency of a witness, whether interest, insanity, infancy, or public policy, if it goes to incompetency for the purpose of which the witness is called, it must be determined by the court. Ordinarily, as we will presently see, the objection must be taken, when known, before the witness is sworn. In order to substantiate the objection, the witness, as we will further see, may be examined, according to the old practice, on the *voir dire*; or being sworn in chief, his examination may be arrested by interrogatories from the opposite

Competency is for court.

¹ See *U. S. v. Coolidge*, 2 Gall. 364; Whart. Crim. Law, 8th ed. § 1251.

² Whart. on Ev. § 389.

³ *Williamson v. Carroll*, 16 N. J. L. 217.

⁴ *Healey, In re*, 53 Vt. 694; *Person v. Greer*, 66 N. Y. 124.

⁵ *Douglass, In re*, 3 Q. B. 837.

⁷ That the order of evidence is under the control of the court, see *Campbell v. State*, 38 Ark. 498.

⁶ Whart. Crim. Pl. & Pr. § 27.

party, as to his competency.¹ But by the court must the objection, whenever it is made, be determined.²

§ 358. The law, on grounds of policy, presumes that all witnesses tendered in a court of justice are not only competent but credible. If a witness is incompetent, this must be shown by the party objecting to him; if he is not credible, this must be shown, either from his examination, or by impeaching evidence *aliunde*. Hence, so far as competency is concerned, if the evidence is in equipoise, the witness should be admitted.³

§ 359. A party who knows objections to the competency of a witness cannot, so it has been held, hold back such objections until the witness has been examined, and then raise the objections if the witness's testimony prove unfavorable. But it is otherwise when the objecting party is not aware of the full force of the objection until the examination has begun.⁴ The objection, however, if discovered during the examination in chief, must be made before cross-examination.⁵ When a witness, after verdict, is discovered to have been incompetent, and this without any laches on the part of the objecting party, a new trial may be granted, if the evidence of the witness was material, or if the party offering the witness is tainted with suspicion of impropriety in concealing the incompetency.⁶ But where the objection could have been taken during the trial a new trial will be refused, nor can the objection be noticed on error.⁷

¹ Whart. on Ev. § 392.

² See cases cited *infra*; and see R. v. Perkins, 2 Mood. C. C. 135; State v. Whittier, 21 Me. 341; Dole v. Thurlow, 12 Met. 157; Com. v. Burke, 16 Gray, 33; Cook v. Mix, 11 Conn. 432; Com. v. Lattin, 29 Conn. 389; Perry's Case, 3 Grat. 632; Peterson v. State, 47 Ga. 524; State v. Scanlan, 58 Mo. 204; and other cases cited Whart. on Ev. § 392.

³ Whart. on Ev. § 392.

⁴ See R. v. Whitehead, L. R. 1 C. C.

33; S. C., 10 Cox, 234; Vaughan v. Worrall, 2 Madd. 322; Selway v. Chappell, 12 Sim. 113; State v. Damery, 48 Me. 327; Shurtleff v. Willard, 19 Pick. 202; Andre v. Bodman, 13 Md. 241; Veiths v. Hagge, 8 Iowa, 163. See Com. v. Green, 17 Mass. 515; Howser v. Com., 51 Penn. St. 332.

⁵ Sheridan v. Medara, 10 N. J. Eq. 469; Brooks v. Crosby, 22 Cal. 42.

⁶ Whart. Crim. Pl. & Pr. §§ 876-81; Wade v. Simeon, 2 C. B. 342.

⁷ Ibid.

§ 360. If a witness speaks of something perceived by himself, and not through the medium of a third party, his testimony cannot be excluded because at the time of perception his attention was not given closely to the thing perceived, or because his powers of perception were feeble, or because his attention at the time was distracted. He may have an impression of what took place, which, from the nature of things is far fainter than that of a witness not called, but he is not on this ground to be excluded. Disabilities of this kind go not to competency but to credibility.¹ A witness, no matter how reliable, cannot be permitted to give the contents of a written instrument that could be produced; but no witness, no matter how unreliable, can be excluded because another more authoritative is not called.² A witness who has heard a party or his agent say certain things can be received, though the party or agent himself might have been examined, but is not;³ and hence the admissions of a party can be proved, though the party himself is in court to be examined as to such admissions.⁴ And, as we have already seen, a person not an expert may be admitted to state facts as to which an expert could be procured who would speak much more authoritatively;⁵ and a party cognizant with another's writing may be called to state his knowledge as well as the writer himself.⁶

Distinction between secondary and primary does not apply to witnesses.

§ 360 a. Statutes regulating the admissibility of witnesses are not unconstitutional as *ex post facto* in respect to antecedent crimes unless they should materially impair the defendant's rights.⁷

Statutes regulating admissibility constitutional.

¹ *Infra*, § 373. See *Lanham v. State*, 7 Tex. App. 126.

² See *supra*, § 174; *Governor v. Roberts*, 2 Hawks, 26; *Green v. Cawthorn*, 4 Dev. 409; *State v. Cain*, 9 W. Va. 559.

³ *Badger v. Story*, 16 N. H. 168; *Featherman v. Miller*, 45 Penn. St. 96. *Infra*, §§ 623 *et seq.*

⁴ *Infra*, § 685; Whart. on Ev. §§ 1094, 1175 *et seq.*

⁵ *Supra*, § 160. *Infra*, § 549.

⁷ Whart. Com. Am. Law, §§ 474, 494.

In *Hopt v. People*, Sup. Ct. U. S. 1884, we have the following from Harlan, J., giving the opinion of the court: "Statutes which simply enlarge the class of persons who may be competent to testify in criminal cases are not *ex post facto* in their application to prosecutions for crimes committed prior to their passage; for they do not attach criminality to any act previously done, and which was innocent when done; nor aggravate any crime theretofore

§ 361. By the English common law, the oath is an essential prerequisite to the admission of a witness to testify. *In judicio non creditur nisi juratis.*¹ In the leading case on this topic² the question came up on the admissibility in evidence of depositions which had been made on oath by some Gentoos before a chancery commission in the East Indies. It had been thought up to that time, on the authority of Coke,³ that none but Christians were competent witnesses. He laid it down that "an infidel cannot be a witness;" and it was clear that, under the designation of infidel, he classified all who were not Christians. But Willes, C. J., ruled that Lord Coke's proposition was "without foundation, either in Scripture, reason, or law;" and proceeded to declare, in an opinion which has not since been questioned, that "such infidels who believe in God, and that He will punish them if they swear falsely (in some cases and under some circumstances), may and ought to be admitted as witnesses in this, though a Christian country." And, "Such infidels, if any such there be, who either do not believe in God, or, if they do, do not think that He will either reward or punish them in this world

committed; nor provide a greater punishment therefor than was prescribed at the time of its commission; nor do they alter the degree, or lessen the amount or measure, of the proof which was made necessary to conviction when the crime was committed.

"The crime for which the present defendant was indicted, the punishment prescribed therefor, and the quantity or the degree of proof necessary to establish his guilt, all remained unaffected by the subsequent statute. Any statutory alteration of the legal rules of evidence which would authorize conviction upon less proof, in amount or degree, than was required when the offence was committed, might, in respect of that offence, be obnoxious to the constitutional inhibition upon *ex post facto* laws. But alterations which do not increase the punishment, nor change the ingredients of the

offence or the ultimate facts necessary to establish guilt, but—leaving untouched the nature of the crime and the amount or degree of proof essential to conviction—only remove existing restrictions upon the competency of certain classes of persons as witnesses, relate to modes of procedure only, in which no one can be said to have a vested right, and which the State, upon grounds of public policy, may regulate at pleasure. Such regulations of the mode in which the facts constituting guilt may be placed before the jury, can be made applicable to prosecutions or trials thereafter had, without reference to the commission of the offence charged." And see *Sutton v. Fox*, 55 Wis. 33.

¹ 2 Salk. 512; 1 Bl. Com. 402.

² *Omichund v. Barker*, Willes, 538; 1 Sm. L. C. 194.

³ Co. Litt. 6 b.

or in the next, cannot be witnesses under any case or under any circumstances, for the plain reason, because an oath cannot possibly be any tie or obligation upon them."¹ It may therefore be regarded as settled by the English common law that an atheist is inadmissible as a witness, independently of the statutes permitting affirmations to be substituted for oaths;² though it is sufficient for admissibility, that the witness proposed believes in a Supreme Being who dispenses retribution in this life alone.³ By statute, however, in several jurisdictions, religious unbelief no longer disqualifies; nor at common law can defect in such belief be a ground of exclusion in jurisdictions which permit the substitution of an affirmation for an oath.⁴

¹ See *Maden v. Catanach*, 7 H. & N. 360; 31 L. J. Ex. 118. That an Indian not understanding the obligation of an oath may be excluded, see *Priest v. State*, 10 Neb. 393.

² *Maden v. Catanach*, 7 H. & N. 360; *Smith v. Coffin*, 18 Me. 157; *Norton v. Ladd*, 4 N. H. 444; *Arnold v. Arnold*, 13 Vt. 363; *Thurston v. Whitney*, 2 Cush. 104; *Beardsly v. Foot*, 2 Root, 399; *Atwood v. Welton*, 7 Conn. 66; *People v. McGarren*, 17 Wend. 460; *Anderson v. Maberry*, 2 Heisk. 653. Otherwise, when an affirmation is permitted. See *Carter v. Stone*, 63 Ala. 52. *Supra*, § 353.

³ Whart. on Ev. § 395.

⁴ *Supra*, § 353. *Com. v. Burke*, 16 Gray, 33; *Perry's Case*, 3 Grat. 632; *People v. Jenness*, 5 Mich. 305; *Bush v. Com.*, 80 Ky. 244; *Fuller v. Fuller*, 17 Cal. 605; *Ake v. State*, 6 Tex. Ap. 398.

The following summary of the older cases may be still not without value. In Pennsylvania, it was directly decided that the true test of the competency of a witness, on the ground of his religious principles, is, whether he believes in the existence of a God who will punish him if he swear falsely. *Cubbison v. McCreary*, 2 W. & S. 262. See *Com. v. Winnemore*, 2 Brewster, 378; *Blair v. Seaver*, 26 Penn. St.

274. Hence those are competent who believe future punishment not to be eternal. *Cubbison v. McCreary*, 2 W. & Serg. 362. See *Butts v. Swartwood*, 2 Cowen, 431; *Blocker v. Burness*, 2 Ala. 354; *U. S. v. Kennedy*, 3 McLean, 175. In Ohio, it is held that a witness's belief that punishments for false swearing are inflicted in this life only might go to his credibility. *U. S. v. Kennedy*, 3 McLean, 175. In Connecticut, it was formerly decided that those who believe in a God, and in rewards and punishments only in this world, are not competent witnesses. *Atwood v. Welton*, 7 Conn. R. 66. The legislature of that State has since enacted that such persons shall be received as witnesses. In Massachusetts, it has been said that mere disbelief in a future existence goes only to the credibility. *Hunscom v. Hunscom*, 15 Mass. 184. In Maine, a belief in the existence of the Supreme Being is rendered sufficient, without any reference to rewards or punishments. Stat. 1833, c. 68; *Smith v. Coffin*, 6 Shep. 157. In South Carolina, a belief in God and his providence has been held sufficient. *Jones v. Harris*, 1 Strob. 160. In Illinois, it has been said that a person who has no religious belief, nor belief in a Supreme Being, and who, though recognizing his

§ 362. The burden of proving religious unbelief in a person tendered as a witness is on the party making the objection.¹ It is competent, under such a rule, at any time before the witness is sworn, to introduce testimony to show his defect in this relation.² Whether he can himself be examined on his *voir dire* as to his religious belief has been doubted. If examined, he must be examined without the prior tendering of an oath,³ for it is a *petitio principii* to swear a person in order to determine whether he can be sworn.⁴ Even when this objection does not apply, as where the objection goes not to competency but to credibility, a witness cannot be compelled to answer as to special phases of his creed.⁵ When the question is competency, the proper course, in order to prove such defect in religious belief as argues a deficiency in a sense of moral accountability, is

amenability to human law in case he testifies falsely, has no sense of moral accountability, is inadmissible. Central Mil. R. R. v. Rockafellow, 17 Ill. 541.

¹ Donnelly v. State, 26 N. J. L. 463.

² Anderson v. Maberry, 2 Heisk. 653. See *infra*, § 475.

³ See R. v. White, 1 Leach, 430; Maden v. Catanach, 7 H. & N. 360; R. v. Serva, 2 C. & K. 56; Scott v. Hooper, 14 Vt. 535; Harrel v. State, 1 Head, 125. In Arnd v. Amling, 53 Md. 192, it was held that a witness objected to on this ground could be examined on his *voir dire* at the discretion of the court.

⁴ *Infra*, § 447. Queen's Case, 2 B. & B. 284; U. S. v. White, 5 Cranch C. C. 38; Wakefield v. Ross, 5 Mason 19; Smith v. Coffin, 6 Shepley, 157; Com. v. Smith, 2 Gray, 516; Com. v. Burke, 16 Gray, 33; Jackson v. Gridley, 18 Johns. 98; Com. v. Winnemore, 1 Brewst. 356; State v. Townsend, 2 Harring. 543; Searcy v. Miller, 57 Iowa, 613. See Odell v. Koppee, 5 Heiske. 88.

⁵ Donkle v. Kohn, 44 Ga. 266. See *infra*, § 475.

"It has sometimes been allowed to counsel," says Mr. Justice Talfourd, "to question witnesses on their *voir dire* as to their religious belief; but it may be doubted whether a witness would not be justified in insisting, when so questioned, on the simple answer that he considers the oath administered in the usual form binding on his own conscience, and in declining to answer further; for a confession thus forced from him, of a disbelief in a state of retribution, would certainly be esteemed disgraceful in a court of justice, and there seems no reason why a person should thus be taxed, perhaps to his own infinite prejudice, merely because he appears to perform a public duty in obedience to a subpoena. At all events, it is quite clear that a witness may properly refuse to answer any questions which go beyond an inquiry into his belief in a Superior Being to whom man is answerable; and that it is the duty of counsel to refuse, however urged, to put such questions, which are altogether impertinent and vexatious." 6 Dick Q. S. 535.

to put in evidence the witness's own declarations.¹ And it is held that his declarations, exhibiting a change of opinion, may be shown by those to whom such declarations were uttered.² If, on cross-examination, it appears that the witness has not the moral sense requisite to make him a competent witness, the court, at its discretion, may strike out his testimony, or leave it to the jury with proper instructions as to its weight.³

§ 363. At common law, persons convicted in courts of record⁴ of crimes which render them infamous are excluded from being witnesses. "Infamous" crime, in this sense, is regarded as comprehending treason, felony, and the *crimen falsi*.⁵ In many jurisdictions, however, the disqualification of infamy is removed by statute, though a conviction may be proved to affect credibility.⁶

Infamy incapacitates at common law.

¹ *Wakefield v. Ross*, 5 Mason, 19; *Central Mil. R. R. v. Rockafellow*, 17 Ill. 541; *Curtiss v. Strong*, 4 Day, 51; *Jackson v. Gridley*, 18 Johns. 98. See *Priest v. State*, 10 Neb. 393.

² *U. S. v. White*, 5 Cranch C. C. 38; *Smith v. Coffin*, 6 Shepley, 157; *Com. v. Wyman*, Thach. C. C. 432; *Atwood v. Welton*, 7 Conn. 66; *Jackson v. Gridley*, 18 Johns. 98; *State v. Townsend*, 2 Harring. 543; *Com. v. Bachelor*, 4 Am. Jur. 79.

³ *People v. Harper*, 1 Edm. (N. Y.) Sel. Cas. 180.

When the question is credibility, it is for the jury to determine what weight is to be given to the testimony of one whose immoral and degraded life shows a want of religious sentiment, or a disregard of personal character or reputation. *Bowman v. Smith*, 1 Strobh. 246. See *infra*, § 384.

⁴ That a summary conviction before a magistrate does not incapacitate, see *Cheatham v. State*, 59 Ala. 40.

⁵ *Phil. & Am. on Ev.* p. 17; 6 *Com. Dig.* 353, *Testm. A.* 4, 5; *Co. Litt.* 6 b; 2 *Hale P. C.* 277; 1 *Stark. Evid.* 94, 95; 1 *Greenl. on Ev.* §§ 372, 373. See

Mr. Livingston's criticism, *Livingston's Works*, i. 468. And see cases in subsequent notes.

The infamy of a defendant, evidence of whose declarations may be given as part of the *res gestae*, does not affect their admissibility. *State v. Dellwood*, 33 La. An. 1229; see *supra*, § 291.

⁶ *Com. v. Gorham*, 99 Mass. 420. In Massachusetts, see *Suppl. Rev. Stat.* 607, 803; in New York, see *Donahue v. People*, 66 N. Y. 208; *People v. McGloin*, 91 N. Y. 241; *S. C.*, 1 N. Y. Cr. Rep. 105, 154 (as to rule under code of 1877 and 1878, see *Perry v. People*, 86 N. Y. 353); in Michigan, see *Dickinson v. Dustin*, 21 Mich. 561; in Ohio, *Brown v. State*, 18 Oh. St. 496; in Georgia, *Frain v. State*, 40 Ga. 529; in Indiana, *Glenn v. Cove*, 42 Ind. 60. And see *U. S. v. Biebusch*, 1 McCrary, C. C., per McCrary, C. J. See for other cases *infra*, § 489. See, as to impeaching witnesses in this way, *infra*, § 489. In New York, however, as late as 1869, all convictions of offences punishable by death or imprisonment in the state prison made the convict incompetent as a witness. See, as ap-

§ 364. Where, even at common law, a convict is a party, he may, in order that he may not be wholly remediless, make an affidavit

plying this provision, *People v. Park*, 41 N. Y. 21; aff. S. C., 1 Lans. 263; *Perry v. People*, 86 N. Y. 353.

As there are still States which retain the disqualification of infamy, and as in several States convictions of infamous offences can be introduced to impeach credibility, it may be proper to append, in this place, a summary of the rulings as to infamy.

A witness is rendered infamous by a conviction in the courts of his own country of forgery; *R. v. Davis*, 5 Mod. 74; *Poage v. State*, 3 Oh. St. 229; perjury; *Greenl. Ev.* § 673; *R. v. Teal*, 11 East, 307; subornation of perjury; *Co. Lit.* 6 b; 6 Com. Dig. 353, Testm. A. 5; *Sawyer's Case*, 2 Hale P. C. 141; suppression of testimony by bribery, conspiracy to procure the absence of a witness; *Clancy's Case*, *Fortesc. R.* 208; *Bushell v. Barratt*, *R. & M.* 434; conspiracy to accuse another of crime; 2 Hale P. C. 277; 6 Hawk. P. C. c. 46, s. 101; *Co. Lit.* 6 b; *R. v. Priddle*, 1 Leach C. C. 442; *Crowther v. Hopwood*, 3 Stark. 21; 1 Stark. Evid. 95; *Ville de Varsovie*, 2 Dods. 191; and barratry; *R. v. Ford*, 2 Salk. 690; *Bull. N. P.* 292. But it is said not to be so with the mere attempt to procure the absence of a witness. *State v. Keyes*, 8 Vt. 57.

It is the infamy of the crime, and not the nature or mode of punishment, that destroys competency; *Gilb. Evid.* 140; *Com. v. Shaver*, 3 W. & S. 338; *Schuykill v. Copley*, 67 Penn. St. 386; and, therefore, though a man had stood in the pillory for a libel, or for seditious words, or the like, he was not thereby disabled from being a witness. *Gilb. Evid.* 140, 141; 3 Lev. 426. Outlawry in a civil suit does not render a man incompetent as a witness; *Co. Lit.* 6 b;

2 Hawk. c. 46, s. 21; nor has the mere commission of any offence that effect, unless the party has been actually convicted of it. *Kel.* 17, 13; 1 Sid. 51; *Cowp.* 3. See 11 East, 309.

The fact that a conviction has been suspended by an appeal and superseas does not remove the incompetency it produces. *Ritter v. Press Co.*, 68 Mo. 488.

In Pennsylvania, a person convicted of arson in the night-time of buildings or board-yards in any city or incorporated district is incompetent to testify. Act April 16, 1849, Pamph. L. 664.

That a conviction of bigamy does not disqualify, see *People v. Crapo*, 76 N. Y. 288. As to adultery, see *Com. v. Stevenson*, 127 Mass. 446.

A conviction of grand or petit larceny disqualifies. *Pendock v. Mackinder*, *Willes*, 665; *Com. v. Keith*, 8 Met. 531; *State v. Gardner*, 1 Root, 485; *Lyford v. Farrar*, 11 Foster, 314. In New York, however, the latter has been ruled to go only to the credibility of a witness. *Carpenter v. Nixon*, 5 Hill, 260.

The statutes in Alabama have not changed the common law rule in regard to burglary or grand larceny. *Taylor v. State*, 62 Ala. 164.

If a statute declare the perpetrator of a crime "infamous," this, it seems, renders him incompetent to testify. 1 *Phil. Evid.* p. 18; 1 *Gilb. Evid.* by *Lofft*, 256, 257.

As to infamy in Illinois, see *Bartholomew v. People*, 104 Ill. 601.

In Massachusetts, it was said at common law that a person convicted of the offence of receiving stolen goods, knowing them to have been stolen, is not a competent witness. *Com. v. Rogers*, 7 Met. 500. In Pennsylvania, however,

necessary to his exculpation or defence, or for relief against an irregular judgment, or the like;¹ but it is said that his affidavit cannot be read to support a criminal

Excepted cases where convict may testify.

the contrary doctrine has been advanced by a learned judge. *Com. v. Murphy*, 5 Penn. Law J. 290.

In Louisiana convicted felons are inadmissible. *State v. Mullen*, 33 La. An. 159. As to Texas, see *Webster v. Mann*, 56 Tex. 119.

No disqualification, it was said by Judge Washington, attends at common law a conviction of assault and battery with intent to kill; *U. S. v. Brockius*, 3 Wash. C. C. 99; nor, it was ruled by the Supreme Court of Pennsylvania, the conviction of a sheriff of the offence of bribing a voter previous to his election to the office. *Com. v. Shaver*, 3 W. & S. 338.

A conviction of the offence of obtaining goods by false pretence does not render the party an incompetent witness; *Utey v. Merrick*, 11 Met. 302; nor does a conviction for obstructing the passage of cars on a railroad; *Com. v. Dame*, 8 Cush. 384; nor for being a common prostitute; *State v. Randolph*, 24 Conn. 363; nor for keeping a gaming or bawdy house; *R. v. Grant*, 1 R. & M. 270; *Deer v. State*, 14 Mo. 348; *Bickel v. Fasig*, 33 Penn. St. 463; nor for cutting timber; *Holler v. Ffirth*, Penning. 531; nor for conspiracy to defraud by spreading false news or otherwise; 1 Greenl. Rv. § 373; though the last point has been ruled differently by the United States Circuit Court in the District of Columbia. *U. S. v. Porter*, 2 Cranch C. C. 60.

Conviction of playing faro does not bring incompetency. *Holloway v. Com.* 11 Bush, 344.

Foreign Convictions.—How far a foreign judgment of an infamous offence disables a witness has been the subject of much conflict of authority. In Massachusetts, it has been determined that such conviction does not attach disability; and, after an argument of remarkable learning and vigor, the court came to the conclusion that it was not bound to respect the criminal judgments of the courts, either of neighboring States or of a foreign country, though the record is admissible to discredit. *Com. v. Green*, 17 Mass. 515, 540. See, also, *Campbell v. State*, 23 Ala. 44. Such seems also to be the opinion of the late Mr. Justice Story; Conf. of Laws, §§ 91–93, 104, 620, 625; and of Mr. Greenleaf; 1 Greenl. on Ev. § 376. See also *State v. Ridgely*, 2 Har. & M'Hen. 120; *Carke's Lessee v. Hall*, ib. 378; *Cole's Lessee v. Cole*, 1 Har. & J. 572. The force of the three last cited cases, however, is much weakened by the fact that in them the rejected witnesses were persons sentenced in England for felony, and transported as such to Maryland before the Revolution. In New York a foreign conviction does not disqualify; *Sims v. Sims*, 75 N. Y. 466; *Nat. Trust Co. v. Gleason*, 77 N. Y. 400 (see *infra*, §§ 489, 596 a). In Virginia, *Uhl v. Com.*, 6 Grat. 706, and Alabama, *Campbell v. State*, 23 Ala. 44, the record is rejected altogether. The contrary opinion was held in North Carolina, after an elaborate examination. *State v. Candler*, 3 Hawks, 393. In New Hampshire, a conviction in another State of a crime

¹ *Davis and Carter's Case*, 2 Salk. 461; *R. v. Gardiner*, 2 Burr. 1117;

Atcheson v. Everitt, Cowp. 382; *Skinner v. Perot*, 1 Ashm. 57.

charge.¹ But the same principle which makes a wife admissible against her husband, in cases of violence committed on herself, should render a convict competent to obtain redress for personal injury, when no other evidence could be obtained.

§ 365. Disability by infamy may be removed by the production of a pardon under the great seal.²

Disability
from in-
famy re-
moved by
pardon.

When the person thus rehabilitated is an accomplice, his testimony is subject to the distinctions hereafter stated in respect to corroboration.³

It is essential to establish the identity of the witness with the person pardoned.⁴

To remove infamy, the pardon must be full. Thus, where a

which by the laws of such State disqualifies the party from being heard as a witness, and which, if committed in New Hampshire, would have operated as a disqualification, is sufficient to exclude the party from being a witness; and so in Nevada, *State v. Foley*, 15 Nev. 64; *Chase v. Blodgett*, 10 N. H. 22. See *Hoffman v. Coster*, 2 Whart. 453; *U. S. v. Wilson*, *Baldw.* 90; *Jackson v. Rose*, 2 Va. Cas. 34. Compare *Com. v. Hanlon*, 3 Brewst. 461; *Kirschner v. State*, 9 Wis. 140; Whart. Conf. of L. §§ 107, 769. See *infra*, § 596 a.

Verdict without Judgment.—Conviction, without judgment, works no disability. *Com. Dig.* 354, *Testm.* A. 5; *R. v. Castell Careinlon*, 8 East, 77; *Lee v. Gansell*, *Cowp.* 3; *Bull. N. P.* 392; *Fitch v. Smallbrook*, *Ld. Raym.* 32; *U. S. v. Dickenson*, 2 McLean, 325; *Cushman v. Loker*, 2 Mass. 108; *Com. v. Gorham*, 99 Mass. 420; *People v. Whipple*, 9 Cow. 707; *People v. Herriek*, 13 Johns. 82; *Blaufus v. People*, 69 N. Y. 107; *Skinner v. Perot*, 1 Ashm. 57; *State v. Valentine*, 7 Ired. 225; *Dawley v. State*, 4 Ind. 128. *Infra*, § 574.

Prisoners who have pleaded guilty, but on whom no sentence has been passed, are constantly admitted in

practice as witnesses; and in one of these cases Baron Wood told the man that he would pass sentence upon him, upon his plea of guilty, because he fenced with the questions. *Auderson, B., R. v. Hincks*, 2 C. & K. 464; *S. C.*, 1 Den. C. C. 84. *Infra*, § 445.

In Virginia, upon the trial of a convict from the penitentiary for a felony committed there, another convict confined there for felony is by statute a competent witness for the prosecution. *Johnson's Case*, 2 Grat. 581. As to Missouri, see communication in 10 Cent. L. J. 363.

¹ *Walker v. Kearney*, 2 Str. 1148; *R. v. Gardiner*, 2 Burr. 1117.

² *State v. Blaisdell*, 33 N. H. 388. See Whart. Cr. Pl. & Pr. §§ 521 *et seq.*; and see *Blane v. Rogers*, 49 Cal. 15. See as to pardon by governor under Tennessee Code, *Evans v. State*, 7 Baxt. 12, where it is held that such pardon does not necessarily rehabilitate. As to presumption of restoration to competency under West Virginia statute, see *State v. Williams*, 14 W. Va. 851.

³ *Infra*, § 441; *U. S. v. Jones*, 2 Wheel. C. C. 451.

⁴ *Com. v. Hanlon*, 3 Brewst. 471. This point is fully discussed in Whart. Cr. Pl. & Pr. §§ 521 *et seq.*

pardon remitted to the convict "the residue of the punishment he was sentenced to endure," it was held that his competency as a witness was not restored.¹

Where the disability is attached to the conviction of a crime by the express words of a statute, the pardon will not, according to the better opinion, restore the competency of the offender, the prerogative of the government being controlled by the authority of the express law. Thus if a man be adjudged guilty on an indictment for perjury at common law, a pardon will restore his competency; but the contrary is the case if the conviction is founded on the statute of 5 Eliz. c. 9.²

A pardon granted *after* the sentence of the court has been complied with, *e. g.*, the fine paid or the imprisonment expired, purges disability, and restores competency.³ *Without* pardon, infamy remains,⁴ unless under local law endurance of sentence rehabilitates.⁵ A pardon *before* conviction, when otherwise legal, is equally operative.⁶

Where a witness for the prosecution, in answer to a question by the prisoner's counsel, states that he had been convicted of felony and pardoned, the *production* of the pardon is not necessary to establish his competency.⁷

Pardons are to be construed like grants, favorably to the grantee.⁸

¹ Perkins v. Stevens, 24 Pick. 277; State v. Blaisdell, 33 N. H. 388.

² R. v. Ford, 2 Salk. 689; Dover v. Maestaer, 5 Esp. 92, 94; 2 Russ. on Cr. 595, 596; R. v. Greepe, 2 Salk. 513, 514; Bull. N. P. 292; Houghtaling v. Kelderhouse, 1 Parker C. R. 241; Phil. & Am. on Ev. 21, 22.

"The power of pardon in criminal cases," it is held by the Supreme Court of the United States, "has been exercised from time immemorial, by the executive of that nation whose language is our language, and to whose judicial institutions ours bear a close resemblance. We adopt their principles respecting the operation and effect of a pardon, and look into their books for the rules prescribing the manner in which it is to be used by the person

who would avail himself of it. A pardon is an act of grace, proceeding from the power intrusted with the execution of the laws, which exempts the individual on whom it is bestowed from the punishment the law inflicts for a crime he has committed." U. S. v. Wilson, 7 Pet. 150.

³ U. S. v. Jones, 2 Wheel. C. C. 451; Whart. Cr. Pl. & Pr. §§ 522 *et seq.*

⁴ State v. Benoit, 16 La. An. 273. See, as to restrictions, Whart. Cr. Pl. & Pr. § 522.

⁵ State v. Williams, 14 W. Va. 851.

⁶ Com. v. Bush, 2 Duvall (Ky.), 264. See Garland, *Ex parte*, 4 Wall. 333; Whart. Cr. Pl. & Pr. §§ 222 *et seq.*

⁷ Howser v. Com., 51 Penn. St. 332.

⁸ Wyvil's Case, 5 Co. 496; 2 Hawk.

Thus, an instrument issued by the President of the United States, directing the immediate discharge of one sentenced for mail robbery, was held to be a pardon.¹

The pardon must correctly recite the offence; and a non-recital or misrecital will render it inoperative.²

Where a pardon is obtained by fraud, it is void.³

The subject of conditional pardon belongs more properly to another volume. It is sufficient here to say, that where the condition is that the defendant shall leave the State, and he either does not leave, or, having left, returns, the original sentence revives and may be enforced.⁴ It was said, however, in a case where the condition was merely that the defendant should "depart without delay," that the sentence did not revive on the defendant's returning, after having once left.⁵ When the time for departure is specified in the pardon, it will not begin to run during sickness or incapacity.⁶ A pardon with a condition precedent does not operate until the condition is performed.⁷ Acceptance of the condition, when favorable, may be inferred.⁸

In Massachusetts, conditional pardons are expressly sanctioned by statute, and provisions are given by which the conditions may be enforced.

Whether a foreign pardon rehabilitates a witness convicted in a foreign court depends upon the question whether the sovereign granting the pardon is to be considered as having jurisdiction for this purpose by the law of nations.⁹

P. C. § 13; *Com. v. R. R.*, 1 Grant, 330; U. S. 307; *Flavel's Case*, 8 W. & S. Hunt, *Ex parte*, 5 Eng. (Ark.) 284. 197; *People v. Potter*, 1 Parker C. R. 47; 1 Edm. (N. Y.) Sel. Cas. 335; Compare discussion in Whart. Cr. Pl. & Pr. §§ 522 *et seq.*

¹ *Jones v. Harris*, 1 Strobh. 160.

² U. S. v. Stetter, U. S. Cir. Ct. Phila. Feb. 1852, Kane, J.; *People v. Bowen*, 43 Cal. 439.

³ Whart. Cr. Pl. & Pr. § 532; 2 Hawk. P. C. 533, §§ 8, 9; *R. v. Madocks*, 1 Sid. 430; *Com. v. Holloway*, 44 Penn. St. 210; *State v. McIntire*, 1 Jones (N. C.), 1; *State v. Leak*, 5 Ind. 359.

⁴ *R. v. Aickless*, 1 Leach, 294; *R. v. Thorpe*, 1 Leach, 391; *R. v. Foxworthy*, 7 Mod. 153; *Wells, Ex parte*, 18 How.

State v. Fuller, 1 McCord, 178; *State v. Smith*, 1 Bailey, 283; *State v. Chancellor*, 1 Strobh. 347; *State v. Addington*, 2 Bailey, 516; *Roberts v. State*, 14 Mo. 138; *Opin. of Att. Gen.* 341-5; *ibid.* 368; *Com. v. Haggerty*, 4 Brewst. 329; *Fowler v. Com.*, 4 Call (Va.), 35; and see other cases, Whart. Cr. Pl. & Pr. § 533.

⁵ *Hunt's Case*, 5 Eng. (Ark.) 284.

⁶ *People v. James*, 2 Caines, 57.

⁷ *Flavel's Case*, 8 W. & S. 197.

⁸ *Victor, In re*, 31 Ohio St. 206.

⁹ See Whart. Conf. of Laws, § 938.

In Pennsylvania the Revised Code (1860) provides: "Where any person hath been, or shall be convicted of any felony, not punishable with death, or any misdemeanor punishable with imprisonment at labor, and hath endured, or shall endure the punishment to which such offender hath been or shall be adjudged for the same, the punishment so endured shall have the like effects and consequences as a pardon by the governor, as to the felony or misdemeanor whereof such person was so convicted: *Provided*, That nothing herein contained, nor the enduring of such punishment, shall prevent or mitigate any punishment to which the offender might otherwise be lawfully sentenced on a subsequent conviction for any other felony or misdemeanor, and that the provisions of this section shall not extend to the case of a party convicted of wilful and corrupt perjury."

§ 366. A child may be very far from maturity, but he may be equally far from idiocy. His memory may be indistinct, but this peculiarity belongs to the old as well as to the young. He may be incapable of expressing himself with precision, but so are multitudes of witnesses whose competency is indisputable. On the other hand, he is comparatively free from those prepossessions by which the perceptive powers are distorted, his memory is impressible,¹ and he is incapable of maintaining a consistent false narrative. It must be remembered, however, that these observations apply only to the border-land between infancy and maturity; to permit a child of under three, or even four, years to be sworn and examined, would be trifling with public justice. Hence the dying declarations of a child of four years have been rejected;² and the admissibility of children of that age as witnesses may be on the same reasoning disputed.³ On the other

Admissibility of infants depends on intelligence.

¹ *Infra*, § 578.

² *Pike's Case*, 3 C. & P. 598. *Supra*, § 290.

³ *Infra*, § 387; *State v. Tom*, 8 Or. 179; *People v. McNair*, 21 Wend. 608. While there should be every caution applied as to the possibility of a child being tampered with by parents, or by those to whose influence they are particularly subjected, it should be observed that, so far as spontaneous action

is concerned, the ideas they receive are much more apt to be transferred unchanged to a third person, than those received by adults. "To them," it is well observed by Mr. Amos (*Great Oyer*, 277), "it is a matter of interest to pay particular attention to the precise words which people utter in their presence. They are usually passive recipients of other persons' ideas and expressions; whereas a grown person,

hand, the testimony of a child between four and five,¹ and that of a child between six and seven, have been received on the trial of an indictment for an attempt to ravish.² And we may regard it as settled, that wherever there is intelligence enough to observe and to narrate, there a child, having a due sense of the obligation of an oath, can be admitted to testify.³

§ 367. The admissibility of infants, therefore, depends upon the degree of intelligence and of sense of responsibility in the concrete case.⁴ Four years have been, indeed, assigned as a minimum;

when he hears a statement, is apt to content himself with the substance of it, and to modify it in his own mind, and may be afterwards unable to trace back his ideas to the original impressions."

"The degree of corroboration which the testimony of the witness (an infant) requires is a question exclusively for the jury, to be determined from all the circumstances, and especially from the manner in which the child has given her testimony." *Anderson, J., Givens v. Com.*, 29 *Grat.* 835.

¹ *R. v. Holmes*, 2 *F. & F.* 788.

² *R. v. Brazier*, 1 *Leach*, 199; *S. C.*, 1 *East P. C.* 443; *Com. v. Hutchinson*, 10 *Mass.* 225; *Johnson v. State*, 61 *Ga.* 35; *State v. Morea*, 2 *Ala.* 275; and see, to same effect, observations of *Alderson, B.*, in *R. v. Perkin*, 2 *Mood. C. C.* 135; *Cf. Anon.*, 2 *Pen. (N. J.)* 390; *Washburn v. People*, 10 *Mich.* 372; *State v. Le Blanc*, *Mill (S. C.)*, 354; *S. C.*, 3 *Brev.* 339. In *Wade v. State*, 50 *Ala.* 164, a girl of eight years was admitted in a prosecution for sexual assault. *S. P.*, *Givens v. Com.*, 29 *Grat.* 835; *Hill v. State*, 5 *Lea*, 725. But see *Coon v. People*, 99 *Ill.* 368, where a conviction for a sexual assault, based upon the testimony of two girls, aged nine and eleven, whose answers were elicited by leading questions, was set aside. See *Holmes v. State*, 88 *Ind.* 145.

³ *R. v. Powell*, 1 *Leach*, 110; *R. v. Brazier*, 1 *Leach*, 199; *R. v. Williams*, 7 *C. & P.* 320; *R. v. Travers*, 2 *Str.* 700; *State v. Whittier*, 21 *Me.* 341; *Com. v. Hutchinson*, 10 *Mass.* 225; *Com. v. Hill*, 14 *Mass.* 207; *State v. De Wolf*, 8 *Conn.* 98; *Jackson v. Gridley*, 18 *Johns.* 98; *People v. McGee*, 1 *Denio*, 19; *Com. v. Carey*, 2 *Brewst.* 404; *Draper v. Draper*, 68 *Ill.* 17; *Blackwell v. State*, 11 *Ind.* 196; *Washburn v. People*, 10 *Mich.* 372; *State v. Levy*, 23 *Minn.* 104; *State v. Edwards*, 79 *N. C.* 648; *State v. Morea*, 2 *Ala.* 275; *Wade v. State*, 50 *Ala.* 164; *State v. Denis*, 19 *La. An.* 119; *State v. Scanlan*, 58 *Mo.* 204; *Vincent v. State*, 3 *Heisk.* 120; *Logston v. State*, 3 *Heisk.* 414; *Flanagin v. State*, 25 *Ark.* 92; *Warner v. State*, 25 *Ark.* 447; *State v. Jackson*, 9 *Oreg.* 457; *Davidson v. State*, 39 *Tex.* 129; *Brown v. State*, 6 *Tex. Ap.* 287; *Williams v. State*, 12 *Tex. Ap.* 127. See, as to the Ohio limit of ten years, *Act of February 14, 1859*, § 1. As to same limit in *Missouri* see *State v. Scanlan*, 58 *Mo.* 204; and in *Indiana*, *Holmes v. State*, 88 *Ind.* 145.

⁴ *Per Patteson, J.*, *R. v. Williams*, 7 *C. & P.* 320; *McGuire v. People*, 44 *Mich.* 286. See, however, *Com. v. Hutchinson*, 10 *Mass.* 225; *State v. Doherty*, 2 *Tenn.* 80, as to *prima facie* incompetency under fourteen.

"It is said by *Blackstone*, that 'where the evidence of children is ad-

but after this age the question of admissibility is to be decided by the court, as we will presently see, to its own satisfaction, by examining the infant on his knowledge of the obligation of an oath, and the religious and secular penalties of perjury.¹

No absolute presumption from infancy.

§ 368. The preliminary examination thus requisite is usually undertaken exclusively by the trial court,² and it is said that it will require a strong case to sustain a reversal of the ruling of the court examining such a witness.³ When a child is incompetent simply for want of instruction as to the nature of an oath, the practice has been to postpone the case so that the child might in the meanwhile be properly instructed.⁴

Court may examine witness, or continue trial.

mitted, it is much to be wished, in order to render it credible, that there should be some concurrent testimony of time, place, and circumstances, in order to make out the fact; and that the conviction should not be grounded solely on the unsupported testimony of an infant under years of discretion.' 4 Com. 214. In many cases undoubtedly the statements of children are to be received with great caution, but it is clear that a person may be legally convicted upon such evidence alone and unsupported; and whether the account of the child requires to be corroborated in any part, or to what extent, is a question exclusively for the jury, to be determined by them on a review of all the circumstances of the case, and especially of the manner in which the evidence of the child has been given. 1 Phill. Ev. 6, 9th ed." Roscoe's Cr. Ev. 8th ed. 115.

¹ 1 Leach, 430, n.; R. v. Nicholas, 2 C. & K. 246; Powell's Evidence, 4th ed. 29; Ake v. State, 6 Tex. Ap. 398.

² R. v. Perkins, 2 Mood. C. C. 135; State v. Whittier, 21 Mo. 341; Com. v. Hutchinson, 10 Mass. 225; Com. v. Mullins, 2 Allen, 295; State v. Lattin, 29 Conn. 389; Den v. Vaneleve, 2 South. 589; Simson v. State, 31 Ind.

90; State v. Edwards, 79 N. C. 648; Com. v. Le Blanc, 3 Brev. 339; Peterson v. State, 47 Ga. 524.

³ Anon. 2 Pen. (N. J.) 930; Peterson v. State, 47 Ga. 524; State v. Jefferson, 77 Mo. 136.

⁴ See note to R. v. White, 1 Leach, 430. In Carter v. State, 63 Ala. 53, it was said by Manning, J.: "So essential is it to the repression of crime that the public shall not in all cases be deprived of the testimony of those, however low in the scale of civilization, who have memory and intelligence enough to relate what they have seen and know, that formerly a statute of this State made it the duty of the presiding judge, whenever a negro slave was a witness, 'to explain to him or her the nature of the oath to be administered, and to state to him or her the punishment for swearing falsely, it being assumed that such instruction would be sufficient to qualify those most ignorant in these particulars, who were not deficient of mind, to be sworn and give evidence to be considered by the jury.' Clay's Digest, 473, § 9. When, however, a child of tender years is produced as a witness, it is the duty of the presiding judge to examine him or her without the interference of counsel further than

When, however, "the infirmity," to use the language of Pollock, C. B., "arises from no neglect, but from the child being too young to have been taught, I doubt whether the loss in point of memory would not more than counteract the gain in point of religious instruction."¹ A temporary suspension, however, to enable a child to recover from agitation, is not merely unobjectionable but proper.² The preliminary examination of the witness must be public, not private.³

§ 369. Capacity, at the time of the occurrence, to perceive the facts testified to, as we shall presently see,⁴ is one of the conditions of credibility. To make such incapacity ground for the *exclusion* of a witness, however, it must be absolute, and must involve an extinction of the faculty by which the particular object could have been perceived. Loss of the applicatory sense, *after* the period of observation, does not affect the admissibility of testimony. Hence, a blind man is competent to testify to what he saw prior to his blindness; a deaf man to what he heard prior to his deafness.⁵ But a person incapable of perception is *pro tanto* incapable of testifying. If the incapacity of perception is total—*e. g.*, idiocy—then the incapacity for giving evidence is total.⁶ Where, however, the incapacity of perception is partial, the incapacity to testify cannot be extended beyond the limits of such incapacity to perceive.⁷ Thus a blind man can tes-

Deficiency in percipient powers, if total, excludes.

the judge may choose to allow, in regard to the obligation of the witness's oath, and in proper cases, to explain the same to one intelligent enough to comprehend what he says, and then to determine whether or not such child shall be sworn and permitted to testify."

¹ R. v. Nicholas, 2 C. & K. 246.

² State v. Scanlan, 58 Mo. 206, Lewis, J.

³ In a trial for rape in Indiana, the prosecuting witness was a child only six years old at the time of the trial, which was sixteen months after the alleged offence. The witness being excepted to, she was examined by the court, who, not being satisfied, appointed two gentlemen, who retired

with the child to a private room, and after some time reported to the court that "in their opinion her testimony ought to be heard, but received with great allowance." It was held that this reference was irregular, and that the court ought to have acted on its own judgment, at a public examination in the defendant's presence. *Simson v. State*, 31 Ind. 90. See *State v. Morea*, 2 Ala. 275.

⁴ *Infra*, § 373.

⁵ Weiske, *Rechtslexicon*, xv. 253; Schneider, *Lehre der Beweise*, § 112. *Infra*, § 374.

⁶ *Coleman v. Com.*, 25 Grat. 865.

⁷ See, as to color-blindness, 3 Wharton & St. Med. Jur. 4th ed. (1884), § 948; *infra*, § 373.

tify as to what he has heard, and a deaf man as to what he has seen.¹ Whether a person drunk, or asleep, or etherized at the time of the event, is competent, has been elsewhere discussed.² Stupor, no matter from what cause, may be always shown to affect credibility.³

§ 370. Insanity, unless amounting to entire extinction of reason, is not now considered ground for absolute exclusion from the witness box.⁴ It is, however, admissible, in order to affect his credit,

¹ *Harrod v. Harrod*, 1 Kay & J. 9; *Morris v. Lennard*, 3 C. & P. 127; *R. v. Powell*, 1 Leach, 110; *R. v. Traversa*, 2 Str. 700; *R. v. Ruston*, 1 Leach, 408; *R. v. Wade*, 1 Mood. C. C. 86; *Com. v. Hill*, 14 Mass. 207; *State v. De Wolf*, 8 Conn. 93.

² 1 Whart. & St. Med. Jur. §§ 245, 789; 3 ib. (4th ed.) 594. In *Beale's Case* (3 ibid. §§ 245, 596, 612), and *Green's Case* (ibid. § 597), convictions were sustained on the testimony of women as to what took place when they were etherized. But these convictions are open to grave criticism. Ibid.

³ *Tuttle v. Russell*, 2 Day, 201; *Hartford v. Palmer*, 16 Johns. 143; *Sisson v. Conger*, 1 Thomp. & C. 564; *Duffy v. Com.*, S. C. Penn. 1878; *Fleming v. State*, 5 Humph. 564. *Infra*, § 384 a.

⁴ 1 Whart. & St. Med. Jur. § 342; 2 *Heard's Lead. Cas.* 20; *R. v. Hill*, 5 Cox C. C. 259; S. C., 2 Den. C. C. 254; 5 Eng. L. & Eq. 547; *Fennell v. Tait*, 1 C., M. & R. 584; *Spittle v. Walton*, L. R. 11 Eq. 420; *Com. v. Reynolds*, cited 10 Allen, 64; *Kendall v. May*, 10 Allen, 59; *Holcomb v. Holcomb*, 28 Conn. 177; *Livingston v. Kiersted*, 10 Johns. 362; *Coleman v. Com.*, 25 Grat. 865; *Campbell v. State*, 23 Ala. 44. *A fortiori*, with witnesses whose minds are merely feeble. *District of Columbia v. Arms*, U. S. Sup. Ct. 1883.

As to witnesses imbecile from old age, see *McCutcheon v. Pigne*, 4 Heisk. 563.

In *R. v. Hill*, *supra*, a lunatic patient, who had been in confinement in a luna-

tic asylum, and who labored under the delusion, both at the time of the transaction and of the trial, that he was possessed by 20,000 spirits, but whom the medical witness believed to be capable of giving an account of any transaction that happened before his eyes, and who appeared to understand the obligation of an oath, and to believe in future rewards and punishments, was called as a witness on a trial for manslaughter. It was held that his testimony was properly received in evidence; and that where a person under an insane delusion is called as a witness, it is for the judge, at the time, to say whether he is competent to be a witness, and it is for the jury to judge of the credit that is to be given to his testimony. If upon his examination upon the *voir dire* he exhibits a knowledge of the religious nature of an oath, it is a ground of his admission. If the judge has admitted a witness to give evidence, but upon proof of subsequent facts affecting the capacity of the witness, and of observations of his subsequent demeanor, the judge changes his opinion as to his competency, the judge may stop the examination of the witness, strike his evidence out of the notes and direct the jury to consider the case exclusively with reference to the evidence of the other witnesses. *R. v. Whitehead*, L. R. 1 C. C. 33; 35 L. J. M. C. 186; 14 W. R. 877. See, as to illusions of witnesses, 3 Whart. & St. Med. Jur. 4th ed. (1884) §§ 944-6.

Insane persons subjected to same test.

to prove that a witness was subject to insane delusions;¹ and it is also admissible to prove that he was at the time intoxicated.²

Witness may be examined by judge.

§ 371. If insanity or other mental incompetency be set up as a ground for exclusion, the preliminary examination of the witness is the peculiar province of the court. If the witness, in the opinion of the court, is absolutely incompetent, he is to be ruled out.³ But to justify such exclusion mere streaks of insanity are not sufficient. A man may have many delusions and yet be capable of narrating facts truly ;

Dr. Ordronaux, commissioner in the case of *State v. N. Y. Hospital*, where the question was the credibility of the testimony of an insane witness, comments as follows on the topic in the text :—

“ Courts have always looked with distrust upon the testimony of the insane, because of its generally misleading character. Nor will this appear surprising when we recall the disturbing influences produced by insanity upon the moral as well as the mental faculties. From the earliest of our decisions, touching the competency of such evidence (*Livingston v. Kiersted*, 10 Johns. 362, A. D. 1813; *Hartford v. Palmer*, 16 *ibid.* 143, A. D. 1819), down to the present day, this form of proof has never been considered *prima facie* wherever any other relating to the same series of facts could be obtained. The reasons for this are aptly set forth in the case of *Holcomb v. Holcomb*, 28 Conn. 181 A. D. 1859, where the court, commenting upon the value of such testimony, said :—

“ The inlets to the understanding may be perfect, as far as any human eye can discern ; the moral qualities may all be healthy and active ; the conscience may be sensitive and vigilant, and the memory may be able to perform its office faithfully, and yet, under the influence of morbid delu-

sions, reason becomes dethroned, false impressions from surrounding objects are received, and the mind becomes an unsafe depository of facts. . . .

“ The force of all human testimony depends as much upon the ability of the witness to observe the facts correctly, as upon his disposition to describe them honestly ; and if the mind of the witness is in such a condition that it cannot accurately observe passing events, and if erroneous impressions are thereby made upon the tablet of the memory, his story will make but a feeble impression upon the hearer, though it be told with the greatest apparent sincerity. ”

The Minnesota statute excluding witnesses on the ground of unsoundness or intoxication is held to be merely affirmatory of the common law. *Canady v. Lynch*, 27 Minn. 435.

¹ *State v. Kelley*, 57 N. H. 549 ; and cases cited *infra*, § 371.

² *Infra*, § 384 a ; *Duffy v. State*, S. C. Penn, 1878 ; *State v. Buckley*, 72 N. C. 358 ; and cases cited to § 370. As to drunkenness at time of trial, see *infra*, § 384 a.

³ *Powell's Ev.* 4th ed. 28 ; *R. v. Hill*, 5 Cox C. C. 259 ; *S. C.*, 2 Den. C. C. 254 ; *Holcomb v. Holcomb*, 28 Conn. 177 ; *Livingston v. Kiersted*, 10 Johns. R. 362 ; *Coleman v. Com.*, 25 Grat. 865. *Supra*, § 357, *infra*, § 374.

and in any view, the existence of such delusions on his part, at the time of trial, goes to his credit and not to his competency.¹ Evidence of mental disturbance, at the time of the events narrated, can be received to affect credibility.² But the court, on being convinced of the incompetency of the witness at the trial, may at any period stop the examination, and direct the jury to disregard the witness's testimony.³ This duty, as we have seen, arises when witnesses testify as to what happened to them when unconscious, or when they are more or less intoxicated at the trial.⁴

§ 372. An inquisition of lunacy may be *prima facie* evidence of incompetency,⁵ but does not exclude if upon hearing the court find that the witness understands the nature of an oath, and the facts of which he speaks.⁶ When there is no inquisition, the burden is on the party disputing sanity.⁷

Inquisition
only *prima facie*
proof.

§ 373. We have already noticed that where it appears that a witness was absolutely deficient of the requisite perceptive powers at the time of the event to be testified to, he may be excluded by the court.⁸ Instances of this kind, however, are of very rare occurrence. Very frequent, on the other hand, are those in which the credibility of witnesses is attacked on the ground of deficient or perverted perceptive powers.⁹ These cases may be grouped as follows:—

Capacity to
observe a
condition of
credibility.

(1) *Defect in Discrimination*.—Discrimination is the basis of perception, without which perception is useless for any rational purpose.¹⁰ Unless the eye of a witness discriminates between colors, his testimony as to colors is worthless; and color-blindness in such

¹ R. v. Hill, 2 Den. C. C. 254; S. C., 5 Cox C. C. 259; R. v. Whitehead, L. R. 1 C. C. R. 33; Spittle v. Walton, L. R. 11 Eq. 420; State v. Kelley, 57 N. H. 549; Campbell v. State, 23 Ala. 44.

² State v. Kelley, 57 N. H. 549; Fairchild v. Bascomb, 35 Vt. 398; Holcomb v. Holcomb, 28 Conn. 177; Rivara v. Ghio, 3 E. D. Smith, 264. See Bell v. Rinner, 16 Oh. St. 45. In Vermont the right to examine *voir dire* is disputed. Robinson v. Dana, 16 Vt. 474.

³ R. v. Whitehead, L. R. 1 C. C. 33.

⁴ See 2 Whart. & St. Med. Jur. §§ 245–66. *Infra*, 375, 384 a.

⁵ Hoyt v. Adees, 3 Lansing, 173.

⁶ See Kendall v. May, 10 Allen, 63. *Infra*, § 374.

⁷ *Infra*, § 729.

⁸ *Supra*, § 379.

⁹ See Ram on Facts, 3d Am. ed. ch. ii.

¹⁰ See Bain's Study of Character, 258–59. "Discrimination is the very beginning of our intellectual life." Bain's Mind and Body, 81, adopted in Calderwood, Mind and Brain, 218.

cases (*e. g.*, where a witness is called upon to testify as to the color of a railway or ship signal) operates to destroy credibility. Color-blindness has been of recent years the object of much investigation, having been productive not only of serious casualties in war, through the mistaking of the color of uniforms and of flags, but of many railroad disasters, through mistake of signals. By eminent specialists in this department (de Fontenay and Holmgren) color-blindness is classified as follows: (1) Total; (2) Partial; consisting of, (*a*) complete blindness of red, green, or violet; (*b*) incomplete color-blindness; (*c*) feeble sense of color. Of 9659 persons examined, of whom 6945 were above the age of sixteen, 217 were color-blind. Of 4492 adult males, 165 were color-blind, and so were 3 per cent. of 2737 railroad officials examined.¹ A power, also, to discriminate perspective is necessary to enable an observer to decide as to distances; a power to discriminate between refraction and reality is necessary to enable him to determine whether what he sees is the object itself, or only its exaggerated reflection. The most dispassionate and the most accurate of observers, we are told, when on one moving vessel, fail in taking a correct view of the absolute course of another vessel. We cannot overcome the instinctive belief that it is our own vessel that is stationary, and that it is the other alone that moves. Hence admiralty courts have held that the testimony of mere observers on board a vessel is to yield, in cases involving the course and deflection of the vessel, to that of those who hold her helm in their hands.² What is true of the sea, is true, though in varying degrees, of the land.³ We all occupy stand-points which make us, however honest, more or less incapable of perfectly accurate observation. Until allowance be made for this incapacity, no testimony can be properly weighed. As to *sounds*, the same distinction may be taken. Whether a witness can give his opinion as to what a sound means is hereafter discussed;⁴ but there can be no question that when the issue depends upon the identification of tunes or sounds, a witness's credibility, in this respect, depends on his knowledge and capacity for discrimination. A particular tune, it

¹ See 3 Wh. & St. Med. Jur., 4th ed. § 948.

² For mistake arising from refraction in land, see De Boismont on Hallucinations, 105; 3 Wh. & St. Med. Jur., § 937.

³ McNally v. Meyer, 5 Ben. 239. See Ram on Facts, 3d Am. ed., ch. ii.

⁴ *Infra*, §§ 459-60.

is alleged, is sung by a mob as a mark of treasonable purpose; and the effect of the evidence on this point depends in part upon how far the witnesses were able to discriminate between tunes. The whistle of a steam-engine, when indicating danger, will be full of meaning to a railroad officer, while the same signal would be unnoticed by an Indian who might be loitering in the neighborhood. On the other hand, the railroad officer would be incapable of discriminating between sounds whose meaning the Indian would at once catch. Of course these remarks are peculiarly applicable to cases where the object testified to by a witness is something of which he is ignorant.¹ A great world exposition may be visited by six specialists, each one thoroughly versed in his own department, and thoroughly ignorant of the departments of his associates. If one of these should be examined as to what he saw, he would be able to give the differentia of his own specialty, but the differentia of no other.

(2) *Lack of Interest.*—This may come from frivolity, as in the case of the fop mentioned in the "Spectator," who saw nothing in a large public assembly but the dresses of certain persons of fashion; or from absorption in some other topic, as was the case with the great scientists whom Gulliver noticed, who, during their periods of study, had flappers by them to call their attention to any object which it might be their duty to notice. Swift's satire was no doubt pointed to the affectation of absorption he elsewhere commented on in philosophers; but there are many others besides philosophers whose testimony as to what took place in their presence is open to this criticism. "I was so much engaged at the time that I did not observe what was done or said until my attention was called to it." A witness, under such circumstances, is apt to work into what he himself saw or heard that which was told him at the time by the person arousing his attention; and even when this is not the case, the fact of his absorption in another topic is to be taken into consideration when determining the accuracy of his perception. Persons, also, who are absorbed in any great personal grief, or whose

¹ Illustrations may be found in rape cases, as noticed in Whart. Crim. Law, 8th ed. § 565. See *Barrett v. Williamson*, 4 McL. 589; *Willet v. Fister*, 18 Wall. 91; *People v. Bodine*, 1 Edm. (N. Y.) Sel. Cas. 36; *Julke v. Adam*, 1 Redf. (N. Y.) 454; *Jacksonville R. R. v. Caldwell*, 21 Ill. 75; *Durham v. Holman*, 30 Ga. 619; *Evans v. Lipcomb*, 31 Ga. 71; *Hitt v. Rush*, 22 Ala. 563. *Infra*, § 377. See, also, more fully, 3 Whart. & St. Med. Jur., §§ 924 *et seq.*

faculties are paralyzed by a sudden shock, lose their power of discrimination as to passing events.¹ We notice this in the paucity of details given in the narratives of persons relating the facts of a crime of which they were the surprised and terrified witnesses. Want of circumstantiality infects other narratives with discredit,² but does not so affect these.

(3) *Partisanship and Prejudice*.—Witnesses to a riot in which partisanship runs high are apt to be inflamed by sympathy with their friends and hatred to their foes. We find this illustrated in the trials of the Philadelphia rioters in 1844.³ The “Native American” witnesses testified, when speaking of specific collisions, to great ferocity in the appearance of the champions of the opposite party, and to great calmness and self-control in their own champions; while the Irish witnesses testified to the contradictory opposites.

(4) *Expectancy*.—That which is ardently and confidently expected is sometimes believed to be seen by a person of a vivid and overstrained imagination. Mr. Dendy gives us a case in which a crowd of persons was collected in the neighborhood of Northumberland House by the confident assertions of two or three gentlemen, made for the purpose of experimenting on this very faculty, that they saw the stone lions on the door-way wag their tails. “They are doing it again; look;” and several of the by-standers thought they saw the tails moving. Some of the phenomena in table-turning may be thus explained; and a good many of the discrepancies in cases of identity.⁴ Symptoms of disease, also, when expected, are

¹ See illustrations in Carpenter’s *Ment. Phys.*, art. 359 *et seq.*; 3 Wh. & St. Med. Jur., §§ 926 *et seq.*

² *Infra*, § 379.

³ See Whart. on Hom. App. Compare *Chicago R. R. v. Triplett*, 38 Ill. 482; *Lanham v. State*, 7 Tex. App. 126.

⁴ After the disappearance of Dr. Parkman, when public curiosity was greatly strained on the question whether he had been seen after the day on which it was alleged that he had been murdered, several entirely honest witnesses were convinced that they had seen him in some of his old

haunts at the time when, there is now no question, he was dead. Numerous have been the persons who, since the disappearance of Charlie Ross, have honestly declared that they recognized the lost child in places so remote from each other, and at times so close, that it is clear that some of them, at least, were mistaken. The same remarkable aberration of the perceptive powers was illustrated in the trials consequent on the Lord George Gordon riots, and on the Philadelphia riots in 1844, already noticed. In each of these cases the collisions were brought

often believed to exist. A person, for instance, imagines he has swallowed a pin, and then believes that he feels lacerations in the

about by intense religious animosity. There was a conviction among certain classes of Protestants, and especially among those from the north of Ireland, that the Roman Catholics were about to rise to murder the foes of their church, and that 'certain well-known and conspicuous Roman Catholics were to be foremost in the work of blood. There was a conviction among certain classes of the Roman Catholics that certain prominent Protestant leaders were engaged in preparing for a slaughter of Roman Catholics, and the destruction of Roman Catholic churches. When the leading rioters were tried, it is remarkable how ubiquitous these champions, on both sides, are sworn to have been, and yet at the same time what vanishing properties they appear to have possessed. In the Philadelphia cases, for instance, when the Protestant rioters were on trial, witnesses from the opposite ranks were found in abundance to testify to the activity of certain leading Protestant agitators in the fray; which participation was negatived by witnesses for the defence. The same condition of things was exhibited when the Roman Catholic rioters were on trial; and it was noticed that one prominent and very obnoxious Roman Catholic alderman was sworn to have been conspicuous in so many distinct operations of mischief that this very multiplicity of inconsistent employments gave strong corroboration to the testimony of his friends that during the whole of the riots he kept quietly at his home. The same observation may be made as to the English prosecutions of the Roman Catholics under the auspices of Titus Oates. That

Oates knowingly perjured himself there is no question. But there were other witnesses for the prosecution whom we cannot so readily dispose of, as they were persons whose honesty of purpose, whatever we may say of their susceptibility to excitement, was unquestioned and unquestionable. The only solution is that here proposed—weak capacity for the perception of identity, acted on by powerful distorting prejudices. The mental eye, never very accurate, is overstrained. It is feared, or hoped, or even believed, that a particular person will be in a particular place. Somebody else is converted into that particular person.

Are such transmutations or idealizations of appearances dependent upon public excitement, as in the cases just mentioned? It would be fortunate for public justice if they were, since in this way our distrust would be limited to cases which involve public excitement. But so far from this being the case, we find that the same deranging and transmutive influence is exercised, on many minds, by any intense personal longing. There are few impostors, striving to seize upon some vacant chair in a desolate household, that have not had at least some sort of temporary recognition of this class. We have before us a French trial, of which the basis was the disappearance of a young girl from a peasant's home. Two years afterwards, a girl, much resembling the lost child, made her appearance in the neighborhood, and was greeted by some of the neighbors as the lost child reappeared. The new-comer, not originally an impostor, but under the influence of one of those not infrequent psychical conditions in which self de-

bowels such as that which a swallowed pin might be supposed to produce. Symptoms may thus be detailed which are unreal, and yet which may be honestly believed in.¹

(5) *Deception*.—The discrimination of the most observant may be baffled by disguises assumed in order to promote or impair identification.²

§ 374. A witness may have been capable of perceiving yet be incapable of narration. He may have no powers of speech, and have no means of expressing himself by signs. He may have become insane since the occurrences he is called upon to relate. If, however, such incapacity is temporary, the court will in proper cases direct an adjournment so that it may be overcome.³ But the application must be made before the jury is sworn.⁴ And his case must be one which promises a speedy restoration.⁵

§ 375. Deaf and dumb persons were formerly regarded as idiots, and therefore incompetent to testify; but the modern doctrine is that if they are of sufficient understanding, and know the nature of an oath, they may give evidence either by signs, or through an interpreter, or in writing.⁶

celt and epidemic delusion mingle, assumed the part thus assigned to her, and appeared in the bereaved home. The strangest part of the procedure was that she was welcomed by the family as really the person she claimed to be; and it was not until months had passed, and a series of counter recognitions sprang up from the family to which she really belonged, that the delusion was dispelled. Lady Tichborne's recognition of the claimant as her lost son is a more familiar illustration of the same phenomenon. (1 Crim. Law Mag. 3-4.) She was passionately convinced that he would certainly reappear; and his reappearance in the person of the claimant she believed. The same criticism applies to Lady Vane's declarations in the Vane Case, before Malins, V. C., December, 1876. Another illustration to the same effect is

given by Dr. Wigan (*Duality of the Mind*, 56): "I was in Paris at a *soirée* given by M. Bellatt, some days after the execution of the Prince of Moskawa. The usher, hearing the name of M. Maréchal *ainé* (the elder), announced M. le Maréchal Ney. An electric shudder ran through the assembly, and, for my part, I own that the resemblance to the prince was for the moment as perfect to my eyes as the reality." Compare Morgan's Case, *infra*, § 804.

¹ See *supra*, § 271.

² See De Boismonet, *op. cit.* 105.

³ R. v. White, 1 Leach, 430, n. a. *Supra*, §§ 368-9, 371.

⁴ R. v. Wade, 1 Mood. C. C. 86; R. v. Kinloch, 18 How. St. Tr. 402.

⁵ *Supra*, § 368.

⁶ 1 Hale P. C. 34; R. v. Ruston, 1 Leach C. C. 408; R. v. Wade, 1 Mood.

A deaf mute may be permitted to express himself in writing, if this be the mode in which he can be better understood, or through a sworn interpreter by whom his signs can be interpreted.¹ Such interpretation is not hearsay,² nor is it excluded by the fact that the witness can write.³

§ 376. Pecuniary interest in a case is by no means the only influence by which bias, on the part of a witness, is produced. Relationship, party sympathy, personal affection, influence the perceptive powers at least as effectively as does pecuniary interest; and it is easy to conceive of cases in which the guilt of perjury may, in certain very rude or very corrupt conditions of society, appear to be not so great as the guilt of disclosing a confidence.⁴ Mendacity, also, may be inbred in a race accustomed to long subjection, and to the habits of

Bias to be taken into account in estimating accuracy of witness.

C. C. 86; *Morrison v. Lennard*, 3 C. & P. 127; *Com. v. Hill*, 14 Mass. 207; *State v. De Wolf*, 8 Conn. 93; *People v. McGee*, 1 Denio, 19; *Snyder v. Nations*, 5 Blackf. 295. See *supra*, § 368; and see 1 Whart. & St. Med. J. §§ 95, 461. See *Harrod v. Harrod*, 1 K. & J. 9, and cases in next section.

¹ *R. v. Ruston*, 1 Leach C. C. 408; *R. v. Steel*, 1 Leach, 452; *Morrison v. Lennard*, 3 C. & P. 127; *Com. v. Hill*, 14 Mass. 207; *State v. De Wolf*, 8 Conn. 93; *Snyder v. Nations*, 5 Blackf. 295.

² *Supra*, § 224.

³ *State v. De Wolf*, 8 Conn. 93.

⁴ "According to the received code of honor, when a lady's reputation is concerned, a gentleman is bound to act like the loyal servant who (in 1716), when twitted with having sworn falsely to save Stirling of Keir's life, said he would rather trust his soul with God than his master's life with the Whigs." *London Quarterly Rev.* Jan. 1878. Art. on Lord Melbourne.

If we should judge from some of the recent English election cases, we might conclude that this preference still continues, and that the reluctance

to trust a master's seat to Tories is as great as is the reluctance to trust a master's life to Whigs. Bribery disqualifies; bribery is an indictable offence; bribery is shown to have been lavishly employed; but the agent who employs it is a Mr. Smith or a Mr. Jones, who never was heard of before or after the election, whom nobody on either side employed, and whom nobody on either side knew. And in inquiries instituted in the United States in cases of alleged bribery, the identity of the persons bribing is either clothed in the same mystery, or, when certain persons are identified as being concerned in the illegal act, these persons uniformly swear they know nothing about it. So generally is this the case that it is now recognized that no case of bribery can be proved, unless (1) by some one of the parties having some great pecuniary or political inducement to disgrace his associates; (2) by some innocent by-stander fortuitously hearing part of the transaction; or (3) by extrinsic facts from which a case of guilt can be inferred. 1 *Crim. Law Mag.* 6.

prevarication and deceit which such subjection produces. Hence the standard of truthfulness is much lower in a race accustomed to such subjection than in a race accustomed to dominancy. Professor Lorimer, of Edinburgh, eminent both as a jurist and a philanthropist, when treating of the relative responsibility of races, thus writes: "My friends, who hold colonial judgeships, tell me that if they were to send to prison all witnesses who tell lies in their courts, there would very soon be no free negroes at all, and the beneficent object of emancipation would be defeated."¹—Where, to view the question generally, all restrictions on admissibility are removed, and proof of interest goes only to credibility, influences of all kinds are objects of consideration in determining how far credibility exists. Credibility, therefore, so far as it depends upon the capacity for accurate narration, is relieved from the obstructions produced by the old rules, and is determinable by the ordinary laws of free logical criticism. In criminal trials, though the abolition of exclusions on ground of interest makes little change, a very great change has been produced by the statutes now generally adopted enabling defendants to be examined in their own behalf. But aside from this conspicuous case of rehabilitation in the face of the most powerful bias, there are no cases in which party sympathy, personal friendship, family affection, operate, as a rule, so effectively as they do where life and liberty are at stake. In such cases, while (unless in the relationship of marriage, to be hereafter discussed) there is no exclusion on account of bias, no matter how strong, bias is always of importance in determining credibility.² Nor is this exclusively on the ground that bias prompts perjury. So it may sometimes do; but cases of this class are rare, while cases in which bias leads to unconscious perversion of facts are frequent. "Though we are accustomed to speak of memory as if it consisted in an *exact* reproduction of past states of consciousness, yet experience is constantly showing us that this reproduction is very often *inexact*, through the modification which the 'trace' has undergone in the interval. Sometimes the trace has been partially obliterated; and what remains may serve to give a very erroneous (because imperfect) view of the occurrence. And where it is one in which our own feelings

¹ Lorimer's Law of Nations, i. 445.

² U. S. v. Borger, 12 Rep. 134; Hines v. State, 11 Tex. Ap. 238.

are interested, we are extremely apt to lose sight of what goes against them, so that the representation given by memory is altogether one-sided."¹ For these reasons, interest, and party or social sympathy may be always shown in order to discredit a witness,² and the same observation may be made as to near relationship.³ But immorality cannot be introduced to affect credibility unless it be involved in a reputation for untruth.⁴

§ 377. We have already noticed that the credibility of a witness depends (1) on his capacity to observe; and (2) on his capacity to narrate. It should be noticed, in the latter connection, that capacity to narrate may depend in a measure on a special acquaintance with the thing narrated. A physician who has once visited a patient can speak as to

And so of want of familiarity with topic.

¹ Carpenter, *Ment. Phys.* art. 365 *et seq.* Dr. Carpenter adds several curious illustrations.

² *Infra*, §§ 476-7, 488.

The temptation of police officers to prove a case they institute is thus noticed by Serjeant Ballantine in his "Experiences of a Barrister's Life:"—

"It is manifest that in all investigations in criminal matters, the police must form a very material element, and the correctness of the result must greatly depend upon their truth and accuracy. It is, therefore, most important that those who preside upon such inquiries should understand the characteristics of the body, and know something of their organizations. I fear that without such knowledge very serious mischances, and perhaps fatal ones, are likely to arise. I have had constant opportunities of forming a judgment, and my remarks are not founded upon any prejudice against a necessary, and in many respects trustworthy, body of men; but from the conclusions that my experience has forced upon me, I am obliged to say that the evidence given by the police ought to be viewed with a considerable amount of caution.

"Wherever men are associated in a

common object, as in their case, an *esprit de corps* naturally arises, and this not unfrequently colors the testimony of individual members. Their duties are extremely trying, and calculated frequently to cause anger and irritation, feelings which almost invariably induce those possessed by them to exaggerate, if not to invent. The classes against whom they appear are usually without the position that commands consideration, and consequently statements made to their prejudice meet with the more ready belief.

"The feeling of sanctity that probably once attached to an oath becomes deadened in the minds of those who are taking it every day, and an easy manner and composed demeanor are acquired by persons constantly in the witness-box. There exists a very bad habit in the force of communicating their opinions at the outset of an inquiry, thus pledging themselves to views which it is damaging to their sagacity to retract."

³ *Infra*, § 488; *Gangwere's Est.*, 14 Penn. St. 417; *Tardif v. Baudoin*, 9 La. An. 127.

⁴ *Infra*, § 487; *State v. Randolph*, 24 Conn. 363; *Smithwick v. Evans*, 24 Ga. 461.

this visit, but cannot speak as to idiosyncrasies he had no time to study.¹ Farmers will be entitled to credit in agricultural matters, as to which other persons are of no authority;² and so *mutatis mutandis*, as to architects.³ Familiarity with the thing testified to, therefore, though not essential to competency, is of much importance in determining credibility, for a witness is entitled to little credit when he speaks of that which he does not comprehend.⁴ In questions of identity this caution is to be peculiarly observed.⁵

§ 378. But capacity for observation and narration are not the only constituents of credibility. There must also be a capacity to recollect, or, as it is called by high authority,⁶ to "reproduce." As conditions of the trustworthiness of such "recollection," or "reproduction," may be mentioned the following:—

(1) *Consciousness of Identity*.—The witness must be sure that he is the person that saw or heard the thing he narrates. It may happen that by hearing a thing very often we may believe we saw or heard it ourselves. The rule excluding hearsay is based on this condition. A witness, to entitle his statement to reception, must be sure that what he states he himself observed.⁷

¹ See *Barrett v. Williamson*, 4 Mo-Lean, 589; *Durham v. Holeman*, 30 Ga. 619; *Hitt v. Rush*, 22 Ala. 563.

² *Jacksonville R. R. v. Caldwell*, 21 Ill. 75.

³ *Tucker v. Williams*, 2 Hilt. (N. Y.) 562. See *infra*, § 408.

⁴ See fully on this point §§ 19, 160.

⁵ *Infra*, § 802; Whart. on Ev. § 409.

⁶ *Carpenter, op. cit.* art. 340.

⁷ As to untrustworthiness from want of this condition, see *Carpenter, op. cit.* art. 353.

"It is said that there are men who, by often telling a mendacious story as true, come at last to believe it to be true. When this happens, the fact is that a case of the memory of *ideas* comes to be mistaken for a case of the memory of *sensations*."

"How did the man know at first that it was a fictitious story; and how

did he afterwards lose that knowledge?

"He knew, at first, by certain associations; he lost his knowledge by losing those associations, and acquiring others in their stead. When he first told the story, the circumstances related called up to him the idea of himself fabricating the story. This was the memory of the fabrication. In repeating the story as real, the idea of himself fabricating the story is hurried over rapidly; the idea of himself as actor in the story is dwelt upon with great emphasis. In continued repetitions, the first circumstance being attended to as little as possible, the association of it grows weaker and weaker; the other circumstance engrossing the attention, the association of it grows stronger and stronger, till the weaker is at last wholly overpowered by the

(2) *Consciousness of Succession as to Time*.—It must not be, “I see this now;” but “I saw it at some prior time.” We must, therefore, add to the consciousness of identity the consciousness of that identity existing substantively at the time specified. Upon the time thus fixed for the act depend in a large measure its juridical bearings.¹ When was it, for instance, that a witness states that a document claimed to be forged was executed? When was it that he saw a person at a particular place? It may be that to make out a false case of *alibi*, the facts belonging to one point of time are transferred to another at which it is proposed to fix the *alibi*.² But unless by some such process facts are transferred in a body from one date to another, there will be a want of that circumstantiality which is so important an element in credibility. And when a body of facts is thus transferred to a false date, this very circumstantiality enables the falsehood to be the more readily detected. But no fact can be stated without some date assigned to it, even though the date be merely negative, *i. e.*, if the thing is not happening now, it happened before the present moment. And credibility is apt to diminish in proportion to the failure of precision as to date.

(3) *Location in Space*.—This is also an essential condition of reproduction by memory. “In the original act of observation I must have been in some place, and the object observed must have sustained some relation to attending or accompanying objects. Neither myself nor the object can ordinarily be recalled without some of these accompaniments involving relations to space.”³

(4) *Derangement of the Associative Powers*.—On these powers, as has been seen, reproduction by memory depends.⁴ To recall an

stronger, and ceases to have any effect.” Mill on the Human Mind, vol. i. 333.

¹ See Porter on Hum. Int. § 273.

² A case of this is reported in 1 Crim. Law Mag. 8; 17 Alb. L. J. 40.

³ Porter, *ut supra*, § 273.

⁴ See New Quar. Mag. April, 1880, p. 310. As an illustration of the way in which recollections may be mistaken for impressions—in other words, of the way in which what we have heard may

be mistaken for what we have ourselves experienced—may be mentioned Disraeli's speech in 1852, in which he introduced as original into a panegyric of the Duke of Wellington what was substantially an extract from a eulogium delivered many years before by Thiers, on Marshal St. Cyr. Cobden, in a letter of November 12, 1852 (2 Cobden's Life, 122), speaks of this “escapade” as helping to demoralize the protectionists; and it seemed at the

isolated fact, if this were possible, would be to recall something which, as it had no relation to past life, can have no relation to present conduct. The fact must have attached to it not only time and place, but collateral circumstances; and in proportion to the accumulation about it of supporting facts does its credibility increase. But the powers of association are subject to various derangements, among which the following may be specified. (a) *Inert association*, arising sometimes from congenital defects, sometimes from the enfeebling effects of time,¹ sometimes from the habit of adjusting

time a discreditable piracy. Disraeli gave no explanation, but Mr. Morley, in anote, supplies the following: "It," the passage in question, "had already appeared in an article in the Morning Chronicle, in 1848; but the writer, a brilliant man well known in society, came forward to say that it was Mr. Disraeli who had called his attention to the passage from Thiers. The 'escapade,'" says Mr. Morley, than whom there is no one better qualified to speak on this point, "was singular, and it was certainly unfortunate, but men of letters, who know the tricks that memory is capable of playing, will hardly think it is incapable of explanation." Coleridge's alleged plagiarisms from Schelling may be explained on the ground that he made the translation, put it away among his papers, and then when it turned up afterwards supposed it was his own. And as both he and Disraeli were fully capable of producing the passages in question, such a supposition is not strange in either case.

¹ "The impairment of the memory in old age commonly shows itself in regard to new impressions; those of the early period of life not only remaining in full distinctness, but even, it would seem, increasing in vividness, from the fact that the Ego is not distracted from attending to them by the continual influx of impressions produced by passing events." Carpenter's Ment. Phy-

siology, art. 351. Illustrations will be found in Porter on the Human Intellect, § 299. Dr. Carpenter attributes this phenomenon to the peculiar plasticity of the brain in childhood. President Porter notices other influences tending to the same result. "The news, the markets, the politics, the literature, the society that occupied his attention so exclusively (in earlier days), are now less attended to, because they are less cared for. In place of an intent and absorbed devotedness to the present, there is a more frequent review of the past. Old scenes are described, old books are read, old companions are talked of, old stories are repeated. The best energies of the mind are given to these objects, while the mind scarcely heeds, or with enfeebled interest, the scenes, the persons, and events that are present. For this reason, recent objects are so readily forgotten, and the singular contrast is furnished of the memory peculiar to the aged—most tenacious of objects and events that occurred longest ago, and readily forgetful, if forgetful at all, of those that were most recent." Porter, Human Intellect, § 299.

Two theories, it will be thus observed, are proposed to account for the retentiveness of memory. The first (the physical) assumes a substance on which impressions are inscribed. The

the mind for only temporary purposes to an immediate object.¹
 (b) *Imaginative association*, as where certain objects, associated

second (the psychical) assumes the non-corporeal existence of these impressions.

Sir W. Hamilton, after noticing the hypothesis that memory is an impression on the substance of the brain, says (Lecture xxx. Metap.): "It may be satisfactory to know that this faculty does not stand in need of such crude modes of explanation. . . . If the unity and self activity of the mind be not denied, it is manifest that the mental activities, which have been once determined, must persist, and these corporeal explanations are superfluous." "The problem," he says, in a prior passage, "most difficult of solution, is not how a mental activity endures, but how it ever vanishes." To same effect is McCosh on Emotions, p. 69.

As to the power of association, see further, *infra*, § 454 a. Compare Laycock on Defects of Memory, Edin. Med. Jour. April, 1874; Laycock on the Laws of Memory, Jour. Ment. Science, July, 1875.

President Porter cites the following from Coleridge (The Friend, sec. ii. Essay iv.): "No finer opportunity is furnished for observing this variety in the order and method which characterize the memory of different persons than in listening to the testimony of different witnesses in a court of justice concerning the same transaction. One witness tells a long and rambling story, which follows the order of his own observations in time, and recites the most trifling accompaniments of place and circumstances. Another recounts those only which are material to

¹ In illustration of the subsequent torpor produced by the concentration of the associative powers for a temporary purpose on a special case, Dr. Carpenter tells us that "a distinguished equity judge has recently favored" him (Dr. C.) with the following experience: "It has frequently occurred to him that 'further proceedings' having been taken in a 'cause' which he had 'heard' some years previously, and had dismissed altogether from his mind, he has found himself in the first instance to have totally forgotten the whole of the *former* proceedings, not being able to recollect that the 'cause' had been previously before him. But in the course of the argument some word, phrase, or incident has furnished a suggestion that has served *at once* to bring the whole case vividly into his recollection; as if a curtain had been

drawn away, and a complete picture presented to his view. The entireness of his previous forgetfulness was probably due to the habit, common to barristers, of 'getting up' their cases only to forget them as soon as possible." Carpenter, *op. cit.* art. 343.

"It is now very generally accepted by psychologists as (to say at least) a probable doctrine, that any idea which has once passed through the mind may be thus (by memory) reproduced, at however long an interval, through the instrumentality of suggestive action; the recurrence of any other state of consciousness with which that idea was originally linked by association being adequate to awaken it from its dormant or 'latent' condition, and to bring it within the sphere of consciousness." Carpenter's Ment. Physiology, art. 340. See fully *infra*, §§ 454, 806.

with a particular place, are assumed to be at such place at a particular visit.¹ (c) *Insane association*, as where the unreal, with-

the object for which he gives testimony."

A great master of legal logic thus speaks: "There are things which pass every day, which make no impression on the mind of one man, but which do make an impression on the mind of another. Men dine at the same mess or table; something occurs in the course of the conversation; one man remembers it, the other does not think of it any more, and the next morning it is forgotten. One man recollects some event in his past life, more or less important, or more or less trivial, which some one else present at the same time, if you were to ask him about it, would have no knowledge or recollection of at all. Of all the unfathomable mysteries which the human mind presents, there is none in my view so astonishing as the faculty of memory, especially in the matter to which I am now adverting; that is how some things comparatively trivial remain indelibly impressed on the recollection, while others, far more important, fade away into the darkness of eternal night, and are totally and entirely forgotten. It would not be fair, therefore, to say, 'Here are half a dozen people who were present with you on a certain occasion, and they all recollect a certain fact. If you do not remember it you cannot be the man.' Still less just would it be if each of those individuals was allowed to pick out some peculiar circumstance which has remained impressed on his individual memory, and then, because the man did not recollect all that the six persons recollected, it should be said, 'Oh, you cannot be the man.' I quite agree we must not deal with a man in that way; it would be unfair and unjust to do so; but there are things

which it is next to impossible any one should forget, and in respect of those things we are entitled to require that a man should exhibit some knowledge, when you know that they happened to a person whom he represents himself to be. Yet even here we must be on our guard; for even things of importance, things that you would have expected to remain impressed on a man's memory, often pass away and are forgotten; but if you find that a multitude of circumstances such as you cannot reasonably believe that a man could have forgotten are unknown, a very different case presents itself." Cockburn, C. J., charge in Tichborne Case. See article in London Quarterly Review for January, 1877.

¹ Realistic details, it should be remembered, may not only be left out, but may be added, in entire unconsciousness of the falsity of the effect produced. That which we are in the habit of associating with an event when real, we invest that event with permanently, and conceive of it as surrounding the event even when unreal. Some years ago two banks were on opposite wings of a particular building in Philadelphia, with entrances very much alike. A gentleman who kept an account with Bank A., and who was accustomed to leave checks without his bank book with the receiving teller, took with him on a particular day a check intending to hand it in at Bank A. By mistake he went into Bank B., and the check was taken by the teller at Bank B., he supposing that the intention of the depositor was to open an account in the latter bank. Some weeks afterwards, when the depositor took his book to Bank A. to be settled, he was

out reason, and even without actual precedent, is associated with the real.

Whatever may be the explanation of defect of memory in a witness, such defect is a legitimate ground of argument to a jury, and must be weighed by them in making up their opinion as to the

surprised to find that he was not credited with the particular check he thought he had left there. "Why, I recollect the conversation I had with you at the time," he said to the teller. The recollection was honest, for he had been in the habit, when he went into the bank, of having a conversation with the teller about some interests they had in common. Recollecting, as he supposed, the fact of the deposit, he associated with it its ordinary incidents. So convinced was he of the deposit that he felt that he could no longer put confidence in the bank to the negligence of whose officers he imputed the loss. Many months afterwards, however, on visiting Bank B., the teller of that bank said to him, "You do not want to follow up the deposit you made here some time since." The truth then flashed across him. He had made the deposit in Bank B. instead of in Bank A.; but believing it to have been in Bank A., and conceiving such to be the case, he associated with the supposed fact the usual incidents of such a fact, and accumulated about it circumstantial details which were natural and exact, but erroneous only in their application to the particular time. See article in *Popular Science Monthly* for May, 1879, p. 78, and in *London Spectator*, for Dec. 16, 1882.

"Sometimes, indeed, we come so completely to realize such forgotten experiences, by repeated picturing them to ourselves, that the ideas of them attain a force and vividness which equal or even exceed that

which the actual memory of them would afford. In like manner, when the imagination has been exercised in a sustained and determinate manner,—as in the composition of a work of fiction,—its ideal creations may be reproduced with the force of actual experiences; and the sense of personal identity may be projected backward (so to speak) into the characters which the author has evolved out of the depths of his own consciousness." Carpenter, *op. cit.* art. 364.

The tenacity of association may be illustrated by the way in which persons subject to sea-sickness are sometimes affected with nausea at the sight of a ship tossing on the waves.

"Dr. Plot, in his history of Staffordshire, tells us of an idiot that chancing to live within the sound of a clock, and always amusing himself with counting the hour of the day whenever the clock struck, the clock being spoiled by some accident, the idiot continued to strike and count the hour without the help of it, in the same manner as he had done when it was entire. Though I dare not vouch for the truth of the story, it is very certain that custom has a mechanical effect upon the body, at the same time that it has a very extraordinary influence upon the mind." Addison, *Spectator*, No. 447.

An article on the topic in the text will be found in the *London New Quart. Mag.* April, 1880, p. 310; and see article on *Delusions of Memory* in *North American Review* for May, 1882.

credibility of a witness. A witness, as we have seen, cannot be excluded on this ground, unless the loss of memory be total.¹ The ordinary way of bringing out such defect before the jury is by cross-examination. But there can be now no question that evidence going to show any impairment of memory is admissible, provided such testimony is direct and not second hand.² But habits (*e. g.*, use of narcotics) likely to impair memory cannot be put in evidence. Such proof, aside from other objections, is secondary. Actual decay or derangement may be proved; not habits likely to have such an effect.³

§ 379. Fabricators deal usually with generalities, avoiding circumstantial references which may be likely to bring their statements into collision with other evidence; and hence it is properly held that a studied avoidance of details, by witnesses, throws suspicion on their statements.⁴ This, however, depends upon the object to be recalled. Events of remote date we cannot expect a witness to remember in detail; and some portion, at least, of such circumstances we must be prepared to find lost in haze. If involving matters of deep interest to the witness they may be remembered in their effects, but not ordinarily in their particulars. A minute specification of details, as to very distant events in which the witness had no personal interest, does not enhance credit;⁵ its absence

¹ See Whart. on Ev. § 410; Lewis v. Ins. Co., 10 Gray, 508; Kurtzman v. Weaver, 20 Penn. St. 422.

² *Supra*, §§ 370-1; Fairchild v. Bascomb, 35 Vt. 398; Com. v. Cooper, 5 Allen, 495, cited *supra*, § 302; Livingston v. Kiersted, 10 Johns. 362; Brindle v. Mollvaine, 10 S. & R. 285, where it was argued by Gibson, C. J., that proof of prior paralysis was admissible; Ketchey v. State, 70 N. C. 621; Isler v. Dewey, 75 N. C. 486; Fleming v. State, 5 Humph. 564.

³ McDowell v. Preston, 26 Ga. 528. See Goodwyn v. Goodwyn, 20 Ga. 600; Alleman v. Stepp, 52 Iowa, 626.

⁴ See *supra*, § 107; Spicott's Case, 5

Rep. 58; Presbytery of Auchterarder v. Kinnoul, 6 Cl. & F. 698; Walker v. Blassingame, 17 Ala. 810; Cornet v. Bertelsmann, 61 Mo. 118. "*Dolus versatur in generalibus*,—a person intending to deceive deals in general terms,—which has been adopted from the civil law, and is frequently cited and applied in our courts." Broom's Legal Max. 389. But compare comments *supra*, § 373. As to attacking truthfulness, see *infra*, § 486. And see article on the Levy Case in London Spectator for Dec. 16, 1882.

⁵ Willet v. Fister, 18 Wall. 91; Parker v. Chambers, 24 Ga. 518; Chandler v. Hough, 7 La. An. 441.

as to such events does not detract from credit.¹ But to matters which the witness, under ordinary circumstances, would remember, the test fairly applies.

§ 380. In criminal as well as in civil trials, appeal is frequently made to the maxim, *Falsum in uno, falsum in omnibus*, and the criticism is proper in cases in which the special falsity is of a nature to imply falsity as to the whole case;² or when the contradictions are so numerous as to show imbecility of memory.³ Beyond this, however, we cannot go.⁴ There are instances, in connection even with an examination in chief, in which a witness may swear falsely in a particular line, and yet with such truthfulness as to the rest of the case that it would work injustice to throw out his entire testimony. A witness's personal assumptions may be false, while his narration of external objects may be true.⁵ He may state some points connected with his own history falsely; he may even swear falsely as to his own relation to the case, yet in other respects he may be accurate. To cross-examinations these observations are peculiarly applicable. A witness, whom it may be attempted to disgrace, may swear falsely as to some sore point which may be touched, yet truly as to the rest of the case. On account of such falsity it would be a perversion of justice to reject the rest of his evidence. It may be proper to punish the witness for his perjury; it would not be proper to punish the party innocently calling the witness by refusing to believe what was true in the witness's testimony. Nor would it be right to tell a jury, who are sworn to determine a case according to the evidence, that they are to reject that which is probably true in the testimony of a witness because that testimony contains something

Falsum in uno does not absolutely dis-credit.

¹ *Fulton v. MacCracken*, 18 Md. 538; *speech on the impeachment of Judge State v. Cowan*, 7 Ired. 239; *Black v. Prescott*, pressed this inference to its extremest limit. See 5 Webster's

² *Hargraves v. Miller*, 16 Oh. 338; *Works*, 540.

Stoffer v. State, 15 Oh. St. 47; *Rich-* ³ *Evans v. Lipscourt*, 31 Ga. 71.

ardson v. Roberts, 23 Ga. 215; *Smith* ⁴ See *State v. Brown*, 76 N. C. 222; *v. State*, 23 Ga. 297; *Ivey v. State*, 23 Ga. 576; *State v. Mix*, 15 Mo. 153; *Paulette v. Brown*, 40 Mo. 52; *Brown v. R. R.*, 66 Mo. 588; *Troxdale v. State*, 9 Humph. 411; *People v. Soto*, 59 Cal. 367. Mr. Webster, in his

⁵ *Whart. on Ev.* § 412.

that is probably false. *Falsa demonstratio non nocet*, is a maxim of universal application, so far as it means that we may reject as surplusage a false description that is not vital to the object of controversy.¹ Hence it is that the maxim, *Falsum in uno, falsum in omnibus*, does not hold good except in cases where the party calling the witness is cognizant of the falsehood, or where the falsehood goes to the core of the witness's testimony.² The maxim is wholly without force in cases where the misstatement is inadvertent, or attributable to the ordinary fluctuations of memory.³ Nor, when we undertake to test credibility by this standard, should we fail to remember that even the most conscientious witnesses, as has just been stated,⁴ may not only forget, but unconsciously misstate details.⁵

§ 381. "Substantial unity with circumstantial variety" is an incident of reliable testimony;⁶ and the circumstantial variety increases in proportion to the comprehensiveness with which details were noticed by the witnesses examined, and the copiousness with which these details are narrated. As to *substance*, harmony is one of the conditions of truth; as to *form*, wherever there are truth and liberty there is variety.

¹ Broom's Legal Maxims, 629; and see for other points, Whart. on Ev. § 945.

² See, generally, authorities cited in Whart. on Ev. § 412; and see *Turner v. Com.*, 86 Penn. St. 54; *Pennsyl. Co. v. Conlan*, 101 Ill. 93; *State v. Brantley*, 63 N. C. 518; *State v. Brown*, 76 N. C. 222; *Finley v. Hunt*, 56 Miss. 521; *People v. Strong*, 30 Cal. 151; *People v. Hicks*, 53 Cal. 354; *People v. Sprague*, 53 Cal. 491; *Dell v. Oppenheimer*, 9 Neb. 454. See as to mistakes of sight, 3 Whart. & St. Med. Jur. 4th ed. [1884], §§ 925 *et seq.*

³ *Brennan v. People*, 15 Ill. 511; *State v. Peace*, 1 Jones (N. C.), 251; *State v. Elkins*, 63 Mo. 159; *Yoes v. State*, 9 Ark. 42; and other cases cited Whart. on Ev. § 412. See *supra*, § 378; *Jackson v. McVey*, 18 Johns. 330; *McDonel v. State*, 90 Ind. 327.

⁴ *Supra*, § 378.

⁵ Pope's correspondence gives several instances of bad acts falsely avowed, of good acts falsely disavowed, and of plots and counter-plots in which truth and falsehood are undistinguishable, but of which the leading object was mischief. When he praised a bishop, in one of his letters, Johnson says, "he meant to hurt somebody, but whom I do not know." And Mr. Leslie Stephen, writing of the same letters, says, "it is painful to track the strange deceptions of a man of genius as a detective unravels the misdeeds of an accomplished swindler." Yet falsifications such as these do not compel us to reject as untrue all other statements made in Pope's letters.

⁶ Paley's Evidence, part iii. c. i.; Brougham's Speeches, i. 245.

§ 382. Testimony, even by a series of witnesses, that they did not see a thing happen which may have happened in the ordinary course of events, at a moment when no one of these witnesses was present, cannot outweigh the testimony of a single reliable witness that he saw the event happen at a time when no one of the others was present.¹ The testimony of a series of witnesses, for instance, that they never saw a party drunk, does not outweigh the testimony of others to the fact of his drunkenness on particular occasions, unless those speaking to the negative cover the same point of time as those speaking to the affirmative.² The weight to be attached to negative witnesses depends upon the exhaustiveness of their observation.³ Put an intelligent and credible witness in a small chamber, open throughout to his scrutiny, and his testimony that in that chamber, at a given time, an event did not occur which could not have occurred without his observation, is entitled to the same weight with that of a witness who, equally intelligent and credible, should swear to the occurrence of the event at the same time.⁴ A negative witness, also, whose attention is concentrated on a particular point, may outweigh an affirmative witness whose attention has not been so concentrated.⁵ On the other hand, as the space covered by a negative witness

Affirmative testimony is stronger than negative.

¹ *Stitt v. Huidekopers*, 17 Wall. 384; *Coughlin v. People*, 18 Ill. 266; *State v. Gates*, 20 Mo. 400; *Ralph v. R. R.*, 32 Wis. 177; *Johnson v. State*, 14 Ga. 55; *Todd v. Hardie*, 5 Ala. 698; *Pool v. Devers*, 30 Ala. 672; *Hepburn v. Bk.*, 2 La. An. 1007; *Auld v. Walton*, 12 La. An. 129; *Coles v. Perry*, 7 Tex. 109.

² *Murphy v. People*, 90 Ill. 59.

³ *Com. v. Cooley*, 6 Gray, 350. That a negative may be proved, see *supra*, § 321; *Burchfield v. State*, 82 Ind. 550.

⁴ See cases cited in Whart. on Ev. § 415; *McConnell v. State*, 67 Ga. 633. Hence it is admissible to show that all guns in a particular neighborhood had been examined to see whether any one of them carried a ball of the same gauge as one by which a wound had been in-

flicted. *Dean v. Com.*, 32 Grat. 912. And see, as to proving a negative by exclusion, *Roberts v. State*, 61 Ala. 401.

It has been ruled that the statement of a witness, who was very wakeful, and who slept in the room with the defendant, and who saw him go to bed that night and rise the next morning, that the defendant could not have left the room that night, is inadmissible, as matter of opinion. *Bennett v. State*, 52 Ala. 371. The proper ground of exclusion in such a case, however, would be irrelevancy; *Chambers v. Hill*, 34 Mich. 523; though ordinarily the objection would go to weight and not to admissibility.

⁵ *Reeves v. Poindexter*, 8 Jones (N. C.) 308.

becomes undetermined, his testimony loses in weight.¹ Yet this objection goes to weight, not to admissibility.²

§ 383. Two witnesses, all other things being equal, are less likely to be mistaken than one,³ and from this the conclusion is sometimes drawn that the weight of testimony as to a contested fact is to be determined by the number of the witnesses testifying. But witnesses cannot be treated as units, to be divested of their own distinctive claims to credit. It may well happen that one intelligent and honest witness may outweigh several who are ignorant or unreliable.⁴ Nor should it be forgotten that one witness, corroborated by facts or documents, may outweigh a multitude whose testimony may have been the result of imperfect observation, or have been influenced by prejudice.⁵

§ 384. Credibility is, therefore, a matter of induction, to be determined by the jury, under such instructions, as to the reason of the case, as may be given by the court,⁶ and the presumptions usually invoked in this relation are presumptions of fact, based on free logic, and are not presumptions of technical law.⁷ It need scarcely be added that the importance of applying psychological tests, resting on the motives which may lead a witness to deceive, or the character which deprives him of trustworthiness, is enhanced by the statutory removal of disqualification from interest, from infamy, and from atheism.

§ 384 a. When the court is satisfied that a witness is so drunk as to be unable to testify, he may be excluded, or his examination post-

¹ *Abel v. Fitch*, 20 Conn. 90; *Thomas v. De Graffenreid*, 17 Ala. 602. See *Matthews v. Poythress*, 4 Ga. 287.

² *State v. Phair*, 48 Vt. 366.

³ See *Dowdell v. Neal*, 10 Ga. 148.

⁴ *Cockburn, C. J.*, in *Tichborne Case*; *M'Lees v. Felt*, 11 Ind. 218; *Glenn v. Bank*, 70 N. C. 191; *Boylston v. Bain*, 90 Ill. 283. See *Sanborn v. Babcock*, 33 Wis. 400.

⁵ See *supra*, § 10; and see *McCrum v. Corby*, 15 Kans. 112; *Parrish v. State*, 45 Tex. 51.

⁶ See *Kinner v. State*, 45 Ind. 175; *Jones v. State*, 48 Ga. 163; *Minor v. State*, 63 Ga. 318; *Grimes v. State*, 63 Ala. 166; *Ford v. State*, 71 Ala. 355; *People v. Lee*, 2 Utah, 441; *Lunsford v. State*, 9 Tex. Ap. 217; *Wilbanks v. State*, 10 Tex. Ap. 642; *Pickens v. State*, 13 Tex. Ap. 13; *State v. Miller*, 53 Iowa, 209; *Mack v. State*, 48 Wis. 271. In Missouri comments on the weight of the evidence are forbidden by statute. *State v. Bell*, 70 Mo. 633.

⁷ *Whart. on Ev.* §§ 124, 417. Among these presumptions may be noticed those drawn from the witness's manner. *Infra*, § 751.

poned until he is sober ;¹ though, to exclude a witness, it is not sufficient that he has been found to be a habitual drunkard under the statute.² To impeach credibility, drunkenness at the time of the event testified to may be proved.³ Evidence of the use of opium cannot be introduced to impair credit, unless it be shown that the witness was under the influence of opium when examined, or that his powers of observation or recollection were affected by the habit.⁴

Intoxicated
witnesses
incompetent.

§ 385. So far as concerns the question of technical competency, a lawyer concerned in a case cannot be excluded from the witness-box on account of his professional connection with the case ; though it has been held that he may in the discretion of the court be precluded from recklessly and unnecessarily uniting the functions of counsel and witness.⁵ The mere fact that the case has been opened by an attorney, who has previously cross-examined witnesses on the other side, does not make him incompetent as a witness for his client.⁶ Where, however, counsel thus become witnesses, it may be a proper exercise of the discretion of the court to prohibit them from subsequently addressing the jury on the case thus made up ; and the testifying of the counsel should be confined to extreme cases where there is no other proof.⁷

Counsel in
case may
be witnesses.

Privilege in professional communications is hereafter considered.⁸

¹ *Hartford v. Palmer*, 16 Johns. 43 ; *Gould v. Crawford*, 2 Barr, 89 ; *State v. Underwood*, 6 Ired. 96. That the jury are to pass on the question, see *State v. McNinch*, 12 S. C. 89.

² *Gebhart v. Shindle*, 15 S. & R. 2. Compare authorities, cited *supra*, § 378.

³ *Duffy v. Com.*, S. C. Penn. 1778. *Supra*, § 369.

⁴ *Supra*, § 378 ; *McDowell v. Preston*, 26 Ga. 528. As to insane witnesses, see *supra*, § 370 ; *infra*, § 399.

⁵ *State v. Cook*, 23 La. An. 347. See *Tilton v. Beecher*, Pamph. Rept., for

an illustration of a case in which such testimony was admitted.

⁶ *Follansbee v. Walker*, 72 Penn. St. 228.

⁷ See *Cobbett v. Hudson*, 1 E. & B. 11 ; *Ross v. Demoss*, 45 Ill. 447 ; *Mad-den v. Farmer*, 7 La. An. 580 ; *Boissy v. Lacou*, 10 La. An. 29. As to Georgia statute, excluding attorneys from testifying for their clients, see *Churchill v. Corker*, 25 Ga. 479 ; *Hines v. State*, 26 Ga. 614 ; *Sharman v. Morton*, 31 Ga. 34.

⁸ *Infra*, § 496.

V. NUMBER OF WITNESSES NECESSARY.¹

§ 386. In high treason, at common law, two witnesses are required, both before the grand jury and at the trial; both of the witnesses to be to the same overt act, or one of them to one overt act and another of them to another overt act of the same species of treason.² If the jury do not give credit to both of the witnesses, the defendant must be acquitted.³ But even one witness, in England, is sufficient to prove a collateral fact;⁴ as, for instance, to prove that the defendant is a natural born subject,⁵ or the like. In this country, although the Constitution declares that two witnesses to the same overt act are necessary to produce conviction, it has been intimated that while there must be two witnesses on trial to some particular overt act in order to secure a conviction, yet with the grand jury it is enough that one witness prove one act, and another prove another act, or that there be one witness to an overt act with corroborating circumstances.⁶

§ 387. The old text-writers, adopting the then current distinction between "circumstantial" and "direct" testimony, held that to convict a witness of perjury, it was necessary that the falsity of his sworn statement should be testified to by two "direct" witnesses.⁷ In view of the fact, however, that all testimony is now considered more or less circumstantial, this rule can be no longer regarded as operative; and we may view it as settled that whenever the falsity of the defendant's statement can be proved beyond reasonable doubt, there may be a conviction.⁸ Hence the testimony of a witness to falsity is suffi-

¹ That one witness is ordinarily sufficient for conviction subject to the exceptions hereafter to be given, see *McLain v. Com.*, 99 Penn. St. 86.

² 7 & 8 W. III. c. 3, s. 2; 1 Ed. VI. c. 12, s. 22; 5 & 6 Ed. VI. c. 11, s. 12; Whart. Crim. Law, 8th ed. § 1808.

³ Per Scroggs, C. J., in *R. v. Palmer*, 3 St. Tr. 56.

⁴ Post. 242; Whart. Crim. Law, 8th ed. § 1808.

⁵ *R. v. Vaughan*, 5 St. Tr. 29.

⁶ *Burr's Trial*, 196; *U. S. v. Han-*

way, 2 Wall. Jr. 130. *Contra*, *Iredell, J., Fries' Case*, Wh. St. Tr. 480. See *R. v. McCafferty*, 1 Irish R. C. L. 365; 10 Cox C. C. 603.

⁷ 1 Starkie Ev. 443; 4 Hawk. P. C. b. 2, c. 46, s. 10; 4 Bl. Comm. 358; 2 Russ. on Cr. 1791; *R. v. Muscot*, 10 Mod. 195. See *Laughran v. Kelly*, 8 Cush. 109.

⁸ *R. v. Boulter*, 2 Den. C. C. 396; 5 Cox C. C. 543; *R. v. Roberts*, 2 C. & K. 607; *R. v. Gardner*, 8 C. & P. 737; *Champney's Case*, 2 Lew. C. C. 258;

ciently sustained by a written admission of the defendant.¹ But the corroboration must go beyond slight and indifferent particulars.² The preponderance of contradictory proof must go to some one particular false statement. It will not be sufficient to prove by one inadequate line of testimony that one statement made by the defendant is false, and then by another inadequate line of testimony that another statement made by him is false.³ But a single witness is sufficient to prove that the witness swore as alleged in the indictment.⁴

§ 388. Another exception to the rule before us is to be found in cases of bastardy, in which it has been held necessary, to sustain an order of affiliation, that the evidence of the mother should be corroborated, in some material particular, by other testimony.⁵ In prosecutions for seduction, also, it is usually required by statute that the prosecutrix should be corroborated at least as to promise of marriage.⁶

§ 389. In divorce cases, the testimony of a party, uncorroborated, has been held insufficient to establish adultery.⁷ It should at the same time be remembered that we have derived this limitation from the English ecclesiastical courts, whose jurisdiction is now reduced almost to a nullity, and whose judges

R. v. Braithwaite, 8 Cox C. C. 254; 1 F. & F. 639; R. v. Hook, 8 Cox C. C. 5; U. S. v. Wood, 14 Pet. 440; Woodbeck v. Keller, 6 Cow. 118; Williams v. Com., 91 Penn. St. 493; Crusen v. State, 10 Ohio St. 258; Hendricks v. State, 26 Ind. 493; State v. Raymond, 20 Iowa, 582; State v. Hayward, 1 N. & McC. 547; State v. Molier, 1 Dev. 263. See Whart. Crim. Law, 8th ed. § 1319; Gabrielsky v. State, 13 Tex. Ap. 439.

¹ R. v. Mayhew, 6 C. & P. 315, per Lord Denman, C. J.; R. v. Hook, 8 Cox C. C. 5; U. S. v. Wood, 14 Pet. 430; State v. Molier, 1 Dev. 263.

² R. v. Yates, C. & M. 139; Simmons v. Simmons, 11 Jur. 830; R. v. Boulter, 2 Den. C. C. 396; 5 Cox C. C. 543; 3 C. & K. 236; Dodge v. State, 4 Zab. 455; People v. Davis, 61 Cal. 536.

³ R. v. Virrier, 12 A. & E. 317; R. v. Parker, C. & M. 639. See Whart. Crim. Law, 8th ed. §§ 1317-21.

⁴ Whart. Crim. Law, 8th ed. § 1308.

⁵ R. v. Roberts, 2 C. & K. 614; Hodges v. Bennett, 5 H. & N. 625; R. v. Read, 9 A. & E. 619. But see State v. Mo-Glothlen, 56 Iowa, 544.

⁶ Wh. Crim. Law, 8th ed. § 1763; Com. v. Walton, 2 Brewst. 487; State v. Painter, 50 Iowa, 317; State v. Curran, 51 Iowa, 112.

⁷ Thayer v. Thayer, 101 Mass. 111; Tate v. Tate, 26 N. J. Eq. 55; Black v. Black, 26 N. J. Eq. 431; Bronson v. Bronson, 8 Phila. 261; Hays v. Hays, 19 Wis. 182; Fugate v. Pierce, 49 Mo. 446; Merritt v. State, 10 Tex. Ap. 402.

considered themselves bound by canon law to refuse a decree upon the testimony of a single witness, unless supported by "adminicular circumstances."¹ "This doctrine was in former days productive of much injustice;"² and is now abandoned, even as to divorce cases, by the statutory prescription of the rules of evidence observed in the superior courts of common law.³ In this country, while the limitation was never accepted as absolute,⁴ the better opinion, as is elsewhere stated, is, that whenever corroboration is from the nature of the case practical, there a divorce will not be granted on the unsupported testimony of a party.⁵

VI. HUSBAND AND WIFE.

§ 390. Where the relation of husband and wife under the local law makes either incompetent as a witness for or against the other, it is necessary, to work such incompetency, that a valid marriage should be proved. *Primâ facie* every person is competent to testify in all issues; if he is to be excluded by the policy of the law, the burden is on the party objecting to him to show the reason for such exclusion.⁶ Intimate sexual relations do not constitute such reason, even though disguised by a pretended but invalid marriage;⁷ and where a man and a woman lived, as they supposed, as husband and wife, but separated in consequence of the woman's discovering that a former husband, believed to be dead, was still alive, it was held that the woman was a competent witness against the man with whom she thus

¹ See Taylor's Ev. § 883, citing Donellan v. Donellan, 2 Hagg. Ecc. R. 144; Simmonds v. Simmonds, 5 Ec. & Mar. Cas. 324; Hutchins v. Denziloe, 1 Const. R. 181.

² Taylor's Ev. § 883.

³ See U., falsely called T., v. J., L. R. 1 P. & D. 461.

⁴ Bishop, Mar. & Div. § 278. See Flattery v. Flattery, 88 Penn. St. 27.

⁵ See Whart. on Ev. § 433.

Privilege as to marital communications is hereafter discussed. *Infra*, § 398.

⁶ Dove v. State, 3 Heisk. 348. In Texas, under a statute permitting husband and wife to testify against each

other in criminal prosecutions for offences committed against each other, either may testify on the indictment of the other for adultery. Roland v. State, 9 Tex. Ap. 277.

⁷ Batthews v. Galindo, 4 Bing. 610; S. C., 3 C. & P. 238; Campbell v. Twemlow, 1 Price, 31; Divoll v. Leadbetter, 4 Pick. 220; Dennis v. Crittenden, 42 N. Y. 542; People v. McCraney, 6 Parker C. R. 49; State v. Taylor, Phill. (N. C.) 508; Hill v. State, 41 Ga. 484; State v. Brown, 28 La. An. 279; Flanagan v. State, 25 Ark. 92; Rickerstriker v. State, 31 Ark. 207; Mann v. State, 44 Tex. 642.

lived as a second husband, even as to facts she learned from him during their cohabitation.¹ For when a former existing marriage is conceded, no subsequent marriage, no matter how solemn, can operate to divest the parties to such subsequent invalid marriage of their privilege as witnesses for or against each other.²

Marriage, however, being proved, neither husband nor wife is competent at common law to testify in a suit for or against the other.³ Thus, a husband is incompetent in a prosecution against

¹ Wells v. Fletcher, 5 C. & P. 12; still alive. Wells v. Fletcher, 5 C. & P. 12, per Patteson, J.; S. C., *nom.* People v. McCraney, 6 Parker C. R. 49. But see People v. Marble, 38 Mich. 117.

² R. v. Serjeant, Ry. & M. 354; R. v. Jones, C. & M. 614; R. v. Madden, 14 Up. Can. Q. B. 588; State v. Patterson, 2 Ired. 346; Finney v. State, 3 Head (Tenn.), 544; State v. Johnson, 12 Minn. 476.

It is said that Lord Kenyon once rejected a woman, called as a witness for a putative husband, to whom she was never married, but who acknowledged her as his wife; Anon., cited by Richards, B., in 1 Price, 83; but in that case the criminal had, *throughout the trial*, admitted that the witness was his wife, and was thus in a manner estopped from denying the marriage when her competency was questioned; and in the subsequent case of Batthews v. Galindo, 4 Bing. 610, 612, 613; 3 C. & P. 238, and 1 M. & P. 565, S. C., where Lord Kenyon's ruling was discussed, Park and Burroughs, JJ., declared that his decision was founded on this admission, and the whole court determined that a kept mistress was a competent witness for her protector, though she passed by his name and appeared to the world as his wife. The same view was afterwards taken even as to confidential communications between persons untruly believing themselves husband and wife; though in the latter case the parties had separated before the trial, on hearing that a former husband of the woman was

still alive. Wells v. Fletcher, 5 C. & P. 12, per Patteson, J.; S. C., *nom.* Wells v. Fisher, 1 M. & Rob. 99, and n. It seems, also, from this last case, and from several others (R. v. Peat, 2 Lew. C. C. 288; R. v. Wakefield, *ibid.* 279; 1 Russ. C. & M. 218, n. t) that a supposed husband or wife may be examined on the *voir dire* to facts showing the invalidity of the marriage; and it is apprehended that no valid reason can be given for not admitting their evidence thus far, though the fact that the marriage ceremony has been actually performed may have been previously proved by independent testimony; R. v. Bramley, 6 T. R. 330; R. v. Bathwick, 2 B. & Ad. 646, where Lord Tenterden observed, "that it might well be doubted, whether the competency of a witness can depend upon the marshalling of the evidence, or the particular stage of the cause at which the witness may be called." Taylor's Ev. § 1231. *Inf.* § 397.

Where one of two prisoners had married his deceased wife's sister, it was held in England, such marriage being there void, that she was a competent witness against him upon his trial. R. v. Young, 5 Cox C. C. 296—Erle.

³ R. v. Smith, 1 Mood. C. C. 289; R. v. Payne, 12 Cox C. C. 118; State v. Welsh, 26 Me. 30; Kelley v. Proctor, 41 N. H. 139; Blain v. Patterson, 48 N. H. 151; Manchester v. Manchester, 24 Vt. 649; Seargent v. Seward, 31 Vt. 509; Com. v. Marsh, 10 Pick. 57;

his wife for her adultery, and so, *mutatis mutandis*, is the wife against the husband;¹ but if the paramour be prosecuted singly, it has been held that the restriction does not continue in force.² But the better opinion is that on the trial of the paramour for adultery, the injured husband or wife, as the case may be, is not a competent witness for the prosecution.³

§ 391. Wherever a defendant is incompetent to testify for or against a co-defendant, then the husband or wife of such defendant is to the same extent incompetent.⁴ Thus, on a trial for conspiracy, the wife of one of the defendants should not be allowed to testify against one of the others,

And so for or against each other's co-defendant.

Lucas v. State, 23 Conn. 18; Wilke v. People, 53 N. Y. 525; Copous v. Kauffman, 8 Paige, 583; Hasbrouck v. Vandervoordt, 9 N. Y. 153; People v. Moore, 65 How. (N. Y.) 177; Bird v. Davis, 14 N. J. Eq. 467; Snyder v. Snyder, 6 Binn. 488; Pringle v. Pringle, 59 Penn. St. 281; Gibson v. Com., 87 Penn. St. 253; Miller v. Williamson, 5 Md. 219; Corse v. Patterson, 6 Har. & J. 153; Steen v. State, 20 Oh. St. 333; Kyle v. Frost, 29 Ind. 382; Taulman v. State, 37 Ind. 353; Mountain v. Fisher, 22 Wis. 93; Osborn v. Black, Speers (S. C.) 431; William v. State, 33 Ga. (Sup.) 85; Williams v. State, 44 Ala. 24; Tulley v. Alexander, 11 La. An. 628; Byrd v. State, 57 Miss. 243; State v. Berlin, 42 Mo. 572; Smead v. Williamson, 16 B. Mon. 492; Turnbull v. Com., 79 Ky. 495; Gilkey v. Peeler, 22 Tex. 663; Whitehead v. Foley, 28 Tex. 268; Overton v. State, 43 Tex. 616.

In R. v. Perry, per Gibbs, C. J., cited and approved by Abbott, C. J., in R. v. Serjeant, Ry. & M. 354, a husband was deemed an inadmissible witness in support of a prosecution, which charged his wife and several other persons with conspiring to procure his marriage without consent of his parents; and where four men were indicted for sheep-stealing, Baron Bol-

land rejected the testimony of the wife of one of them, who was called to prove facts against the other prisoners. R. v. Webb, 2 Russ. on Cr. 982. See 1 Hale, 301.

"It seems highly questionable, however," says Mr. Taylor, "whether this last decision does not outstep the bounds of law."

¹ State v. Welch, 26 Me. 30; Com. v. Sparks, 7 Allen, 534; State v. Gardner, 1 Root, 485; Doughty v. Doughty, 32 N. J. Eq. 32; State v. Berlin, 42 Mo. 572; Thomas v. State, 14 Tex. Ap. 70; but see State v. Bennett, 31 Iowa, 24.

² State v. Marvin, 35 N. H. 22. See Com. v. Reid, 8 Phil. 385; Merrill v. State, 5 Tex. Ap. 447.

³ See Com. v. Gordon, 2 Brewst. 569; State v. Welch, 26 Me. 30; State v. Gardner, 1 Root, 485; Com. v. I. F., 12 Weekly Notes, 108; Cotton v. State, 62 Ala. 12. See R. v. Clivinger, 2 Ld. Ray. 752.

⁴ *Infra*, § 445; R. v. Smith, 1 Mood. C. C. 289; R. v. Hood, 1 Mood. C. C. 281; R. v. Payne, 12 Cox C. C. 118; R. v. Thompson, L. R. 1 C. C. 379; U. S. v. Hanway, 2 Wall. Jr. 139; Com. v. Robinson, 1 Gray, 555; Com. v. Reid, 8 Phil. 385; State v. Smith, 2 Ired. 402; State v. McGrew, 13 Rich. 316; State v. Workman, 15 S. C. 540; Johnson v. State, 47 Ala. 9; Mask v.

as to any act done by him in furtherance of the common design, if there be any evidence given connecting the husband with the defendants in the general conspiracy.¹ And on an indictment against several defendants, for a conspiracy to charge the wife of one of them with adultery, such wife is not a competent witness for the prosecution.² But where a co-defendant is admissible his wife is admissible.³

§ 892. But where the grounds of defence are several and distinct, and in no way dependent on each other, as is observed by Mr. Greenleaf, "no reason is perceived why the wife of one defendant should not be admitted as a witness for another;"⁴ and where the acquittal of one defendant does not necessarily involve the acquittal of the other, the wife of one defendant, where the trials are separate, may be a witness for the other.⁵ Thus, where H., D., S., Z., and T. were jointly indicted for murder, and a separate trial awarded to T., and upon the trial of T. he offered to prove an *alibi* by the wives of H. and S., it was held that they were competent witnesses. The court, after reviewing the authorities upon the question, said: "The mere fact that the husband is a party to the record does not of itself exclude the wife as a witness on behalf of the other parties, but the rule of exclusion is only to be applied to cases in which the interest of the husband is to be affected by the testimony of the wife."⁶ Where, also, a married defendant has pleaded guilty,⁷ or is entirely removed from the record, whether by a verdict pronounced in his favor, or by a previous conviction, his wife may testify either for or against any other persons who may

Rule does not apply to separate suits where the acquittal of one defendant does not operate on the other.

State, 22 Miss. 405; Casey v. State, 37 Ark. 67; Daffin v. State, 11 Tex. Ap. 46.

¹ R. v. Serjeant, 1 R. & M. 352, and cases cited *infra*, § 392.

² State v. Burlingham, 3 Shep. 104; see Johnson v. State, 47 Ala. 9.

³ Blackburn v. Com., 12 Bush. 481. See Ray v. Com., 12 Bush. 397.

⁴ 1 Greenl. on Ev. § 335.

⁵ U. S. v. Addatte, 6 Blatch. 76; Com. v. Easland, 1 Mass. 15; Com. v. Manson, 2 Ashm. 33; Com. v. Reid, 8

Phil. 385; Com. v. David, 8 Phil. 611; State v. Mooney, 64 N. C. 54; Powell v. State, 58 Ala. 362; State v. Anthony, 1 McCord, 286; Cornelius v. Com., 3 Metc. (Ky.) 481; though, see Pullen v. People, 1 Dougl. 48; Workman v. State, 4 Sneed, 425; State v. Burnside, 37 Mo. 343.

⁶ Thompson v. Com., 1 Metc. (Ky.) 13; Cornelius v. Com., 3 Metc. (Ky.)

481; Workman v. State, 4 Sneed, 425.

⁷ R. v. Thompson, 3 F. & F. 824, per Keatin, J.

be parties to the record;¹ and the mere hope that, by testifying against a prisoner, a wife may procure the pardon of her husband, who has been previously convicted of another crime, will not affect her competency, though it may shake her credit.² But where the offence is such that the acquittal of one defendant is the acquittal of the other (*e. g.*, adultery, as well as riot and conspiracy), then the husband or wife of one of the parties is, under any circumstances, incompetent.³

The wife of a prosecutor is not precluded by this rule from giving evidence either for the prosecution or for the defendant.⁴

§ 393. Where, however, violence has been committed on the person of the wife by the husband, she is competent to prove such violence.⁵ Hence on the trial of a man for the murder of his wife, her dying declarations are evidence against him.⁶ And in all cases of personal injuries committed by the husband or wife against each other, the injured party is an admissible witness against the other.⁷ Thus the husband may be a witness against the wife when she is prosecuted for assaulting him.⁸ The wife may be a witness against the husband on a prosecution against him for attempting to poison her;⁹ and for being concerned in attempting on her a miscarriage. On this rule, however, the Supreme Court of North Carolina has grafted the qualification that the assault must amount to an attempted felony,

¹ *Hawkesworth v. Showler*, 12 M. & W. 49, 50, per Alderson, B.; *R. v. Williams*, 8 C. & P. 284, per id., who stated that, in *Thurtell's Case*, Mrs. Probett was examined as the principal witness against Thurtell after her husband was acquitted.

² *R. v. Rudd*, 1 Leach, 127.

³ *Com. v. Gordon*, 2 Brewst. 569; *Mask v. State*, 31 Miss. 405. See Whart. Cr. Pl. & Pr. § 873.

⁴ See *R. v. Houlton*, 1 Jebb. C. C. 24; *Taylor's Ev.* § 1230, from which the above is taken.

⁵ *Audley's Case*, 4 St. Tr. 402; *R. v. Wasson*, 1 Craw. & D. 197; *R. v. Serjeant*, R. & M. 352; *U. S. v. Smallwood*, 5 Cranch C. C. 35; *Murphy v.*

Com., 4 Allen, 491; *People v. Fitzpatrick*, 5 Parker C. R. 2.

⁶ *Woodcock's Case*, 1 Leach C. C. 500; *John's Case*, 1 East P. C. 357; *Soulis's Case*, 5 Greenl. 407; *State v. Boyd*, 2 Hill, 288; *People v. Green*, 1 Denio, 614; *Resp. v. Hevice*, 2 Yeates, 114; *Penn. v. Stoops*, Addison, 382; *Moore v. State*, 12 Ala. 764; 1 Phil. Evid. 75, n. 1; *supra*, § 289.

⁷ *R. v. Jagger*, 1 East P. C. 455; *R. v. Pearce*, 9 C. & P. 667; *People v. Mercein*, 8 Paige, 47; *State v. Davis*, 3 Brev. 3; *Hampton v. State*, 45 Ala. 82.

⁸ *Whipp v. State*, 34 Oh. St. 87.

⁹ *R. v. Jagger*, 1 East P. C. 455; *R. v. Wasson*, 1 Craw. & Dix, 197.

or cause lasting injury, or great bodily harm.¹ And it is plain that in cases not involving personal injury the wife cannot, at common law, be called against her husband.²

§ 394. If a woman be taken away by force and married, she may be a witness against her husband, indicted on stat. 9 Geo. IV. c. 31, s. 19, against the stealing of women; for a con-
So in abduction and rape.

¹ *State v. Hussey*, 1 Busbee, 123. In this case, Nash, C. J., said: "Mr. Greenleaf, 1st vol. § 343, in enumerating the cases in which a wife may be examined as a witness, states some which are for felonies, or acts leading to felonies, and refers to one for assault and battery on her. For this he refers to *Azire's Case*, 1 Strange, 633, where it is reported in about as many words as Mr. Greenleaf has used in stating the principle. Nothing is said of the facts, or the nature and extent of the assault and battery, and for it is only cited *Lord Audley's Case*, which was for an atrocious felony upon her person. Nor is it utterly impossible that the principle can be true, as stated. We know that a slap on a cheek, let it be as light as it may, indeed, any touching of the person of another in a rude or angry manner, is in law an assault and battery. In the nature of things, it cannot apply to persons in the marriage state; it would break down the great principle of mutual confidence and dependence; throw open the bedroom to the gaze of the public; and spread discord and misery, contention and strife, where peace and concord ought to reign. It must be remembered that rules of law are intended to act in all classes of society. In *Sedgwick v. Watkins*, 1st Ves. Jun. 49, which was an application of a wife for a *ne exeat* against her husband, Lord Thurlow said: 'She may make application for it, but the question is, by what evidence she can support it;

and whether her affidavit can be read to affect her husband?' He admits that for security of the peace *ex necessitate rei*, she may make an affidavit against her husband, but cannot be a witness to sustain an indictment, and closes by observing, 'I have always taken it to be a rule, that a wife never can be a witness against her husband, except in the case I have alluded to.' The rule, as we gather it from authority and reason, is, that a wife may be a witness against her husband for felonies perpetrated, or attempted to be perpetrated on her, and we would say for an assault and battery which inflicted or threatened a lasting injury or great bodily harm; but in all cases of a minor grade she is not. In this case, there is no pretence that any lasting injury was inflicted; on the contrary, the case states that the injury was temporary." And in this State it is now settled that a wife is not a competent witness against her husband "for an assault and battery on her where no lasting injury is inflicted or threatened to be inflicted upon her," and the same rule, *mutatis mutandis*, is applied to the husband. *State v. Rhodes*, Phil. (N. C.) 453; *State v. Oliver*, 70 N. C. 60; *State v. Davidson*, 77 N. C. 522. *Contra*, U. S. v. Smallwood, 5 Cranch C. C. 35.

² *People v. Carpenter*, 9 Barb. 580; *Com. v. Jailer*, 1 Grant, 218; *Steen v. State*, 20 Oh. St. 333; *State v. Berlin*, 42 Mo. 572.

tract obtained by force has no obligation in law.¹ So upon an indictment on the same act, section 22, for marrying a second wife, the first being alive, though the first cannot be a witness,² yet the second may after proof of the first marriage, the second marriage being void.³ In Lord Audley's case, his wife was allowed to be a witness to prove that he assisted in a rape upon her.⁴

§ 394 a. In all cases where husband and wife are admissible against each other they are admissible for each other.⁵ Thus, on an indictment of a husband for an assault and battery on his wife, she is a competent witness for him to disprove the charge.⁶

§ 395. While to test competency either the man or the woman may be examined on the *voir dire* as to marriage,⁷ to establish the marriage, proof *aliunde* must be adduced. The reasoning is simply this: if the marriage is valid, the witness is not competent; admitting that which he is offered to prove, then he is incompetent as a witness in the suit. This conclusion, however, does not apply to settlement cases or collateral inquiries.⁸ Thus it has been held in Pennsylvania, that a woman

¹ R. v. Reading, Hardw. 73; B. N. P. 286; Whart. Crim. Law, 8th ed. § 587.

² In a case before Mr. Baron Hulloek, where the defendants were charged in one count with a conspiracy to carry away a young lady, under the age of sixteen, from the custody appointed by her father, and to cause her to marry one of the defendants; and in another count with conspiring to take her away by force, being an heiress, and to marry her to one of the defendants; the learned judge was of opinion that even assuming the witness to be at the time of the trial the lawful wife of one of the defendants, she was yet a competent witness for the prosecution, on the ground of necessity, although there was no evidence to support that part of the indictment which charged force; and also on the ground that the latter defendant, by his own criminal act, could not exclude such evidence against

himself. R. v. Wakefield, 257, Murray's ed.; 2 Russ. 605; 2 Stark. Ev. 402 (n.), 2d ed." Roscoe's Cr. Ev. 126.

³ Williams v. State, 44 Ala. 24.

⁴ Griggs's Case, Sir T. Raym. 1; 4 St. Tr. 754; B. N. P. 287; 2 Hawk. c. 46, s. 72; R. & M. 354; *infra*, § 397.

⁵ 1 St. Tr. 393; and see 1 Hale P. C. 301; 1 Phil. 84.

⁶ R. v. Serjeant, R. & M. 352; People v. Fitzpatrick, 5 Parker C. R. 26.

⁷ Com. v. Murphey, 4 Allen, 491; State v. Neill, 6 Ala. 685, and cases cited *supra*.

⁸ Seeley v. Engell, 13 N. Y. 542.

⁹ R. v. Peat, 2 Lew. C. C. 288; R. v. Bramley, 6 T. R. 330; R. v. Bathwick, 2 B. & Ad. 646; R. v. Bienvenu, 15 Low. C. J. 181; Scherpf v. Szadeczky, 4 E. D. Smith, 110; Redgrave v. Redgrave, 38 Md. 93; Williams v. State, 44 Ala. 24. In New York, however, under the statute permitting a wife to

is a competent witness to prove the contract of marriage in a proceeding by the guardians of the poor to compel the alleged husband to contribute to her support.¹ To invalidate a second marriage collaterally, by proving the existence of a first marriage, either party is competent.²

§ 396. The mere fact that the testimony to be given by a wife criminales her husband, or that the testimony of the husband criminales the wife, does not exclude such testimony in prosecutions in which the party so criminated is not a defendant.³ Yet while such testimony will be *admitted*, it will not be *compelled*,⁴ though an answer will be required as to matters only disgracing, but not criminating.⁵

Husband and wife cannot be compelled collaterally to criminate each other.

testify in matters affecting her husband, she may testify in her own behalf, in a suit of divorce brought by her, to prove a marriage. *Bissell v. Bissell*, 55 Barb. 325. At common law, either husband or wife may be a witness to prove marriage collaterally in all cases in which proof of the marriage would make the witness incompetent. *Willis v. Underhill*, 6 How. N. Y. (Pr.) 396.

¹ *Guardians of the Poor v. Nathans*, 2 Brewst. 149. See *Christy v. Clarke*, 45 Barb. 529.

² *Shaak's Est.*, 4 Brewst. 305.

³ See *Whart. on Ev.* § 432; *R. v. Bathwick*, 2 B. & Ad. 639; *R. v. All Saints*, 6 M. & S. 194; *R. v. Halliday*, 8 Cox C. C. 298; *Henman v. Dickinson*, 5 Bing. 183; *State v. Bridgman*, 49 Vt. 202; *Com. v. Reid*, 8 Phila. 609. For other cases see *infra*, § 402.

In *Tilton v. Beecher* (Abbott's Rep. ii. 48 *et seq.*), Mr. Tilton, the plaintiff (the suit being against Mr. Beecher for damages for criminal conversation with the plaintiff's wife), was offered as a witness to prove his wife's adultery. This was objected to by the defendant's counsel, who, after citing a series of common law authorities, relied on *Chamberlain v. People*, 23 N. Y. 88;

Dann v. Kingdom, 1 N. Y. Sup. Ct. 492; *Lucas v. Brooks*, 18 Wall. 452; *Rideout's Trusts*, L. R. 10 Eq. 44. In behalf of the plaintiff it was argued that his competency, for this purpose, was established by the statute of 1867. To this effect were cited: *Potter v. Marsh*, 30 Barb. 506; S. C., 24 How. Pr. 610, note; *Wehrkamp v. Willett*, 4 Abb. App. 548, 559; *Potter v. Chamberlain*, 23 N. Y. 85; *White v. Stafford*, 35 Barb. 419; *Card v. Card*, 39 N. Y. 317; *Matteson v. R. R.*, 62 Barb. 364; S. C., 35 N. Y. 487; *Petrie v. Howe*, 4 N. Y. Sup. Ct. 85. The court (p. 116) held that the plaintiff was entitled to testify as a witness to the fact proposed, but not as to confidential communications from his wife.

In *Dickerman v. Graves*, 6 Cush. 308, a wife, *after a divorce* from her husband, was held a competent witness for him to prove the fact of adultery in a suit by him against the alleged adulterer. But see *infra*, § 399.

⁴ *Cartwright v. Green*, 8 Ves. 405; *R. v. All Saints*, 6 M. & S. 200; *R. v. Williams*, 8 C. & P. 284; *State v. Briggs*, 9 R. I. 361; *Com. v. Reid*, 8 Phil. 385. See fully *infra*, § 402.

⁵ *R. v. Bathwick*, 2 B. & A. 639; *State v. Marvin*, 35 N. H. 22; *Com. v.*

§ 397. It has been ruled in Canada that on an indictment for bigamy the first wife is inadmissible for the defence to prove that her marriage is invalid.¹ This, however, is founded on a *petitio principii*. The question is, whether the first marriage is valid. If so, she is not a witness, but she is a witness if such marriage is invalid. For the court to refuse to admit her, when called by the defence, to disprove the marriage, is to prejudge the question in issue.² That she cannot be called to sustain the marriage is clear, for she is excluded by the very hypothesis she is called to support.³ The proper course is to examine her on her *voir dire*. If she claims to be the first wife, on her own showing she is inadmissible. If she denies that she was married to the defendant, then she should be admitted, and the jury directed to disregard her testimony if they believe her to be the defendant's wife.⁴ Otherwise material testimony might be excluded on a hypothesis not only artificial but false. On the other hand, if a man be prosecuted for bigamy, his first wife, the validity of whose marriage is assumed by the prosecution, cannot be called to prove her marriage with the defendant.⁵ The first marriage being established, the woman with whom the second marriage was had is a competent witness either for or against the

Sparks, 7 Allen, 534; *State v. Briggs*, 9 R. I. 361; *Ware v. State*, 35 N. J. L. 553; *State v. Dudley*, 7 Wis. 664.

¹ The question whether a wife is bound to answer questions criminating her husband is not in a satisfactory state. It was held at common law, in *R. v. Claviger*, 2 T. R. 268, that a wife could not be compelled to answer questions criminating her husband. In *R. v. Worcester*, 6 M. & S. 194, Lord Ellenborough held that a wife was competent to answer such questions, and that the answers were not excluded on the ground of public policy; but Bayley, J., was of opinion that a wife who threw herself upon the protection of the court would not be compelled to answer. In equity there is no doubt that a wife cannot be compelled to answer any question which may expose

her husband to a charge of felony. *Cartwright v. Green*, 8 Ves. 410." *Powell's Evidence* (4th ed.), 110.

That husband and wife may be admitted to contradict each other see *infra*, § 402.

² *R. v. Madden*, 14 Up. Can. Q. B. 588; *R. v. Tubbee*, 1 Up. Can. P. R. 103.

³ See Whart. Crim. Law, 8th ed. § 1710; *Dumas v. State*, 14 Tex. Ap. 464.

⁴ But see *State v. Sloan*, 55 Iowa, 217.

⁵ *Peat's Case*, 2 Lew. C. C. 288; *R. v. Wakefield*, *ibid.* 279; which cases are noticed *supra*, § 390.

⁶ *Griggs's Case*, T. Ray. 1; 1 Hale, 693; 1 Russ. on Cr. 218; and see *supra*, § 390.

prisoner; for the second marriage is void.¹ If the proof of the first marriage is doubtful, and the fact is controverted, the alleged second wife cannot be admitted at common law for the prosecution.²

It has been argued that the lawful wife, though incompetent as a witness, may appear in court for the purpose of being identified, although by this process suspicion may attach to her husband; it being said, by way of illustration, that she may be thus produced to be identified as having passed a note which he is charged with having stolen.³

§ 898. Aside from the question just stated, confidential communications between husband and wife are so far privileged that the law refuses to permit either to be interrogated as to what occurred in their confidential intercourse during their marital relations,⁴ covering, therefore, admissions by silence as well as admissions by words.⁵

Neither husband nor wife can testify as to confidential marital relations.

¹ B. N. P. 287; Roscoe's Cr. Ev. 8th ed. 124; R. v. Serjeant, Ry. & M. 354, per Abbott, C. J.; R. v. Jones, C. & M. 614; State v. Patterson, 2 Ired. 346; Finney v. State, 3 Head, 544; Johnson v. State, 61 Ga. 305; State v. Johnson, 12 Minn. 476, and cases cited *supra*.

So where a woman had married the plaintiff, and lived with him as his wife during the time of the transactions to which she was called to speak, but had left him on the return of a former husband, who had been absent from England upwards of thirty years, and was supposed to be dead, Patteson, J., held that there was no objection to her giving evidence for the defendant. Wells v. Fisher, 1 M. & R. 99; S. C., 5 C. & P. 12.

² 1 Hale P. C. 693; 1 East P. C. 469; Griggs's Case, T. Ray. 1; see Miles v. U. S., 103 U. S. 304.

³ Alison, Pract. of Cr. Law, 463; Taylor's Ev. § 1231. See Whart. Crim. Law, 8th ed. § 1710.

⁴ Dexter v. Booth, 2 Allen, 559; Baldwin v. Parker, 99 Mass. 79; Raynes v. Bennett, 114 Mass. 424; Drew v. Tarbell, 117 Mass. 90; Brad-

ford v. Williams, 2 Md. Ch. 1; Wadams v. Humphrey, 22 Ill. 661; Costello v. Costello, 41 Ga. 613; Wade's Succession, 21 La. An. 343. A husband, under the Massachusetts statute, cannot be admitted to testify as to his private conversations with his wife, so as to charge his wife with liability based on such conversations. Drew v. Tarbell, 117 Mass. 90. So under Missouri statute. Moore v. Wingate, 53 Mo. 398; though in other respects either husband or wife may be a witness for the other. Chesley v. Chesley, 54 Mo. 347.

On a trial for an assault with intent to kill, the witness upon whom the assault was alleged to have been made was asked if he did not tell his wife that the prisoner acted only in his own defence. It was held that the question required him to state a communication supposed to have been made by him to his wife, which, if made, was a confidential communication, and which he was not bound to disclose. Murphy v. Com. 23 Grat. 960.

⁵ Goodrum v. State, 60 Ga. 509.

The privilege, however, is personal to the parties; a third person who happened to overhear a confidential conversation between husband and wife may be examined as to such conversation.¹ A letter, also, written confidentially by husband to wife is admissible against the husband, when brought into court by a third party.² Nor does the privilege extend to conversations with third parties which the wife overheard;³ nor does it protect husband or wife from being examined as to their conversation in presence of third parties;⁴ though it is otherwise where such third persons are infants, or incapable, from their ignorance or other incapacity, of taking part in the conversation.⁵ The privilege, also, extends only to confidential communications, and does not cover topics incident to general intercourse.⁶

The wife is not competent to prove non-access of the husband; but she may from necessity, in a case of bastardy, be examined to prove her criminal intercourse with another.⁷

§ 399. Even death or permanent separation by divorce does not release the parties from the obligation of secrecy thus imposed by marriage.⁸ The survivor, in such cases, is ordinarily precluded from divulging information he has received in marital confidence.⁹

Effect on
admissi-
bility of
death or
divorce.

¹ *Com. v. Griffin*, 110 Mass. 181.

² *State v. Hoyt*, 47 Conn. 518; *State v. Buffington*, 20 Kans. 599.

³ *Mercer v. Patterson*, 41 Ind. 440.

⁴ *State v. Center*, 35 Vt. 379; *Keator v. Dimmick*, 46 Barb. 158; *Allison v. Barrow*, 3 Coldw. 414. On this point see *Westerman v. Westerman*, 25 Oh. St. 500; cited *infra*, § 401.

⁵ *Jacobs v. Hesler*, 113 Mass. 160.

⁶ See *Colt, J.*, *Litchfield v. Merritt*, 102 Mass. 524.

As to statutory changes in this respect see *infra*, § 401.

⁷ *Com. v. Shepherd*, 6 Binn. 283; *Com. v. Conelly*, 1 Browne, 284; *State v. Pet-taway*, 3 Hawks, 623. See *infra*, § 518.

⁸ See *Whart. on Ev.* § 429, for cases.

⁹ *Monroe v. Twistleton*, *Peake's Ev. Ap.* 39; *Doker v. Hasler*, *R. & M.* 198; *Avison v. Kinnaird*, 6 East, 192; *Stein*

v. Bowman, 13 Pet. 209; *Ryan v. Follansbee*, 47 N. H. 100; *Williams v. Baldwin*, 7 Vt. 503; *State v. Phelps*, 2 Tyler, 374; *Coffin v. Jones*, 13 Pick. 444; *Gray v. Cole*, 5 Harring. 418; *Wells v. Tucker*, 3 Binn. 366; *Cornell v. Vanartsdalen*, 4 Penn. St. 364; *Griffin v. Smith*, 45 Ind. 366; *Spradling v. Conway*, 51 Mo. 51; *State v. Jolly*, 3 D. & Bat. 110; *Lingo v. State*, 29 Ga. 470; *Brewer v. Ferguson*, 11 Humph. 565.

On an indictment for fornication and adultery, one who had been the husband of the female defendant, but had been divorced from her on account of her adultery, was held in North Carolina incompetent to testify against the defendants as to the adulterous intercourse, or any other fact which occurred while the marriage existed.

§ 400. The reason for the exclusion of husband and wife, when called for or against the other, being social policy, and not interest, statutes abolishing incompetency resting on interest do not remove the common law incompetency of husband and wife for or against the other.¹ This is eminently the case in respect, as will presently be seen, to the confidential communications to each other of husband and wife.²

General statutes removing disabilities do not touch this.

§ 401. Whether special statutes prescribing that the marital relation shall not be a ground for the exclusion of witnesses apply to criminal prosecutions depends upon the terms of such statutes.³ But such statutes, when limited to the restoration of competency, do not preclude the parties from taking advantage of the right of withholding privileged communications which occurred during coverture and not in the presence of third parties;⁴ nor do they strip the parties of the

Under special enabling statutes may testify.

State v. Jolly, 3 Dev. & B. 110. Otherwise in civil suit against paramour. *Dickerman v. Graves*, 6 Cush. 30. And after a divorce *a vinculo*, the husband has been held a competent witness to prove the marriage with his divorced wife, on an indictment of another for adultery alleged to have been committed during coverture with such divorced wife. *State v. Dudley*, 7 Wis. 664.

¹ *R. v. Brittleton*, 50 L. T. (N. S.), 276; *Lucas v. Brooks*, 18 Wall. 436; *McKeen v. Frost*, 46 Me. 239; *Young v. Gilman*, 46 N. H. 484; *Cram v. Cram*, 33 Vt. 15; *Lunay v. Vantyne*, 40 Vt. 501; *Kelly v. Drew*, 12 Allen, 107; *Drew v. Tarbell*, 117 Mass. 90; *Symonds v. Peck*, 10 How. (N. Y.) Pr. 395; *Rich v. Husson*, 4 Sandf. 115; *People v. Reagle*, 60 Barb. 527; *Turpin v. State*, 55 Md. 462; *Steen v. State*, 20 Oh. St. 333; *Mitchinson v. Cross*, 58 Ill. 366; *Berins v. Cline*, 21 Ind. 37; *Pea v. Pea*, 35 Ind. 387; *Stanley v. Stanton*, 36 Ind. 445; *Costello v. Costello*, 41 Ga. 613; *Dunlap v. Hearn*, 37 Miss. 471 (though see *Lockhart v. Luker*, 36 Miss. 68); *Funk v. Dillon*, 21 Mo. 294; *Birdsall v. Dunn*, 16 Wis.

235; *Hobby v. Wisconsin Bk.*, 17 Wis. 167. See *infra*, § 437.

² See *infra*, §§ 407, 437.

³ See *Packet Co. v. Clough*, 20 Wall. 528; *State v. Black*, 63 Me. 210; *Burke v. Savage*, 13 Allen, 408; *Merriam v. R. R.*, 20 Conn. 554; *Southwick v. Southwick*, 49 N. Y. 510; *Marsh v. Potter*, 30 Barb. 506; *People v. Commis.*, 16 N. Y. Sup. Ct. (9 Hun) 212; *Bronson v. Bronson*, 8 Phila. 261; *Dellinger's Appeal*, 71 Penn. St. 425; *Robinson v. Chadwick*, 22 Oh. St. 527; *Menk v. Steinfort*, 39 Wis. 370; *Bennifield v. Hypress*, 38 Ind. 498; *McNail v. Zeigler*, 68 Ill. 224; *State v. Nash*, 10 Iowa, 81; *State v. Bennett*, 31 Iowa, 24; *State v. Hazen*, 39 Iowa, 649; *Ruth v. Ford*, 9 Kans. 17; *Furrow v. Chapin*, 13 Kans. 107; *Bradsher v. Brooks*, 71 N. C. 322; *Chesley v. Chesley*, 54 Mo. 347; *Evers v. Ins. Co.*, 59 Mo. 429. As to distinctive rule in Texas, see *Daffin v. State*, 11 Tex. Ap. 76; *Compton v. State*, 13 Tex. Ap. 271.

⁴ *McKeen v. Frost*, 46 Me. 239; *Jones v. Simpson*, 59 Me. 180; *Young v. Gilman*, 46 N. H. 484; *Dexter v. Booth*, 2 Allen, 559; *Burke v. Savage*, 13 Al-

right to decline to answer criminating questions.¹ Privilege, as it exists at common law, can be asserted in all cases in which it is not specifically prohibited by statute.²

len, 408; *Bliss v. Franklin*, 13 Allen, 244; *Packard v. Reynolds*, 100 Mass. 153; *Baxter v. R. R.*, 102 Mass. 385; *Raynes v. Bennett*, 114 Mass. 424; *Drew v. Tarbell*, 117 Mass. 90; *People v. Reagle*, 60 Barb. 527; *Southwick v. Southwick*, 49 N. Y. 513; *Wehrkamp v. Willett*, 4 Abb. (N. Y.) App. 548; *Westerman v. Westerman*, 25 Ohio St. 500; *Bevins v. Cline*, 21 Ind. 371; *Thomas v. Barbour*, 49 Ill. 370; *Mitchinson v. Cross*, 58 Ill. 366; *Reeves v. Herr*, 59 Ill. 81; *State v. Bernard*, 45 Iowa, 234; *Jackson v. Jackson*, 40 Ga. 157; *Costello v. Costello*, 41 Ga. 613; *Buck v. Ashbrook*, 51 Mo. 539; *Moore v. Wingate*, 53 Mo. 398; *Magness v. Walker*, 26 Ark. 470; *Creamer v. State*, 34 Tex. 173; *State v. McCord*, 8 Kans. 232.

¹ *Bronson v. Bronson*, 8 Phila. 261; *State v. McCord*, 8 Kans. 232.

² In New Hampshire the statutes are thus recapitulated:—

"In *State v. Moulton*, 48 N. H. 485, it was expressly held that the recent statutes, making the wife a witness for her husband, do not apply in criminal cases. A different rule is now established by the following statute, P. L. 1871, c. 38, § 2: 'In any case where the respondent in any criminal prosecution is allowed to testify by law, the wife of such respondent shall be a competent witness.' Sec. 3. 'This act shall apply to all cases now pending, and shall take effect upon its passage.' Approved July 13, 1871.

"In civil cases, under the provisions of § 22, of c. 209, Gen. Sts. (as amended by P. L. 1869, c. 29, and P. L. 1870, c. 20), the wife may testify for or against her husband, and the husband for or against the wife, in any

case, when it appears to the court that their examination as witnesses upon the points to which their testimony is offered would not lead to a violation of marital confidence; and in the trial of any civil suit or proceeding in which a husband or wife is competent, or shall be admitted to testify as witnesses for or against each other on one side of a case, the same right shall exist on the opposite side of the case. Besides these general provisions applicable to all cases alike, the husband and wife are by statute (Gen. Sts. c. 209, §§ 20, 21) made witnesses for or against each other, whether joined as parties or not, in the following cases: 1st. In actions upon insurance policies, so far as relates to the amount and value of the property insured. 2d. In suits against common carriers, so far as relates to the loss, amount, and value of the property in question. 3d. In actions on matter arising before marriage. 4th. In suits for personal injuries to the wife, or for damages to the husband on that account.'" *State v. Straw*, 50 N. H. 460, Ladd, J.

Under the Illinois statute husband and wife are not competent witnesses against each other, though in certain cases they may be examined in each other's behalf. *Hawver v. Hawver*, 78 Ill. 412; *Trepp v. Barker*, 78 Ill. 146; *Primmer v. Clabaugh*, 78 Ill. 94.

In New York, under the provisions of the Act of 1867 (c. 887 Laws of 1867), in an action between husband and wife, either is a witness in his or her behalf, against the other, save in the cases excepted in the act. The act, it is held, applies to all trials thereafter had in actions pending when it took effect, and under it the husband or wife can

§ 402. The fact that a married person has testified in one way in a trial, does not preclude the husband or wife of such person

testify to conversations and communications (not confidential) had with the other prior to the taking effect of the act. *Southwick v. Southwick*, 49 N. Y. 510.

In *Houghton v. People*, N. Y. Sup. Court, 23 Alb. L. J. 442, which was an indictment for bigamy, on the trial of which the defendant's wife was admitted as a witness against him, the conviction was set aside, Judge Dykman speaking of the statute as follows:—

"It is a statute in derogation of the common law, and can be permitted to accomplish nothing beyond what is fairly intended. It is first affirmatively enacted that a husband or wife may be examined as a witness for the other in a criminal prosecution, and, further, the statute does not provide affirmatively. What follows is a provision that on no criminal trial or examination shall husband or wife be compelled to testify against the other. These are negative words only, and make no innovation or relaxation of the old rule of law. Probably their true intention and operation will be found in preventing the elicitation of testimony from husband or wife against each other after being called in their behalf. Substantially the same view of this statute was taken in the *Briggs Case*, 60 How. 17. If it had been the intention of the statute makers to break down the barrier protecting the husband and wife from the testimony of the others in criminal prosecutions, it would not have been left to inference or implication, and we are not at liberty to resort to either to find it. In this case the court proceeded on the theory that the wife was competent but not compellable, and might testify of her free

will, but as we have seen already the statute affirms her competency only in favor of her husband and not against him." The editor of the *Albany Law Journal* cites as to the same effect: *Byrd v. State*, 57 Miss. 243; S. C., 34 Am. Rep. 440; also, 22 Alb. L. J. 81.

In Pennsylvania, under the Act of April 15, 1869, a wife may be called by her husband as a witness, notwithstanding she may be compelled, on cross-examination, to give evidence against him; the act provides for the competency of the witness, not for the effect of her testimony. *Ballantine v. White*, 77 Penn. St. 20. But the statutes of 1872 and 1877 do not confer competency on the wife as a witness in criminal cases for her husband. *Gibson v. Com.*, 87 Penn. St. 253.

In Ohio, under the Amendatory Act of April 18, 1870 (67 Ohio L. 113), husband and wife are competent witnesses for and against each other, except as to communications made by one to the other, and acts done by one in the presence of the other during coverture, and not in the known presence of a third person.

The act is held to be applicable to cases pending and causes of action existing at the time of its passage, notwithstanding the provisions of the Act of February 19, 1866 (S. & S. 1), declaring the effect of repeals and amendments.

It has been further ruled that evidence that a third person was present, and known to be present, at the time of making such communications, or doing such acts, is for the court, and not for the jury, and, on error, will be presumed to have been given to the court, unless the contrary appears. *Westerman v. Westerman*, 25 Ohio St. 500.

from testifying precisely to the opposite. Such impeaching testimony is admissible, even though the effect be to discredit the party contradicted.¹ Whether either husband or wife can be permitted, in a collateral proceeding, to charge the other with a criminal offence, has been doubted. In England, it was at one time held that no such testimony could be received,² and so has it frequently been ruled in this country.³ But it is more reasonable to admit such testimony in all cases where it cannot be used as an instrument of future prosecution, provided the witness be not compelled to testify.⁴

Husband and wife may be admitted to contradict each other.

VII. DISTINCTIVE RULES AS TO EXPERTS.⁵

§ 408. An expert in a specialty has been frequently defined to be a person experienced in such specialty; and to this definition, in fact, we are led by the derivation of the word. But with this definition we cannot rest. All experts are more or less experienced in a specialty, but all persons more or less experienced in a specialty are not to be regarded as experts in such specialty so as to be called as such in a court of justice. We must go further, therefore, and seek for the distinguishing mark of experts when so called. It has sometimes been said that an expert is a witness who testifies as to conclusions from facts, while an ordinary witness testifies only as to facts. This definition, also, is not sufficiently exact. No witnesses, called to detail

Expert is entitled to testify as a specialist.

¹ *Supra*, § 396; *Stapleton v. Crofts*, 18 Q. B. 368; *Annesley v. Anglesea*, 17 How. St. Tr. 1276; *R. v. All Saints*, 6 M. & S. 194; *R. v. Bathwick*, 2 B. & Ad. 639; *Stein v. Bowman*, 13 Pet. 209; *State v. Marvin*, 35 N. H. 22; *Fitch v. Hill*, 11 Mass. 286; *Roy. Ins. Co. v. Noble*, 5 Abb. Pr. (N. S.) 55; *Ware v. State*, 35 N. J. 553; *Com. v. Patterson*, 8 Phila. 609; *State v. Dudley*, 7 Wis. 664; *Chubb v. State*, 14 Tex. App. 192. See, however, *contra*, *Roach v. State*, 41 Tex. 261; *Keaton v. McGwier*, 24 Ga. 217.

² *R. v. Clivinger*, 2 T. R. 263.

³ *State v. Welsh*, 26 Me. 30; *Com. v. Sparks*, 7 Allen, 534; *State v. Gard-*

ner, 1 Root, 485; *State v. Wilson*, 31 N. J. 77; *State v. Pettaway*, 3 Hawks. 623; *People v. Horton*, 4 Mich. 87. See *R. v. Williams*, 8 C. & P. 289. But see *Tilton v. Beecher*, *supra*, § 396.

⁴ *R. v. Bathwick*, 2 B. & Ad. 639; *R. v. All Saints*, 6 M. & S. 194; *R. v. Halliday*, 8 Cox, 298; *State v. Briggs*, 9 R. I. 361; *Petrie v. Howe*, 4 N. Y. Sup. Ct. 85; *Tilton v. Beecher*, *Abbott's Rep.* ii. 116. See *Phillipp's Ev.* i. 84 (4th Am. ed.); *Com. v. Reid*, 8 Phila. 609; *State v. Dudley*, 7 Wis. 664. See *supra*, § 396.

⁵ See as to expert testimony, 3 *Wharton & St. Med. Jur.*, 4th ed. [1884], §§ 900 *et seq.*

facts, reproduce such facts as they really exist.¹ Apart from the psychological question, whether what we see is immediately perceived by us, such acts are inferred, not actually witnessed.² I hear the report of a gun, for instance; I notice that the gun is aimed at a particular bird by a sportsman, and I see the bird fall; I infer that the sportsman killed the bird, though I did not see the shot as it passed through the air and struck. Identity (as has already been seen) is always a matter of inference, and so are all statements involving the application of a predicate to a subject.³ We must therefore proceed further when we seek to distinguish between the expert and the non-expert. And the true distinction is this: that the non-expert testifies to a subject matter readily mastered by the adjudicating tribunal; the expert to conclusions outside of such range. The non-expert gives the results of a process of reasoning familiar to every-day life; the expert gives the results of a process of reasoning which can be verified only by specialists.⁴

§ 404. It is elsewhere shown that foreign laws are to be proved by experts, which proof may be by parol.⁵ Such is also the case with domestic systems of law not cognate with or included in the common law or the statute law of the jurisdiction. Hence the opinion of experienced military officers may be taken as to a point of military practice.⁶

Specialists may be examined as to laws other than the *lex fori*.

And in an action for libel arising out of a race-horse transaction, it was held by Lord Denman, that a member of the jockey club might be asked, as a witness, whether he did not consider a certain course of conduct to be dishonorable.⁷

§ 405. The difficulty of distinguishing between "facts" and "opinions" has been already noticed; and it has been seen that, while all facts testified to are in one sense opinions, all opinions testified to are in one sense facts.⁸ The question, therefore, is one as to the meaning of terms; and assuming, for the purpose of the present inquiry, that "opinion" means a conclusion from a series

On matters non-professional or of common observation experts cannot give opinions.

¹ *Supra*, § 378.

² See *supra*, § 17.

³ See *supra*, §§ 7, 18, 19.

⁴ Whart. on Ev. § 403. See *People v. Royal*, 58 Cal. 62. That an official examiner appointed by statute to make an autopsy does not exclude other ex-

perts as witnesses, see *Com. v. Dunan* 128 Mass. 422. *Infra*, § 422.

⁵ Whart. on Ev. § 435. See *supra*, § 172.

⁶ *Bradley v. Arthur*, 4 B. & C. 295.

⁷ *Greville v. Chapman*, 5 Q. B. 731.

⁸ *Supra*, §§ 7 *et seq.*

of facts capable of being substantively proved, we must accept as a general rule the proposition, to be hereafter more fully illustrated,¹ that a witness cannot give his conclusions from facts, but must state the facts, leaving the drawing of conclusions to the court and jury. The same rule applies to experts, in all matters as to which the lay mind is capable of forming a conclusion from facts susceptible of ascertainment, either as matters testified to by witnesses, or as matters of notoriety.² Thus an expert cannot be asked whether a railroad train stopped long enough for the passengers to get off, or whether it is safer to discharge passengers at a station or before reaching it,³ or whether it was prudent to blow a steam-whistle at a particular time.⁴ So a practising physician cannot be examined as to the amount of damages resulting to one physician from the violation of a contract by another not to practise in a particular district;⁵ nor can a city fireman be asked as to the influence of the wind in extending a fire.⁶ So a physician cannot be asked as an expert whether a rape could have been committed in a particular way, when the question is one which it required no professional knowledge to answer;⁷ nor as to the effect of sexual solicitations;⁸ nor as to the effect on the health of an habitual use of intoxicating liquor.⁹ Nor can an expert in "the

¹ *Infra*, §§ 411, 457.

² See cases cited Whart. on Ev. § 436. *Kennedy v. People*, 39 N. Y. 245. Compare *Com. v. Piper*, 120 Mass. 185; *People v. Manke*, 78 N. Y. 611; *Dillard v. State*, 58 Miss. 368; *Jones v. State*, 71 Ind. 66; *Beasley v. People*, 89 Ill. 572; *Rash v. State*, 61 Ala. 89; *Monroe v. Latten*, 25 Kan. 351; *Hunt v. State*, 9 Tex. Ap. 166. See *Heacock v. State*, 13 Tex. Ap. 97.

³ *Keller v. R. R.*, 2 Abb. (N. Y.) App. 480.

⁴ *Hill v. R. R.*, 55 Me. 438.

⁵ *Linn v. Sigsbee*, 67 Ill. 75.

⁶ *State v. Watson*, 65 Me. 74.

⁷ *Cook v. State*, 24 N. J. L. 843. But in Michigan it has been held that it was permissible to call medical experts to testify as to the unlikeliness of sexual intercourse having been ac-

complished, as the prosecutrix stated, in a buggy. *People v. Clark*, 33 Mich. 112; and see *Woodin v. People*, 1 Park. C. C. 465. In *Noonan v. State*, 55 Wis. 255, it was held not allowable to ask a witness whether inflammation in the sexual organs had not been produced by a violent as distinguished from a voluntary connection. A question of this character was permitted in *State v. Malley*, New Haven, 1882.

⁸ *People v. Royal*, 53 Cal. 62.

⁹ *Rawls v. Ins. Co.*, 27 N. Y. 282. See *Carson v. State*, 69 Ala. 235.

In New York, on a trial for murder, a medical witness testified that he saw defendant on the evening of the day after the killing, conversed with him, and then thought him deranged; that he thought the insanity was *delirium tremens*; that he knew defendant's

laws of vision" be received to prove that there cannot be recognition of an assailant by the flash of a pistol.¹

§ 406. Where, however, it is necessary for the jury to be familiar with the operation of laws too recondite to be mastered by the lay mind in the hurry of a trial, it is necessary to call experts in such laws to testify to their bearing on points in issue. It is to such matters, and only as to such matters, that experts are entitled to give what, in the sense in which the term is here used, is "opinion."²

Court is to determine whether witnesses are properly "experts."

Whether, as to the particular question, the witness is an expert, the trial court is to determine,³ and on this point the witness may be examined, and evidence may be received *aliunde*.⁴ Except in an extraordinary case, an appellate court will not reverse on account of a mistake of judgment, on the part of the trial court, in determining qualifications of this class.⁵

habits of drinking, and supposed drinking to be the cause of his insanity; that he had been present and heard all the evidence. The witness then stated, under objection, how long he thought defendant had been in this state of delirium, but was not allowed to state whether, in his opinion, he was in this state on the night of the alleged killing. It was held that this was no error. *People v. McCann*, 3 Parker C. R. 272.

When, in Missouri, in a murder trial, the counsel for the defendant put to a medical expert the following question: "When the defendant has been undeniably subject to fits of epilepsy, should he not have the benefit of every reasonable doubt that might arise as to his sanity?" it was correctly decided by the Supreme Court that the question was properly ruled out. *State v. Klinger*, 46 Mo. 224.

In *Com. v. Collier*, 134 Mass. 203, which was a prosecution for illegal sale of intoxicating liquors, a witness testified for the government that he tasted liquor sold by the defendant; that it

was lager beer; and that he could tell by the taste alone whether it contained three per cent. of alcohol. It was ruled that the defendant was not entitled to ask a witness, an expert in the manufacture and taste of beer, whether a person could determine from the taste alone the proportion of alcohol contained in a given sample of beer. In *Carson v. State*, 69 Ala. 235, it was held that a witness not an expert could testify as to the intoxicating character of certain liquor.

¹ *Smith v. State*, 2 Ohio St. 511. See 3 Whart. & St. Med. Jur., 4th ed. § 939.

² See Whart. on Ev. § 336.

³ See *infra*, § 408.

⁴ *Infra*, § 411; *Davis v. State*, 38 Md. 15; *Tome v. R. R.*, 39 Md. 36; *Mendum v. Com.*, 6 Rand. 704; *Bills v. Ottumwa*, 35 Iowa, 107; *Brabbitts v. R. R.* 38 Wis. 290; *Caleb v. State*, 39 Miss. 721; *Waite v. State*, 13 Tex. Ap. 169. And see Whart. on Ev. §§ 666-721.

⁵ *Goessler v. Eagle Co.*, 103 Mass. 331; *Hill v. Ice Co.*, 120 Mass. 345; *Nelson v. Ins. Co.*, 71 N. Y. 453. In

§ 407. An expert, such is the prevailing opinion, may state that his views are sustained by standard authorities in his profession.¹ He cannot, however, be permitted to read, as independent proof, extracts from books in his department,² though he may refresh his memory, when giving the conclusions arrived at in his specialty, by turning to standard works.³ But unless an expert, in his examination or cross-examination, cites particular scientific works, such works cannot be afterwards put in evidence to discredit him.⁴

Expert
may be ex-
amined as
to scientific
authorities.

Dole v. Johnson, 50 N. H. 455, it was held that the decision of the trial court is final.

¹ *R. v. Thomas*, 13 Cox C. C. 77; *Collier v. Simpson*, 5 C. & P. 73; *Cocks v. Purday*, 2 C. & K. 290; *Carter v. State*, 2 Ind. 617.

² *Washburn v. Cuddihy*, 8 Gray, 430; *Whitton v. Ins. Co.*, 109 Mass. 44; *Com. v. Sturtivant*, 117 Mass. 122; *Com. v. Brown*, 121 Mass. 69; *Stilling v. Thorpe*, 54 Wis. 528; *Boyle v. State*, S. Ct. Wis. 1883. *Infra*, § 419. As to admissibility of scientific works as independent authority, see *infra*, §§ 537-9. In *Boyle v. State*, Sup. Ct. Wis. 1883 (17 Cent. L. J. 91), Taylor, J., giving the opinion of the Supreme Court, said: "It seems to us that the court erred in permitting Dr. Cody to testify as to what was said in standard medical works upon the subject of strangulation, and what effects would be produced upon the body of the deceased when death resulted from such cause. The admission of such evidence is in direct conflict with the rulings of this court in the case of *Stilling v. Town of Thorp*, 54 Wis. 528. In that case the question of admission of medical works in evidence was fully discussed, and it was held that they were not admissible. In addition to the cases cited by Justice Cassoday in that opinion we cite the following cases sustaining the ruling in that case: *Whitton v. Ins. Co.*, 109 Mass. 44; *Fowler v. Lewis*, 25

Tex. 380; *Collier v. Simpson*, 5 C. & P. 73; *Regina v. Thomas*, 13 Cox's Crim. Cases, 52; *Carter v. State*, 7 Ind. 617; *State v. O'Brien*, 7 R. I. 336; *Ware v. Ware*, 8 Me. 42; *Commonwealth v. Brown*, 121 Mass. 69, 75; *Frazier v. Jennison*, 42 Mich. 207-214; *Pinney v. Cahill*, 12 N. W. R. 862; *People v. Hall*, id. 665; *Harris v. E. R. Co.*, 3 Bosw. 1-18; *Rogers on Expert Testimony*, 237-243. The author of this treatise cites the authorities, showing that evidence of this kind is held not admissible by the English courts, and the courts of Indiana, Maine, Maryland, Massachusetts, Michigan, North Carolina, Rhode Island, Wisconsin, California, and New Hampshire, and admissible in the States of Iowa and Alabama. The rule stated by this court in *Stilling v. Town of Thorp*, *supra*, was followed in the case of *Kroll v. State*, 55 Wis. 249-256."

³ See *infra*, §§ 537-9; *Darby v. Ousley*, 1 H. & N. 1; *Pierson v. Hoag*, 47 Barb. 243; *Hornblower, C. J.*, in 1 Zab. 196; *Connecticut Ins. Co. v. Ellis*, 89 Ill. 516; *Cory v. Silcox*, 6 Ind. 39; *Harvey v. State*, 40 Ind. 516; *Bowman v. Torr*, 3 Iowa, 571; *Ripon v. Bittel*, 30 Wis. 614; *Luning v. State*, 1 Chandel. (Wis.) 264; *State v. Terrell*, 12 Richard. 321; *Merkle v. State*, 37 Ala. 139. See *Melvin v. Easley*, 1 Jones (N. C.), 386.

⁴ *Infra*, § 539; *Ripon v. Bittel*, 30 Wis. 614.

§ 408. To entitle a witness to be examined as an expert in a specific topic, he must, in the opinion of the court, have special practical acquaintance with the immediate line of inquiry.¹ Yet he need not be thoroughly acquainted with the differentia of the specialty under consideration.

An expert must be specially skilled.

If this were necessary, few experts could be admitted to testify; certainly no courts could be found capable of determining whether such experts were competent. A general knowledge of the department to which the specialty belongs would seem to be enough.² And it has been held in Virginia that one who has played the game of "keno" two or three times, but who has said he is no expert, is competent to describe the game.³

§ 409. The court has to decide, also, not only what makes an expert, but how he is to be sustained or impeached. "After a witness has been admitted to testify as an expert," so says, it is true, an able writer, "evidence cannot be given to the jury of the

¹ *Supra*, § 406. See cases cited in Whart. on Ev. §§ 439; and compare *State v. Watson*, 65 Me. 74; *State v. Secrist*, 80 N. C. 450; *Heacock v. State*, 13 Tex. Ap. 97.

In *Brownell v. People*, 38 Mich. 735, Campbell, C. J., said:—

"It appears to us that the testimony of one called as an expert upon the effect of a pistol shot upon the clothing, when fired at a certain distance, was based on too small an experience. A single pistol shot through his own clothing, without any proof of the comparative amounts or kinds of loading, and without ever seeing further experiments at greater or less distances or at the same distance, with pistols of the same of different make or calibre, is too small a foundation for generalizing." In *Sullivan v. Com.*, 93 Penn. St. 284, a physician was allowed to give the result of his experiments in firing a pistol at muslin or cloth, and the muslin with the powder marks were also admitted.

² *State v. Wood*, 53 N. H. 484;

Dole v. Johnson, 50 N. H. 452; *Cook v. Castner*, 9 Cush. 286; *Com. v. Rich*, 14 Gray, 335; *Shattuck v. Train*, 116 Mass. 296; *Roberts v. Johnson*, 58 N. Y. 613; *Castner v. Sliker*, 33 N. J. L. 95, 507; *Consolidated Co. v. Cashow*, 41 Md. 59; *House v. Fort*, 4 Blackf. 293; *Washington v. Cole*, 6 Ala. 212; *Tullis v. Kidd*, 12 Ala. 648; *Spiva v. Stapleton*, 38 Ala. 171; *Morrissey v. People*, 11 Mich. 327; *Davis v. State*, 35 Ind. 496; *State v. Hinkle*, 6 Iowa, 380; *State v. Reddick*, 7 Kans. 143. But in *Emerson v. Lowell*, 6 Allen, 146, it was ruled that a physician who has had no experience of the effect on health of breathing illuminating gas could not be examined as an expert as to such effects. And the experience of an expert is to be considered in weighing his testimony: *Koons v. State*, 36 Oh. St. 195. See *Myers v. State*, 14 Tex. 35, where it was held that experts in handling weapons may be examined as to their capacity.

³ *Nuckolls v. Com.*, 32 Grat. 884.

opinions of other experts in the same science as to whether the witness was qualified to draw correct conclusions in the science on which he had been examined, though such testimony might have been properly offered to the court to show the competency of the witness before he was admitted to testify.¹ The rule imposing limitations upon such opinions is now well established, and the expert's own character is best protected by it, under the maxim of *experto crede*, since whatever might be said by one expert in derogation of another's opinion might in turn be said of his own: *mutato nomine de te fabula narratur*.² But it is difficult to understand why an expert should be withdrawn from the operation of the general rule of law which permits witnesses to be impeached by showing their incapacity. It is admissible to show that a witness who testifies that he saw a particular thing did not see it, because he was absent or blind; and hence it may be shown that an expert who testifies to certain results is incapable of reaching them. But unless the capacity or reputation of an expert be *assailed* it cannot be independently *proved* by the party calling him,³ though his special knowledge may be thus proved by his own examination.⁴ At all events, whether an expert can be thus impeached or sustained, and if so, how this is to be done, is exclusively for the court.

§ 410. Still more strikingly are we reminded that we must after all go back to the courts to determine the limits of expert testimony, when we accept the position so often invoked, that while "men of science" are experts, "quacks" are not. But who are "quacks?" Are practitioners of new, and what may at the time be professionally viewed as heretical, schools, "quacks?" This would have disqualified both Willis and Esquirol, each of whom was for a time viewed as a quack by the body of conservative practitioners. Is he a quack who adheres to a system which, though venerable and supported by high past authority, is now regarded as exploded? Would one of Bishop Berkeley's disciples be an expert as to the value of tar water? Is even a psychological physician of eminence an expert as to matters speculative or ethical? The latter question was justly negatived

Court decides as to impeaching or sustaining expert.

Limits of specialty to be defined by court.

¹ Tullis v. Kidd, 12 Ala. 648.

⁴ *Supra*, § 406; Laros v. Com., 84

³ Ordonaux, Juris. of Med. § 117.

Penn. St. 200.

² Dephue v. State, 44 Ala. 32.

in 1869, in the Court of Appeals of Kentucky, by Chief Justice Williams, who said that "the opinions of experts, not founded on science, but on a mere theory of morals or ethics, whether given by professional or unprofessional men, are wholly inadmissible as evidence. Hence the opinion of even physicians, that no sane man in a Christian country would commit suicide, not being founded on the science or phenomena of the mind, but rather a theory of morals, religion, and future responsibility, is not evidence."¹

We find ourselves, therefore, reduced to the following dilemma: Either the court must distinguish between rival schools, in which case it determines in advance that particular tenets of science are substantive; or it must decline so to decide, in which case there is no ground of discrimination between professed experts.

To the same result are we driven by the criterion invoked by Chief Justice Williams, in the case just cited. To declare that experts are admissible to state what is "scientific," but not what is "speculative" or "ethical," is to define what "science" is and what are its bounds, and to assume the right of rejecting from the domain of science anything that the law claims to belong to its own specific control. We then have either to abdicate such a right on the part of the court, and to give unrestrained license and final authoritativeness to experts; or we must revert to the old doctrine, that experts, no matter on what they testify, simply supply data as to whose competency and relevancy the court is to judge, and as to which the court is finally to declare the law. And it is to this result that sound reason as well as recent adjudications tend.

§ 411. So far as concerns the line between experts and non-experts, the rule, as already stated, is that on topics of notoriety, and within the ordinary experience of jurymen, an expert cannot give conclusions.²

But not to include matters of ordinary observation.

§ 412. Between medical men of distinct schools, and between medical men of different grades of culture in the same school, another line of discrimination is to be invoked. Jurisprudence does not say to any particular school, "You are right and the others are wrong;" but

Medical man if an expert in his school may testify as such.

¹ St. Louis Mut. Ins. Co. v. Graves, Tex. Ap. 166; Bell on Expert Test. 6 Bush, 290. 13. See Nuckolls v. Com., 32 Gratt.

² *Supra*, § 405; Carter v. Boehm, 1 884; *supra*, § 408. That the inference from the direction of a wound is

it says to the members of each school, "You are bound to exercise the skill and possess the qualifications usual to good practitioners of your particular class."¹ So jurisprudence does not say to a physician or surgeon called to testify whether a wound or a poison was fatal, "You must have a particular diploma, or belong to a particular professional school;" but it says, "If you have become familiar with such laws of your profession as bear upon this issue, then you can testify how the issue is affected by such laws."² Hence, physicians, when in general practice, are admissible to state the nature and effects of a disease;³ the conditions of gestation;⁴ the effect of particular poisons on the human system;⁵ the effects of a particular treatment;⁶ the likelihood that death could be produced by a particular disease,⁷ though they have not made such topics a specialty.⁸ Medical attendants, neither specialists nor family physicians, may be examined as to cases of insanity,⁹ though they may not be competent to answer questions as to hypothetical cases.¹⁰ And a surgeon is admissible to prove the nature of a wound and its probable cause and effects,¹¹ and that it was not of

not that of a specialty, see *People v. Westlake*, 62 Cal. 303; 3 Wh. & St. Med. Jur. 4th ed. § 299; *inf.* § 771.

¹ Whart. on Neg. § 733; *Corsi v. Maretzek*, 4 E. D. Smith, 1.

² *Livingston's Case*, 14 Grat. 592; *New OrL. Co. v. Allbritton*, 38 Miss. 242; *Polk v. State*, 36 Ark. 117. As to restrictions in Wisconsin statute, see *Montgomery v. Scott*, 34 Wis. 339.

³ See cases cited Whart. on Ev. § 411; *Mitchell v. State*, 58 Ala. 417.

⁴ *State v. Smith*, 32 Me. 369; *Young v. Makepeace*, 103 Mass. 50; *Daegling v. State*, 58 Wis. 586; see *inf.* § 816.

⁵ *Stephens v. People*, 4 Parker C. R. 396; *Pierson v. People*, 18 Hun. 239.

⁶ *Barber v. Merriam*, 11 Allen, 322.

⁷ *State v. Smith*, 32 Me. 369; and cases cited Whart. on Ev. § 441.

⁸ *Dole v. Johnson*, 50 N. H. 452; *Castner v. Sliker*, 33 N. J. L. 95, 507.

⁹ *Hastings v. Rider*, 100 Mass. 622; *Chandler v. Barrett*, 21 La. An. 58;

Davis v. State, 35 Inn. 496; *State v. Reddick*, 7 Kans. 143.

¹⁰ See fully *inf.* § 418; *Com. v. Rich*, 14 Gray, 335.

¹¹ *State v. Knight*, 48 Me. 11; *Rowell v. Lowell*, 11 Gray, 420; *Linton v. Hurley*, 14 Gray, 191; *Com. v. Piper*, 120 Mass. 186; *Gardiner v. People*, 6 Parker C. R. 155; *Rumsey v. People*, 19 N. Y. 41; *Fort v. Brown*, 46 Barb. 366; *People v. Kerrains*, 1 Thomp. & C. 333; *Com. v. Lenox*, 3 Brewst. 249; *Davis v. State*, 38 Md. 15, 43; *Livingston's Case*, 14 Grat. 592; *Batten v. State*, 80 Ind. 394; *Ulrich v. People*, 39 Mich. 245; *State v. Morphy*, 33 Iowa, 270; *State v. Crenshaw*, 32 La. An. 406; *Ebos v. State*, 34 Ark. 520; *Shelton v. State*, 34 Tex. 662; *Banks v. State*, 13 Tex. Ap. 182; *Powell v. State*, id. 244; *Waite v. State*, id. 169. As to cases where a medical examiner did not follow a statute regulating autopsies, see *Com. v. Taylor*, 132 Mass. 261. In *Wilson v. People*, 4 Park. C.

recent infliction,¹ and as to its probable period, based on the testimony of others,² though it has been held not admissible for a surgeon to give an opinion on merely speculative data.³ And he may be asked which of several wounds produced death,⁴ though not as to matters in respect to which the jury can judge as well as an expert.⁵ But as to matters out of the range of a specific department to which he has confined himself, an expert is not entitled to testify.⁶ Practice, however, in such specialty is not a prerequisite to admissibility if the specialty has been made the object of study.⁷ And a general family practitioner may be received to give an opinion, whatever may be its weight, as to whatever comes within the range of such practice.⁸ But a medical man is not permitted to

C. 619, the court rejected expert evidence to determine whether the wound was inflicted by a blunt or a sharp instrument. In *Davis v. State*, *ut supra*, expert testimony was received to show that the death was produced by a fall into a sink.

For cases relative to expert testimony in rape cases, see *supra*, § 405.

In *State v. Harris*, 63 N. C. 1, a physician was admitted to prove that a burn was produced after death; and in *Clark v. State*, 15 S. C. 403, to prove whether a party was dead before a train struck him. In *Rash v. State*, 61 Ala. 98, a surgeon was admitted to explain how a gunshot wound was inflicted.

In *State v. Potter*, 34 Iowa, 131, a question was allowed as to whether a particular blow could have come from a fall from a chair.

In *O'Mara v. Com.*, 75 Penn. St. 424 (*infra*, §§ 721, 764, 778), a physician was admitted to testify as to the quantity of blood likely to flow from a particular wound.

In *Cowley v. People*, 83 N. Y. 464, testimony of a physician was received as to what would have been likely to have produced particular emaciation in a child.

In *State v. Single*, 83 N. C. 630, a physician was examined as to the deleterious effect of a particular medicine in a given case.

¹ *Lindsay v. People*, 63 N. Y. 143.

² *State v. Clark*, 15 S. C. 403.

³ *Com. v. Piper*, 120 Mass. 186; *Hawks v. Charlemon*, 110 Mass. 110; *Kennedy v. People*, 39 N. Y. 245.

⁴ *Infra*, § 774.

⁵ *Kennedy v. People*, 39 N. Y. 245; *Cook v. State*, 24 N. J. L. 852 (*supra*, § 405); *Noonan v. State*, 55 Wis. 258; *Cooper v. State*, 23 Tex. 331; *Dillard v. State*, 58 Miss. 368.

⁶ See *Emerson v. Lowell*, 6 Allen, 146; *Com. v. Collier*, 134 Mass. 203, cited *supra*, § 405. In *State v. Smith*, 49 Conn. 376, it was held that a physician could not be admitted to prove that the defendant was peculiarly susceptible to the influence of a spirituous liquor.

⁷ See *State v. Wood*, 53 N. H. 484; *Baxter v. Abbott*, 7 Gray, 71, cited *infra*, §§ 417, 493.

⁸ *Hastings v. Rider*, 99 Mass. 622; *State v. Clark*, 12 Ired. L. 151; *Horton v. Green*, 64 N. C. 64; *Everett v. State*, 62 Ga. 65 (see *infra*, §§ 460, 756); *State v. Cook*, 17 Kans. 392.

testify as an expert as to matters not distinctively belonging to his profession.¹ And it has been held that medical men cannot be admitted to testify, in order to contradict witnesses who had identified the head of a deceased person, that after a certain stage of decomposition a human head cannot be identified.²

§ 413. Experts in physical science are admissible on the same conditions.³ Thus it is allowable to examine chemists and microscopists, as to whether certain stains are from blood,⁴ as to the effects of a particular poison,⁵ as to the nature of ink stains,⁶ as to effects of particular powders in erasing writing;⁷ physicians, with a general, though not special knowledge of chemistry, as to whether a particular poison was found in the stomach of the deceased;⁸ a machinist as to the causes of a leak in a water-pipe;⁹ and a college graduate who has studied chemistry with a distinguished chemist, has taught chemistry for five years, and is acquainted with gases and with the composition of camphene, as to the safety of a camphene lamp.¹⁰

§ 414. Nor is it necessary that a specialty, to enable one of its practitioners to be examined as an expert, should involve abstruse scientific conditions. No matter how humble may be a specialty, and how purely mechanical may be its practice, those familiar with it may be examined as

¹ *Supra*, § 405; Lawson on Expert Ev., Rule 28; Emerson v. Lowell, 6 Allen, 146; *supra*, § 408.

² State v. Vincent, 24 Iowa, 570.

³ Page v. Parker, 40 N. H. 47.

⁴ State v. Knights, 43 Me. 11; People v. Gonzales, 35 N. Y. 49; Gaines v. Com., 50 Penn. St. 319. See Whart. on Hom. § 683. *Infra*, § 777.

⁵ Hartung v. People, 4 Parker, C. R. 319; and this though the expert be not a physician, or trained as such. State v. Cook, 17 Kans. 392.

⁶ Farmers' Bank v. Young, 36 Iowa, 45.

⁷ People v. Brotherton, 47 Cal. 388.

In this, which was a trial for forgery committed by altering a check, by extracting writing therefrom and writing

new words or figures in place thereof, a witness, who was not called as a scientific expert, was permitted to testify as to the chemical effect that a powder, found in the possession of the defendants, had on writing in a check similar to that by the alteration of which the forgery was committed. It was further held, that the check upon which the effect testified to by the witness was produced might be exhibited to the jury.

⁸ State v. Hinkle, 6 Iowa, 380.

⁹ Hand v. Brookline, 125 Mass. 324. See Sheldon v. Booth, 50 Iowa, 209.

¹⁰ Bieroe v. Stocking, 11 Gray, 174. See Whart. on Ev. § 444; Downing v. State, 66 Ga. 110, 160.

to its laws.¹ But the specialty must be that in which the expert is skilled.² Thus a painter cannot be examined as to the construction of a building,³ nor can a surveyor of highways, who is not an expert in road building, as to the safety of a road,⁴ nor a surveyor as to the legal interpretation to be given to a survey,⁵ nor a person not skilled in anatomy as to whether a skeleton is that of a male or of a female.⁶ But practical surveyors may express their opinions, whether certain marks on trees, piles of stone, etc., were intended as monuments of boundaries;⁷ farmers may be asked as to the smell of grain;⁸ a person familiar with the use of revolvers as to what barrels of a revolver had been fired;⁹ persons familiar with the negro race as to the mixture of negro blood in particular persons;¹⁰ persons familiar with a game as to the mode of playing such game.¹¹

§ 415. A specialist in a particular art is admissible to prove the conditions of such art. Thus a painter, whether professional or amateur, is admissible on the question of the genuineness of a picture;¹² a photographer, as to the character of the execution of a photograph.¹³ So, where the question is whether a paper had contained certain pencil marks, which were alleged to have been rubbed out, the opinion of an engraver, who had examined the paper with a mirror, may be received.¹⁴ And seal-engravers may be called to give their opinions upon an impression, whether it was made from an original seal or from another impression.¹⁵

§ 416. Value can only be proved by obtaining the sense of those who determine the market price; since when we ask a witness as to the value of an article, we do not mean the value to himself, but the value to those who

So of
artists.

So of per-
sons fa-
miliar with
a market.

¹ See *State v. Norton*, 76 Mo. 180.

² *Supra*, § 408. *State v. Smith*, 49 Conn. 376.

³ *Kilbourne v. Jennings*, 38 Iowa, 533.

⁴ *Lincoln v. Barre*, 5 Cush. 590.

⁵ *Ormsby v. Ihmsen*, 34 Penn. St. 462; *Whart. on Ev.* § 972.

⁶ *Wilson v. State*, 41 Tex. 320.

⁷ *Davis v. Mason*, 4 Pick. 156.

⁸ *Walker v. State*, 58 Ala. 393.

⁹ *Wynne v. State*, 56 Ga. 113.

¹⁰ *State v. Jacobs*, 6 Jones L. 285.

¹¹ *Hall v. State*, 6 Baxt. 522.

¹² *Abbey v. Lill*, 5 Bing. 299, 304; *Woodcock v. Houldsworth*, 16 M. & W. 124.

¹³ *Barnes v. Ingalls*, 39 Ala. 193.

¹⁴ *R. v. Williams*, 8 C. & P. 434, per Parke, B., and Tindal, C. J.

¹⁵ Per *Ld. Mansfield*, in *Foulkes v. Chadd*, 3 Dougl. 157.

at the time in question are buying or selling such articles. For this purpose it is proper to call as witnesses those familiar with the particular market.¹

§ 417. If the object is to determine whether a particular supposed case is to be regarded as indicating insanity, only experts in insanity are to be called, since only experts are competent to describe the differentia of insanity scientifically.² But on the question whether a particular person is insane, there is a strong chain of decisions to the effect that not merely physicians, skilled in diseases of the mind, but intelligent and observant attendants and friends, who have had constant intercourse with the patient, may be examined.³ So far as concerns stupor, senile amentia, or other chronic and obvious mental disease, which ordinary observers are competent to determine, the practical observation of business men, coming into constant intercourse with a party, is naturally

On questions of sanity, not only experts but friends and attendants may give opinion.

¹ Whart. on Ev. § 446. On a prosecution for the theft of a seal-skin cloak, which the owner had worn, she may testify to its value from having priced similar articles. *Printz v. People*, 42 Mich. 144.

² *Com. v. Rogers*, 7 Met. 500; *State v. Windsor*, 5 Harring. 512, and cases *infra*, § 418.

³ *Wheeler v. Alderson*, 3 Hagg. 574; *Wright v. Tatham*, 5 Cl. & F. 692; *Harrison v. Rowan*, 3 Wash. C. C. 580; *Cram v. Cram*, 33 Vt. 15; *Fairchild v. Bascomb*, 35 Vt. 398; *State v. Hayden*, 51 Vt. 296; *Grant v. Thompson*, 4 Conn. 203; *Kinne v. Kinne*, 9 Conn. 102; *Real v. People*, 42 N. Y. 270; *Fagnan v. Knox*, 40 N. Y. Sup. Ct. 41; *Castner v. Sliker*, 33 N. J. L. 95, 507; *Rambler v. Tryon*, 7 S. & R. 90; *Wilkinson v. Pearson*, 23 Penn. St. 177; *Pannell v. Com.*, 86 Penn. St. 260; *Titlow v. Titlow*, 54 Penn. St. 216; *Townshend v. Townshend*, 7 Gill. 10; *Weems v. Weems*, 19 Md. 334; *Livingston v. Com.*, 14 Grat. 592; *Brown v. Com.*, 14 Bush, 398; *Clark v. State*, 12 Oh. 483; *Doe v. Reagan*, 5 Blackf.

217; *Davis v. State*, 35 Ind. 496; *State v. Reddick*, 7 Kans. 143; *Beaubien v. Cicotte*, 12 Mich. 459; *Clary v. Clary*, 2 Ired. L. 78; *State v. Henderson*, 68 N. C. 350; *State v. Ketchey*, 70 N. C. 621; *Powell v. State*, 25 Ala. 21; *Stuckey v. Bellah*, 41 Ala. 700; *Wilkinson v. Mosely*, 30 Ala. 562; *Carmichael v. State*, 36 Ala. 574; *Ford v. State*, 71 Ala. 355; *Baldwin v. State*, 12 Mo. 223; *State v. Erb*, 74 Mo. 199; *Dove v. State*, 3 Heisk. 348; *People v. Sanford*, 43 Cal. 29; *People v. Wreden*, 59 Cal. 392; *Pigg v. State*, 43 Tex. 108; *Schlenker v. State*, 9 Neb. 241.

A witness may be allowed to express his opinion as to the state of mind of another witness during certain periods; and it is not necessary that such witness should be an expert or a physician. *State v. Ketchey*, 70 N. C. 621; approving *State v. Baker*, 63 N. C. 279; *State v. Henderson*, 68 N. C. 350. See *supra*, § 378, for other cases. But such an opinion must be based on intelligent and extended observation, which must be detailed as a prerequisite to admission. *Rowell v. State*, 25 Ala. 21.

more likely to attract confidence than are the speculative conclusions of experts.¹ It is otherwise, however, when a non-expert is called upon to express an opinion as to facts capable of a contested interpretation, concerning which the jury are as competent to judge as is the witness,² though it is hard to see how his opinion, based on his personal observations of the patient's condition, can be in this way excluded,³ since his opinion in such cases is but a short way of expressing the facts, and the facts, when he details them, are all opinions. But as to hypothetical cases, a non-expert, or an expert without special cultivation,⁴ cannot be asked;⁵ and while an expert who has personally visited a patient can be asked for his opinion as to the patient's sanity,⁶ his conclusions must be drawn from personal observation, not from the reports of others out of court.⁷ As to whether a party at a given time was intoxicated, non-experts as well as experts can speak.⁸

¹ *Rutherford v. Morris*, 77 Ill. 397; *Rankin v. Rankin*, 61 Mo. 295; *People v. Sanford*, 43 Cal. 29; *People v. Wreden*, 59 Cal. 392.

² As limiting non-experts to a bare statement of facts, see *State v. Pike*, 47 N. H. 379; *Dewitt v. Barley*, 5 Selden, 371; *Clapp v. Fullerton*, 34 N. Y. 190; *Real v. People*, 42 N. Y. 270; *Sears v. Schafer*, 1 Barb. 408; *Higgins v. Carlton*, 28 Md. 115; *Runyan v. Price*, 15 Oh. St. 1; *Caleb v. State*, 39 Miss. 722; *Farrell v. Brennan*, 32 Mo. 328; *State v. Coleman*, 27 La. An. 691; *Gehrke v. State*, 13 Tex. 568. That a non-expert may be cross-examined as to basis of his opinion, see *Pannell v. Com.*, 86 Penn. St. 260.

When non-professional witnesses were asked, "from what you saw of him that night, what impression did his words and acts make upon your mind? What impression as to his condition of mind did his conduct and acts and words make upon you at the time? In what state of mind did you believe him to be by reason of what

he said and did upon that occasion?" and other like question; it was held that they were properly excluded. *Real v. The People*, 42 N. Y. 270.

³ *Com. v. Sturtivant*, 117 Mass. 122; and compare authorities collected in Judge Doe's dissenting opinion in *State v. Pike*, 47 N. H. 120; *Bell on Expert Test*, 21.

⁴ *Infra*, § 418; *Com. v. Rich*, 14 Gray, 335; *Caleb v. State*, 39 Miss. 722; *Russell v. State*, 53 Miss. 368.

⁵ *Com. v. Rich*, 14 Gray, 335; *State v. Klinger*, 46 Mo. 228; *Caleb v. State*, 39 Miss. 722, and cases *infra*, § 418.

⁶ *R. v. Searle*, 1 M. & Rob. 75; *R. v. Offord*, 5 C. & P. 168; *Com. v. Rogers*, 7 Met. (Mass.) 500; *Baxter v. Abbott*, 7 Gray, 71; *Delafield v. Parish*, 25 N. Y. 9; *Clark v. State*, 12 Ohio, 483; *Choice v. State*, 31 Ga. 424.

⁷ *Heald v. Thing*, 45 Me. 392.

⁸ *State v. Pike*, 49 N. H. 399; *Gahagan v. R. R.*, 1 Allen, 187; *People v. Eastwood*, 14 N. Y. 562; *Pierce v. State*, 53 Ga. 365; *Stanley v. State*, 26 Ala. 26.

§ 418. An expert cannot be asked his opinion as to the evidence in the case as rendered, not only because this puts the expert in the place of the jury, in determining as to the credibility of the facts in evidence, but because the duty devolving on court and jury of supervising the reasoning of experts is one which should not be surrendered.¹ It has been held, however, that when the facts are undisputed, the opinion of an expert can be asked as to the conclusions to be drawn from them;² and as to the conclusions to be drawn from the testi-

Experts
may be
examined
as to hypo-
thetical
case.

¹ *R. v. Higginson*, 1 C. & K. 129; *Sills v. Brown*, 9 C. & P. 604; *R. v. Frances*, 4 Cox C. C. 57; *R. v. Richards*, 1 F. & F. 87; *Dexter v. Hall*, 15 Wall. 9; *Willey v. Portsmouth*, 35 N. H. 303; *Perkins v. R. R.*, 44 N. H. 223; *Woodberry v. Obear*, 7 Gray, 467; *Miller v. Smith*, 112 Mass. 475; *Draper v. Saxton*, 118 Mass. 431; *Nash v. Hunt*, 116 Mass. 237, 418; *May v. Bradlee*, 127 Mass. 414; *Brill v. Flager*, 23 Wend. 354; *People v. McCann*, 3 Parker C. R. 272; *People v. Lake*, 12 N. Y. 358; *Sanchez v. People*, 22 N. Y. 147; *State v. Powell*, 2 Halst. 244; *Kempsey v. McGinniss*, 21 Mich. 123; *Bishop v. Spining*, 38 Ind. 143; *Phillips v. Starr*, 26 Iowa, 349; *Brown v. Com.*, 14 Bush, 398; *State v. Medlicott*, 9 Kans. 257; *State v. Bowman*, 78 N. C. 509; *State v. Clark*, 15 S. C. 403; *Choice v. State*, 31 Ga. 424; *Page v. State*, 61 Ala. 16; *State v. White*, 76 Mo. 96; *State v. Anderson*, 10 Oreg. 448. See, however, *State v. Hayden*, 51 Vt. 296; *Hunt v. State*, 9 Tex. Ap. 116; *Webb v. State*, 9 Tex. Ap. 490; *Lovelady v. State*, 14 Tex. Ap. 546, where a wider range was assigned.

² *McNaughton's Case*, 10 Cl. & F. 200, 211, 212; 1 C. & K. 135; though see *R. v. Frances*, 4 Cox C. C. 57.

In Massachusetts, we have the following from Chief Justice Shaw:—

"One caution in regard to this point it is proper to give. Even where the medical or other profes-

sional witnesses have attended the whole trial, and heard the testimony of the other witnesses as to the facts and circumstances of the case, they are not to judge of the credit of the witnesses, or of the truth of the facts testified to by others. It is for the jury to decide whether such facts are satisfactorily proved. And the proper question to be put to the professional witnesses is this: If the symptoms and indications testified to by the other witnesses are proved, and if the jury are satisfied of the truth of them, whether in their opinion the party was insane, and what was the nature and character of that insanity; what state of mind did they indicate; and what they would expect would be the conduct of such a person in any supposed circumstances." *Com. v. Rogers*, 7 Met. 500. So, also, was it said by Chief Justice Chapman, in *Andrews's Case* (1868): "You may put a hypothetical case, and ask whether it shows insanity, or, if the witness has heard all the testimony, whether the facts in his opinion indicate insanity. The witness, however, must not discriminate upon the facts, but assuming all the testimony to be true, he may state whether or no they indicate insanity." *Com. v. Andrews*, Pamph. 182. See *Com. v. Wilson*, 1 Gray, 338. But the weight both of authority and argument is, that when there is a conflict of evidence the

mony of a particular witness;¹ and it is settled that experts of all classes may be asked as to a hypothetical case,² and as to whether certain testimony, if true, indicates certain conditions as to which an expert in the specialty is qualified to speak.³ But if the facts on which the hypothesis is based fall, the answer falls also.⁴ Nor can an expert be asked as to an hypothesis having no foundation in the evidence in the case,⁵ or resting upon statements made to him by persons out of court,⁶ though it is not necessary that the case should be an exact reproduction of the evidence.⁷

§ 418 *a*. It has been ruled that as a physician must necessarily, in forming his opinion, be to some extent guided by what the sick person may have told him in detailing his pains and sufferings, not only the opinion of the expert, founded in part upon such *data*, is receivable in evidence, but he may state what the patient said, in describing his bodily condition, if said under circumstances which free it from all suspicion of being spoken with reference to future litigation, and give it the

May be examined as to party's statements.

witness should be limited to a specific hypothetical case. See cases cited in this and prior note.

¹ *Hand v. Brookline*, 226 Mass. 324.

² *Dexter v. Hall*, 15 Wall. 9; *U. S. v. McGlue*, 1 Curtis C. C. 1; *Sills v. Brown*, *ut supra*; *Spear v. Richardson*, 37 N. H. 23; *Fairchild v. Bascomb*, 35 Vt. 398; *Woodbury v. Obeare*, 7 Gray, 467; *Com. v. Rogers*, 7 Met. 500; *Com. v. Rich*, 14 Gray, 335; *Erickson v. Smith*, 2 Abb. (N. Y.) App. 64; *Hoard v. Peck*, 56 Barb. 202; *Carpenter v. Blake*, 2 Lans. 206; *People v. Lake*, 12 N. Y. (2 Kernan), 358; *Cowley v. People*, 83 N. Y. 464; *State v. Winsor*, 5 Harring. 512; *Negro Jerry v. Townsend*, 9 Md. 145; *Choice v. State*, 31 Ga. 424; *Griggs v. State*, 59 Ga. 738; *Davis v. State*, 35 Ind. 496; *Bishop v. Spining*, 38 Ind. 143; *State v. Newlin*, 69 Ind. 108; *Wright v. Hardy*, 22 Wis. 348; *Yanke v. State*, 51 Wis. 464; *Crawford v. Wolf*, 29 Iowa, 567; *McAllister v. State*, 17 Ala. 434; *Wilkinson v. Moseley*, 30 Ala. 562; *Caleb v.*

State, 39 Miss. 722; *Wood v. State*, 58 Miss. 741; *State v. Klingler*, 46 Mo. 224; *Tingley v. Cowgill*, 48 Mo. 291; *North Mo. R. R. v. Akers*, 4 Kans. 453; *Dove v. State*, 3 Heisk. 348, and cases cited in prior notes to this section as to insanity.

³ *Goodrich v. People*, 3 Park. C. R. 622; *State v. Clark*, 15 S. C. 403.

⁴ *Hovey v. Chase*, 52 Me. 304; *Thayer v. Davis*, 38 Vt. 163; *Guetig v. State*, 66 Ind. 95. See *Schlenker v. State*, 9 Neb. 241, where it is held that an expert may be asked his opinion on a supposed case in order to show what under different conditions the appearance of a wound made by the same agency would have been.

⁵ *People v. Bodine*, 1 Denio, 281; *Guetig v. State*, 66 Ind. 95; *Muldowney v. R. R.*, 39 Iowa, 615; *Ames's Will*, 51 Iowa, 596; *State v. Stokeley*, 16 Minn. 282.

⁶ *Heald v. Thing*, 45 Me. 392.

⁷ *Angaburg v. People*, 1 N. Y. Cr. Rep. 299.

character of *res gestae*.¹ Yet this is an exception to be jealously guarded ; and even in civil issues, when there is reason to believe that the declarations in question may have been uttered in view of subsequent legal issues, they will be excluded.² In criminal issues, where the temptation to fabricate evidence is so powerful, such declarations, when made after the defendant has had leisure to prepare himself for his defence, should be regarded with a scrutiny peculiarly close.

§ 419. An expert may be asked by either party as to the reasons on which his opinion is based ; or he may, with leave of court, give such explanation on his own account.³ Beyond this he cannot go in such examination ;⁴ though he may be fully examined in details in order to test his credibility and judgment.⁵ Even on a re-examination, he may be permitted to give explanations of facts transpiring since his examination in chief.⁶

§ 420. When expert testimony was first introduced, it was regarded with great respect. An expert, when called as a witness, was viewed as the representative of the science of which he was a professor, giving impartially its conclusions. Two conditions have combined to produce a material change in this relation. In the first place, it has been discovered that no expert, no matter how learned or how incorrupt, speaks for his science as a whole. Few specialties are so small as not to be torn by factions ; and often, the smaller the specialty, the bitterer and the more inflaming and distorting are the animosities by which these factions are possessed. Peculiarly is this the case in matters psychological, in which there is no hypothesis so monstrous that an expert cannot be found to swear to it on the stand, and to defend it with vehemence when off the stand. “ Nihil tam absurde dici potest, quod non dicatur ab aliquo philosophorum.”⁷ In the

¹ *Supra*, § 272.

² *Ibid.* ; Rowell v. City of Lowell, 11 Gray, 420. See Wetherbee v. Wetherbee, 38 Vt. 454.

³ Keith v. Lothrop. 10 Cush. 453 ; Sexton v. North Bridgewater, 116 Mass. 200 ; Hawkins v. Fall River, 119 Mass. 94. *Supra*, § 407.

⁴ Ingledew v. R. R., 7 Gray, 86.

⁵ Shaw v. Charlestown, 2 Gray, 107 ; Hunt v. Lowell, 8 Allen, 169.

⁶ Farmers' Bk. v. Young, 36 Iowa, 45. That he cannot cite medical books to sustain his views, unless in answer to cross-examination, see Com. v. Sturtevant, 117 Mass. 123 ; and see *supra*, § 407.

⁷ Cic. de. Div. ii. 58. See *supra*, § 8 a.

second place the retaining of experts, by a fee proportioned to the importance of their testimony, is now, in cases in which they are required, as customary as is the retaining of lawyers. No court would take as authority the sworn statement of the law given by counsel, retained on a particular side, for the reason that the most high-minded men are so swayed by an employment of this kind as to lose the power of impartial judgment; and so intense is this conviction, that there is no civilized community in which a judge who receives a present from a suitor is not buried in disgrace. Hence it is that, apart from the partisan temper more or less common to experts, their utterances, now that they have as a class become retained agents of parties, have lost all judicial authority, and are entitled only to the weight which a sound and cautious criticism would award to such utterances.¹ In adjusting this criticism a large allowance must be made for the bias necessarily belonging to men retained to advocate a cause, who speak, not as to *fact*, but as to *opinion*; and who are selected, on all moot questions, either from their prior advocacy of, or from their readiness to adopt, the opinion to be proved. In this sense we may adopt the strong language of Lord Campbell, that "skilled witnesses come with such a bias on their minds to support the cause in which they are embarked, that hardly any weight should be given to their evidence."²

¹ See, to this effect, *Neal's Case*, cited 1 *Redfield on Wills*, c. iii. § 13; *Woodruff, J., Gay v. Ins. Co.*, 2 *Big. Life Ins. Cas.* 14; *Brehm v. R. R.*, 34 *Barb.* 256; *Snyder v. State*, 70 *Ind.* 349; *People v. Morrigan*, 29 *Mich.* 9; *Grisby v. Water Co.*, 40 *Cal.* 396; *Watson v. Anderson*, 13 *Ala.* 202; 1 *Whart. & St. Med. Jur.* (1873) §§ 190, 269. See *supra*, § 8 a. In 1 *Am. Law Rev.* 45, is a learned article on this topic by Professor Waasburn. See, also, Mr. Moak's address of Sept. 20, 1881, before the N. Y. State Bar Association; and article in 15 *Cent. L. J.* 7. On the subordination of experts to jury, see *Clark v. State*, 12 *Ohio*, 483.

As to the impropriety of the State feeling exclusively its own experts, see *supra*, § 347.

² *Tracy Peerage*, 10 *Cl. & Fin.* 191. See also *Winans v. R. R.*, 21 *How.* 101; *American Middlings Co. v. Christian*, 4 *Dill.* 459.

That in matters of physical science, experts, when they fairly and fully give the conclusions of such science, are to be regarded as contributing facts to the issue by which, if true, court and jury will be bound, has been already fully shown. It is otherwise, however, when they treat of psychological science, and especially of those branches of that science which discuss mental competency for the responsible performance of certain legal acts. Whatever may once have been the attitude of the courts in this respect, the present necessary tendency of the judicial mind is to regard the opinions

§ 421. The practice has been to receive for what it is worth the testimony of an expert, when his observations are made *ex parte*,

of experts, on questions of responsibility, as of weight only as arguments on which the court is ultimately to decide. As affording rules by which courts are to be bound, such opinions have ceased to be regarded as of any efficacy. Chief Justice Chapman, of Massachusetts, on the trial of Andrews, Pamph. R. 356, in 1868, said: "I think the opinions of experts are not so highly regarded now as they formerly were; for, while they often afford great aid in determining facts, it often happens that experts can be found to testify to any theory, however absurd." And Judge Davis, of the Supreme Court of Maine (Neale's Case, cited 1 Redfield on Wills, c. iii. § 13), went so far as to say: "If there is any kind of testimony that is not only of no value, but even worse than that, it is, in my judgment, that of medical experts. They may be able to state the diagnosis of a disease most learnedly; but upon the question, whether it had, at a given time, reached such a stage that the subject of it was incapable of making a contract, or irresponsible for his acts, the opinion of his neighbors, if men of good common sense, would be worth more than that of all the experts in the country." And Judge Redfield, on commenting on this case, says, that there seems to be "but one opinion as to the fact that this kind of testimony is extremely unsatisfactory. . . . We are more and more confirmed in an opinion that the difficulty comes largely from the manner in which the witnesses are selected. . . . If the State, or the courts, do not esteem the matter of sufficient importance to justify the appointment of public officers, . . . it is certain the parties must employ their own agents to do it; and it is

perhaps almost equally certain, that if it be done in this mode it will produce two trained bands of witnesses, in battle array against each other, since neither party is bound to produce, or will be likely to produce, those of their witnesses who will not confirm their views." So, also, an eminent federal judge, Judge Woodruff, said to a jury in 1871, that "where the opinion (of experts) is speculative, theoretical, and states only the belief of the witness, while yet some other opinion is consistent with the facts stated, it is entitled to but little weight in the minds of the jury. Testimony of experts of this latter description, and especially where the speculative and theoretical character of the testimony is illustrated by opinions of experts on both sides of the question, is justly the subject of remark, and has been often condemned by judges as of slight value. And like observations apply to a greater or less degree to the opinion of witnesses who are employed for a purpose and paid for their services; who are brought to testify as witnesses for their employers. . . . This condemnation is not always applicable; often it would be unjust. Where an expert of integrity and skill states conclusions which are the necessary or even the usual results of the facts upon which his opinion is based, the evidence should not be lightly esteemed or hastily discredited." Woodruff, J., in *Gay v. Ins. Co.*, 2 Big. Ins. Cas. 14; 9 Blatch. 149.

Three remarkable trials in the United States in 1872 may be cited in illustration of the text.

Mrs. E. G. Wharton was tried in Maryland for the poisoning of General Ketchum; and the experts called by

as when a chemist sent by one party examines, without notice to the other party, remains supposed to contain poison, or a physician is taken by one party, also without notice to the other party, to visit a patient whose

Especially when observations are *ex parte*.

the State to prove poison were flatly contradicted by experts, of at least equal authority, called by the defence, who swore that neither in symptom nor in autopsy was poison shown. A few months later occurred the trial of Stokes for the murder of Fisk, in which experts, equal, at least in respect to number, contradicted each other directly on the question whether Fisk was killed by Stokes, or by the surgeons who endeavored to extract Stokes's balls. And in September, 1872, as if to exhibit this capriciousness in the strongest possible relief, followed in Pennsylvania the second trial of Dr. Schœppe. He was convicted, on the former trial, on the testimony of a single expert, of murder by poison; and it was not till after a delay of more than two years, and then only by legislative action, that a new trial was obtained. Then was it discovered that there was nothing in the prosecution's case. The expert on which it relied, though respectable and conscientious, had been guided by tests which recent science has shown to be worthless. The court ordered an acquittal, on the ground that there was not even a *prima facie* case of the *corpus delicti*.

As a criticism on such testimony may be studied an address by Chief Justice Campbell, given at Michigan University in 1880 (21 Alb. L. J. 403).

On the other hand, in *Pannell v. Com.*, 86 Penn. St. 260 (1878), the Supreme Court of Pennsylvania, after saying that the opinion of medical experts are of great value in insanity, ruled that it was error to charge a jury

as follows: "We question very much whether you will realize much, if any, valuable aid from them, in coming to a correct conclusion as regards the responsibility for crime by this prisoner."

To the same effect see *Templeton v. People*, 3 Hun, 358; 60 N. Y. 643. Cf. Lawson on Expert Evidence, Rule 44.

In *Belt v. Lawes*, already noticed, tried in London, in 1883, the question was as to Mr. Belt's capacity to make certain statues. That such statues could have been made by him was emphatically denied by a series of experts, embracing some of the most eminent sculptors in England. On the other hand, Mr. Belt did a bust in court by which his capacity as a sculptor was, it was maintained, placed beyond doubt. The controversy is thus noticed in the *Spectator* of December 30, 1882: "Witness after witness testified that Mr. Belt was a total impostor, and could not even model a decent bust or make a trustworthy drawing; and sculptor after sculptor gave an opinion that the work he claimed could not, on internal evidence of style, be his. It is not for us to question, as Baron Huddleston does, the good faith of the witnesses for the defendant (by whom the libel charging Mr. Belt with being an impostor was published), but we suppose we may say that they showed marked bitterness, amounting, in the matter of the cheque, to unreasoning prejudice, and that they were opposed by testimony so direct that it is hardly possible—we do not say quite impossible—to reject it without supposing

sanity is in dispute. In cases such as these, expert testimony is open to peculiar suspicion; and is likely, if the observation be surreptitious and clandestine, to prejudice the party under whose directions they are made.¹ Wherever notice of such observations

either perjury or the crassest stupidity. Several witnesses, however—Canon Wilkinson, for example—were men utterly beyond either charge; and the jury, believing them, threw over the defendants' witnesses altogether. There remained the body of experts, headed by Sir Frederick Leighton, and they certainly testified, with rare consistency, that Mr. Belt's work was not his own, that, in fact, one man could not have had all those styles, or have stood at different times on such different steps of the great ladder of art. On the public, their evidence, obviously sincere, though possibly prejudiced, will, we imagine, produce the impression that Mr. Belt did use much more assistance than he chose to allow, or possibly—for artists are vain—acknowledged even to himself; but in a court of justice such testimony, when confronted as it was with the direct and positive counter-testimony of eye-witnesses, could not be expected to weigh heavily. Nor ought it. We should be prepared, we do not doubt, to swear in a court of justice that a poem obviously Mr. Tennyson's or Mr. Arnold's was not by Post Close. But if half a dozen decent witnesses swore that they saw Mr. Close sketch the poem out, discuss particular lines, *alter the lines on their advice*—for that was sworn as to Mr. Belt's work—and take the poem to the printer, the jury would be bound to believe them, and not us. It would be uncontradicted fact against peremptory opinion, and if opinion is not rejected under such circumstances, there is an end to the utility of evi-

dence. The jury were told this by the judge, they believed it, and an accident made their belief conviction. Mr. Belt had done a bust of Mr. Pagliatti, a man with a very pronounced expression. He was called on to do a second bust of Mr. Pagliatti in court, and did it, producing an admirable, though exaggerated, and it may be, inartistic likeness. The experts swore that the second bust, though like, was so wanting in artistic qualities, that it could not have been done by the hand that did the first bust, which is good work. But unhappily the evidence that Mr. Belt did do the first bust was irresistible, and artistic criticism was, in the jurymen's eyes, woefully discredited. The defendants' witnesses, having broken down, the great experts having been discredited, and the plaintiff's witnesses being undestroyed, only one verdict was possible—that given by the jury. The amount of damages is a separate question. It is unprecedentedly heavy, but the judge accepted it; the charge, if not disproved, would have deprived Mr. Belt of his whole income, and there may have been evidence as to the amount of that income which we missed."

The verdict was for £5000 for the plaintiff. This was set aside by the Divisional Court, Lord Coleridge, C. J., presiding. Subsequently (March, 1884), the decision of the Divisional Court was reversed by the Court of Appeals, Sir B. Brett, M. R., giving the opinion.

¹ See *State v. Hays*, 22 La. An. 39. *Infra*, § 777.

to the opposing interests is practicable, then such notice should be given. On the other hand, when experts are appointed by the State, or by referees agreed on by the parties, and when the examinations made by such experts are not *ex parte*, but conducted with notice to the opposite party, then the testimony is entitled to great weight.¹ Of course the question of what is *ex parte* depends to some extent on the subject matter of the inquiry.

It is also the duty of experts to secure and use all available materials and opportunities of diagnosis; and if they do not, their testimony is secondary, *i. e.*, is not the best that could be obtained, and on this ground, if not rejected by the court, should be submitted to the jury with many cautions.²

§ 422. As *post-mortem* examinations generally take place under the direction of a coroner or other officer, immediately after death, and often before any particular person is pointed out as the future defendant, there cannot be notice to any actual opposing interest.³ To relieve the proceedings from suspicion, however, it is important that volunteers, unless appointed to watch the case by persons interested, should be excluded, and that the examination should be conducted by officers appointed by the State. When, however (*e. g.*, in cases of poisoning), a body is exhumed after proceedings commenced, no examination should take place except in the presence of the representatives of both sides.⁴ Nor should the result of such researches be admitted in evidence unless the identity of the subject matter be established.

Post-mortem examinations.

§ 423 The examination of blood-stains, in order to be entitled to weight, should be by public officers, on materials proved to have been untampered with; and on notice proved to the opposite side, if a party be charged with the offence. But the mere fact that such examination is *ex parte* does

Examination of blood-stains.

¹ See Whart. Crim. Law, § 821 *h* (7th ed.); *Heald v. Thing*, 45 Me. 392; *Parlange v. Parlange*, 16 La. An. 17.

² See *Heald v. Thing*, 45 Me. 392; *Parlange v. Parlange*, 16 La. An. 17.

³ That there is an official examiner appointed for such purposes does not exclude other experts, see *Com. v. Du-*

nan, 128 Mass. 422, cited *supra*, § 403. This topic is discussed in 3 Wh. & St. Med. Jur., §§ 702 *et seq.*

⁴ But see *State v. Bowman*, 80 N. C. 432, where it was held that *post-mortem* examinations do not require the attendance of the defendant or his counsel to make their results admissible.

not exclude.¹ And ordinary observers, when the question is not as to the application of scientific tests, may prove that certain stains look like blood.²

§ 424. Experts, as is well settled, may be permitted to testify to their opinion that certain writings are genuine; and in some courts they may do this merely on the comparison of the contested paper with standards admitted to be genuine. Ought such tests to be exhibited to experts *ex parte*? At first view the answer would be in the negative; yet, though it would be against both reason and precedent arbitrarily to exclude testimony of such inspection when *ex parte*, it would be wiser and more effective to reserve the exhibition of the test papers to the expert until he is under examination in the presence of the opposite counsel. Experience tells us that an expert in handwriting is apt to be preoccupied by the case of a party who consults him *ex parte*, and to carry the prejudice thus received through the whole case. The testimony of such experts, especially if employed at the outset as feed advisers, should be received with many scruples, not because it is intentionally false, but on account of the tendency of the mind, in all matters of criticism, to adopt the view most favorable to a client or friend.³

§ 425. Experts may be received to decipher or interpret terms of art which the jury or court, without such explanation, would not understand. And for the same reason an expert will be admitted to ascertain the meaning of signs and words in a document, of ordinary unintelligible characters; of signs, of abbreviations, and of local idioms.⁴

§ 426. We have already had occasion to observe that in many jurisdictions experts are entitled by law to special fees,⁵ however much the fact that they are feed exclusively by the party calling them detracts from their credit.⁶ But as a matter of law, such employment and remuneration do not render them inadmissible.⁷

¹ See *State v. Knight*, 43 Me. 11. On this topic see fully *infra*, § 777.

² *Infra*, §§ 777-8. *McLain v. Com.*, 99 Penn. St. 86.

³ *Infra*, §§ 550, 844.

⁴ *Whart. on Ev.* § 972.

⁵ See *supra*, § 347.

⁶ See, also, comments in § 420. See

article on this topic in 16 Cent. L. J. 45; *Roelker's Case*, 1 Sprague, 276; *Re Attorney-General*, 104 Mass. 537.

⁷ *People v. Montgomery*, 13 Abb. (N. Y.) Pr. N. S. 207; *Buchman v. State*, 59 Ind. 1. See, however, *Lyon v. Wilkes*, 1 Cow. 591. Extra fees were refused in *Dement, Ex parte*, 53 Ala.

VIII. DEFENDANTS AS WITNESSES.

§ 427. At common law, a defendant, at least in capital cases, is entitled to address the jury, at the conclusion of the case, giving his own story as to any relevant facts.¹ In making this statement he is not subject to cross-examination. We have also the authority of Alderson, B., extending this right to cases not capital.² But in England there have been rulings that where the party has counsel this right may be refused.³

Defendants
at common
law may
make
statements.

389; *Sumner v. State*, 5 Tex. Ap. 374. In some States such fees are allowed by statute. See *Lawson on Expert Evidence*, Rule 44.

¹ See *Whart. Cr. Pl. & Pr.* § 579; *People v. Lopez*, 2 Edm. Sel. Ca. 262. Where the statement of the defendant and the testimony of a sworn credible witness were opposed, it was held error to charge the jury that the former was to give way to the latter. *Day v. State*, 63 Ga. 667; *Pease v. State*, id. 631. See further as to Georgia practice, *Coxwell v. State*, 66 Ga. 309.

² *R. v. Malings*, 8 C. & P. 242.

The defendant, being on trial for shooting with intent to do grievous bodily harm, there having been no witnesses at the time of the offence, was allowed to make a statement before his counsel addressed the jury. Alderson, B., said: "I see no objection to his doing so; I have read the statement he made before the magistrates. I think it is right that a person should have an opportunity of stating such facts as he may think material, and that his counsel should be allowed to comment on that statement as one of the circumstances of the case. On trials of high treason the prisoner is always allowed to make his own statement after his counsel has addressed the jury. It is true that the prisoner's statement may often defeat

the defence intended by his counsel; but, if so, the ends of justice will be furthered. Besides, it is often the genuine defence of the party, and not a mere imaginary case invented by the ingenuity of counsel." See *London Law Times*, April 13, 1878. As to Michigan, see *infra*, § 436; *De Foe v. People*, 22 Mich. 224.

³ *Ibid.*; *R. v. Manzano*, 2 F. & F. 64; *R. v. Burdett*, *Dears. C. C.* 431; *Whart. Cr. Pl. & Pr.* § 579.

On the other hand, in *R. v. Dyer*, 1 Cox C. C. 113, and *R. v. Burrows*, 1 Cox C. C. 363, it was intimated that no such limitation should be applied. See *London Law Times* of Feb. 21, 1880, p. 301.

In Alabama, a defendant, under the Act of 1882, is entitled to make a statement, which, it has been held, is subject to the tests as to credibility imposed as to witnesses generally. But this does not make the statement technically evidence; nor does it subject the defendant to examination, cross-examination, or impeachment. *Blackburn v. State*, 71 Ala. 319; *Chappell v. State*, id. 322; *Beasley v. State*, id. 328; *Whizenart v. State*, id. 383.

In 1883, the question whether counsel for the defendant, in addressing the jury, could be permitted to state for the defendant facts not in evidence, was the subject of much discussion in the

§ 428. The law in this relation has been revolutionized in most of the United States by the enactment of statutes authorizing, though under various conditions, the examination of a defendant on trial in his own behalf. Taking these statutes in connection with those rehabilitating parties in civil actions as witnesses, we may state the following conclusions:¹—

English press. As it is conceded that no such right can be claimed when the defendant can be examined as a witness, the question has no interest in States where the law is settled by statutes.

An article on the topic in the text will be found in 7th South. Law Rev., 683 *et seq.*

¹ In Pennsylvania, under the Act of 3d April, 1872, the defendant was entitled to testify for himself only in misdemeanors. He was consequently excluded in cases where the indictment contained counts for felony. *Stevick v. Com.*, 78 Penn. St. 400; *Hunter v. Com.*, 79 Penn. St. 503.

By Act 24th March, 1877, in the trial of all indictments, complaints, and other proceedings, in any court of criminal jurisdiction, against persons charged with the commission of misdemeanors and *felonies*, except felonies triable exclusively in the Court of Oyer and Terminer, the person so charged shall at his own request, but not otherwise, be a competent witness.

The following is from the London Spectator of March 8, 1884: "It is a testimony at once to the power of thought, and yet to the slowness with which thought is transfused into fact, that barely three-quarters of a century have passed since Bentham published his rationale of judicial evidence, and inveighed against the absurd rules for the exclusion of witnesses then in force; and this week, we have seen a government bill pass its second reading for abolishing one of the last remnants of

those absurd rules, and enabling prisoners and their wives or husbands to give evidence in criminal cases. When Bentham began the attack, not only were any parties to a civil proceeding, their husbands and wives, excluded from giving evidence, but witnesses also were excluded wholesale, on the ground of interest, subject to irrational but reasonable exceptions on the ground of equal interest, and to intricate distinctions as to what constituted interest. They were excluded on the ground of deficient probity, because they had been convicted of certain crimes, but not of all; or because they held certain religious, or did not hold certain religious opinions. Great masses of evidence, and often of the most essential evidence, were excluded by these rules, and the law was reduced to a game of mixed chance and skill, presided over by Justice, who was very properly represented as blind, as she had always to be taking leaps in a subjective darkness. All these rules have been gradually swept away. In 1843, the exclusion of evidence on the ground of interest, or for incompetency because of conviction of crimes, was removed. In 1851, parties were made admissible witnesses in civil cases; in 1853, their wives and husbands were let in, with some exceptions. In 1861, after many separate measures in favor of Moravians, Separatists, and so forth, a general act was passed allowing affirmations to be substituted for oaths in all cases, except that of Atheists, who were admitted in

§ 429. A party, it may be said generally, when he becomes a witness, is subject to the usual duties, liabilities, prerogatives, and

1869. Now, as the result of the recent discussion as to the admission of prisoners' statements in addition to or through the speeches of counsel defending them, it is proposed to admit the prisoner, his or her husband or wife, as an ordinary witness, to be treated in the ordinary way, in any criminal proceedings and at any stage of the proceedings. Neither the prisoner nor the wife or husband is to be compellable to give evidence, except at the option of the prisoner. But as to refuse to give evidence would amount to an admission of guilt, it is not probable that the accused person will often abstain from giving evidence, at least on the trial, if not at the preliminary proceedings. There is no disguising the fact the new law will in all probability result in more convictions. It will be hardly possible for the most skilful advocate to conceal facts in a haze of rhetoric, as is now sometimes effected by judicious hints of what 'the unfortunate man in the dock could say, if his mouth were not stopped,' a statement, by the way, which Mr. Justice Stephen characterizes as 'one which no one who is acquainted with the law can believe, and one which judges ought not to allow to pass uncontradicted.' But though the new rule may tend, and very properly, to an increase in the number of convictions, there is not the smallest doubt that it will also prevent a number of wrongful convictions, if not make wrongful conviction almost impossible. Of this, there could not be a stronger instance given than that of the man who had been convicted at Sessions of stealing a spade, and when asked what he had to say why sentence should not be passed on him, replied, 'Well, it is very hard I

should be sent to gaol for this spade, when the man I bought it of is standing there in court.' The man referred to was called and examined, and the result was that the jury recalled their verdict and acquitted the prisoner. It is impossible to suppose that if this prisoner had been examined as a witness he would not have made his story intelligible at an earlier stage, instead of leaving it to the chances of the last moment.

"In thus admitting the prisoner to examination, we are only returning to the practice which prevailed in England up to the eighteenth century, as it has prevailed elsewhere down to the present time. The judge-made rules protecting the prisoner from examination arose from a reaction against the system of browbeating and intimidation of prisoners pursued by the judges and the crown counsel, which still disgust the observer with criminal proceedings in France. The fact that now the prisoner will be examined by counsel, and that the judge will be able to preserve his position as moderator, is a sufficient safeguard against a recurrence of the abuses of the old system. But there is a further difference between the new and the older system of examination in this. Formerly the admissions of the prisoner were used against him, but as he was not a sworn witness, the jury was entitled and sometimes was directed to disregard his statements in his own favor. By admitting the prisoner as a witness, on the same footing as other witnesses, this disability is removed. It is remarkable that in thus admitting the prisoner, not merely as a witness, but as a sworn witness, we are returning not to the practice of the seventeenth

limitations of witnesses.¹ The statute, for instance, does not affect the rule, that parol evidence cannot be received to vary a written contract.² So, also, a party may be examined as an expert.³ He may, *a fortiori*, be called to contradict statements made by witnesses for the prosecution.⁴ A party, when so examined, is also subject to the law which authorizes a party's admissions out of court to be used in evidence against him on trial;⁵ and if he suppresses facts, this may be urged against him.⁶

He can make no statement to the jury, in States where such statutes exist, unless as a witness under oath.⁷

Prior conviction of infamous crime, however, does not incapacitate him, as the statute entitles him to testify as an arbitrary universal right.⁸ But such conviction may be shown to affect his credibility,⁹ though the conviction should ordinarily be proved by the record.¹⁰

As to his credibility, the usual distinctions apply;¹¹ though in States where credibility is exclusively for the jury, it is error for

century or the eighteenth century, but to that of the eleventh century and the eighth century, to the earliest practice of our English ancestors."

¹ Wheeldon v. Wilson, 44 Me. 11; Quimby v. Morrill, 47 Me. 470; McDaniels v. Robinson, 26 Vt. 316; State v. Arnold, 50 Vt. 316; Granger v. Bassett, 98 Mass. 462; Cowles v. Bacon, 21 Conn. 451; Roberts v. Gee, 15 Barb. 449; Donohue v. People, 56 N. Y. 208; People v. Courtney, 1 N. Y. Cr. Rep. 557, 573; Morrow v. State, 48 Ind. 423; State v. Beal, 68 Ind. 345; State v. Red, 53 Iowa, 69; State v. Eber, 85 N. C. 585; State v. Rugan, 68 Mo. 214; State v. Thomas, 68 Mo. 605; State v. Devlin, 7 Mo. Ap. 32; Mattingly v. State, 8 Tex. Ap. 345; People v. Russell, 46 Cal. 121; People v. Rodondo, 44 Cal. 558.

A defendant's statement goes to the jury for what it is worth. Brown v. State, 60 Ga. 210; State v. Maguire, 69 Mo. 197; State v. Zorn, 71 Mo. 415.

² Kelly v. Cunningham, 1 Allen, 473; Dillon v. Anderson, 43 N. Y. 231. See Whart. on Ev. § 955; *infra*, § 431.

³ Dickenson v. Fitchburg, 13 Gray, 596.

⁴ Morrow v. State, 48 Ind. 432. See Donohue v. People, 56 N. Y. 208. Under the Mississippi Code a defendant may testify as to his admissions and confessions introduced as evidence, but he cannot do so if such admissions are part of the *res gestae*. Howze v. State, 59 Miss. 230.

⁵ Hall v. The Emily Banning, 33 Cal. 522. *Infra*, § 685.

⁶ Stover v. People, 56 N. Y. 315; Brashears v. State, cited *infra*.

⁷ Com. v. Scott, 123 Mass. 222. See *supra*, § 312.

⁸ Newman v. People, 63 Barb. 630.

⁹ State v. Kelsoe, 76 Mo. 505.

¹⁰ *Supra*, § 153; Bartholomew v. State, 104 Ill. 601. But see *infra*, § 432.

¹¹ See People v. Cronin, 34 Cal. 195; People v. Nichols, 62 Cal. 579.

the court to comment unfavorably on the defendant's credibility.¹ As will be hereafter shown, his reputation for truth may be assailed.²

The mere fact that he is charged with a crime should not in itself impair his credit, since otherwise guilt would be assumed before it is proved. But the jury is entitled to disregard his testimony if this be required by the proof as a whole.³

¹ Greer v. State, 53 Ind. 420. See Veatch v. State, 56 Ind. 182; Chambers v. People, 105 Ill. 409. *Infra*, § 435 a.

² *Infra*, § 433; State v. Cox, 67 Mo. 392; State v. Ruan, 5 Mo. Ap. 592.

³ Bartholomew v. State, 104 Ill. 601; State v. Swain, 68 Mo. 605; State v. Ruan, 68 Mo. 214; State v. Cooper, 71 Mo. 436; State v. McGinnis, 76 Mo. 326; State v. Sanders, 76 Mo. 35; People v. Morrow, 60 Cal. 142. See People v. Strange, 61 Cal. 496.

In State v. Johnson, 12 Nev. 121, it was held error for the court to tell the jury "that in every criminal there is a greater or less temptation to testify strongly, or even falsely, in his favor." "If the defendant," said the Supreme Court, "is guilty, there may be a temptation to swear falsely; but whether there is such an inducement or temptation is always a question for the jury, and not for the court, to determine. If the defendant is innocent, it will generally be to his interest to tell the truth, and there can seldom be any inducement or temptation for him to testify falsely. For the reasons already stated, it was also erroneous and prejudicial to the defendants for the court to say 'that jurors should in every instance consider the testimony of a defendant with great caution.' The principles we have announced are sustained by numerous authorities. State v. Larkin, 11 Nev. 330; Greer v. State, 53 Ind. 421; Pratt v. State, 56 Ib. 179;

Veatch v. State, 56 Ib. 584; Rafferty v. People, 72 Ill. 37; Roach v. People, 77 Ib. 25; People v. Arnold, 40 Mich. 710; Moses v. State, 58 Ala. 118; Hogsett v. State, 40 Miss. 527." See as taking a stricter view People v. Jones, 24 Mich. 217; *Cf.* State v. Johnson, 16 Nev. 36; State v. Vasquez, 16 Nev. 42.

On a trial of a party for forging and uttering a forged promissory note with intent to defraud, after the State had offered testimony tending to prove that the note had been forged by the prisoner, and also that on a day specified he had uttered or attempted to dispose of it to one T. C. as genuine, the defendant, in his own behalf, voluntarily went upon the witness stand, and confined himself, in testifying, to the simple statement that he could not write. It was held that his course in this relation on the witness stand, and his silence when testifying as to matters involved in the pending inquiry, which were certainly within his knowledge, were circumstances which the jury had a right to consider in deciding upon the credit due to the witness, in connection with the other facts proved in the case, and were therefore necessarily circumstances upon which the prosecuting attorney had a right to comment in addressing the jury, and to argue that they raised a presumption of the guilt of the defendant. Bra-shears v. State, 58 Md. 363. See Stover v. People, 56 N. Y. 315.

§ 480. A defendant, when thus sworn, subjects himself to the same liabilities on cross-examination as do other witnesses.¹ Thus on a trial for adultery, where the defendant and his alleged paramour, being examined on the stand, deny the act charged, it is competent to cross-examine them upon the intimacy of their mutual relations before and after the alleged act; and in particular as to their representations that they were man and wife, their residence in the same house nine months prior to the reputed birth of a child, and other criminating circumstances.² The defendant may be even cross-examined on the whole case, and not simply on what relates to his examination in chief,³ though this expansion of the liberty of cross-examination may not be sustained in those States in which strict rules of demarcation in this respect are maintained.⁴

§ 481. Ordinarily, as is elsewhere seen, a witness cannot be examined as to another person's motives.⁵ It is otherwise with a witness's own motives, as to which, when relevant, he is always open either to examination or cross-examination. Hence a party, when examined as a witness, may be asked as to his own motives or intentions, when these are material.⁶ Thus the defendant, setting up self-defence, is entitled

¹ State v. Wentworth, 65 Me. 234; ² Com. v. Curtis, 97 Mass. 574. *Infra*, § 432.

State v. Witham, 72 Me. 531; Marx v. People, 63 Barb. 618; Fralich v. People, 65 Barb. 48; Varonna v. Socarros, 8 Abb. N. Y. Pr. 302; Anable v. Anable, 24 How. N. Y. Pr. 92; Pontius v. People, 82 N. Y. 339; Brubacker v. Taylor, 76 Penn. St. 83; Roddy v. Finnegan, 43 Md. 490; Brown v. State, 60 Ga. 210; State v. Clinton, 67 Mo. 380; Burden v. People, 26 Mich. 162; State v. Fay, 43 Iowa, 651; State v. Huff, 11 Nev. 17; State v. Harrington, 12 Nev. 125.

³ Livingston v. Keech, 34 N. Y. Sup. Ct. 547. See Holbrook v. Mix, 1 E. D. Smith, 154.

⁴ Com. v. Nichols, 114 Mass. 285; Com. v. Tolliver, 119 Mass. 312; State v. Smith, 49 Conn. 376; Malone v. Dougherty, 79 Penn. St. 46. Compare comments of Bradley, J., Rea v. Missouri, 17 Wall. 542-51.

⁵ *Infra*, § 456.

⁶ Wheeldon v. Wilson, 44 Me. 1; Quimby v. Morrill, 47 Me. 470; Lawton v. Chase, 108 Mass. 241; Snow v. Paine, 114 Mass. 520; Seymour v. Wilson, 14 N. Y. 567; Griffin v. Marquandt, 21 N. Y. 121; People v. Pease, 27 N. Y. 45; Thurston v. Cornell, 38 N. Y. 281; Fiedler v. Darrin, 50 N. Y. 437; Ker-

to testify to the jury that at the time of the act he believed himself in danger of his life;¹ and the defendant on trial for larceny may testify as to his intention in taking the goods.² But such answers are not conclusive.³

§ 432. If a defendant offers himself as a witness to disprove a criminal charge, can he excuse himself from answering on the ground that by so doing he would criminate himself? This question has been much agitated since the passing of the enabling statutes; and the general conclusion is, that so far as concerns questions touching the merits, the defendant, by making himself a witness as to an offence, waives his privileges to all matters connected with the offence.⁴ It has been ruled also that, to affect his credibility, he may be asked whether he has been in prison on other charges,⁵ whether he has suborned testimony in the particular

He cannot avoid relevant questions on the ground that the answer would criminate.

rains v. People, 60 N. Y. 221; *Babcock v. People*, 15 Hun, 347; *Greer v. State*, 53 Ind. 520; *White v. State*, 53 Ind. 595; *People v. Farrell*, 31 Cal. 576. See Whart. on Hom. § 520. *Bode v. State*, 6 Tex. Ap. 424.

¹ *State v. Harrington*, 12 Nev. 125. See Whart. Crim. Law, 8th ed. § 491. *Infra*, § 459.

A party, however, cannot be admitted to prove his intent so as to vary the terms of a document by which he is bound. *Dillon v. Anderson*, 43 N. Y. 231; *Harrison v. Kirke*, 38 N. Y. Sup. Ct. 396; *supra*, § 429.

In *Com. v. Damon*, Sup. Ct. Mass. 1884 (17 Rep. 559), where the point of the text was reaffirmed, it was said by Field, J.: "The questions put to the defendant, who offered himself as a witness, if put to any other witness, might perhaps be held incompetent, as calling for an opinion upon the character of articles published in a newspaper, when, so far as appears, the articles themselves could be obtained and were the best evidence of what they contained. But the intention or state of mind of the defendant towards

Hart in making the publications with which he was charged was material, and for this purpose his opinion or understanding of the articles published by him in his paper, as friendly or unfriendly towards Hart, would be relevant upon the question of the intention or good or ill-will towards Hart with which he made the publication."

² *Smith v. State*, 13 Tex. Ap. 507.

³ *Ibid*.

⁴ *State v. Wentworth*, 65 Me. 234; *State v. Ober*, 52 N. H. 459; *Com. v. Lannan*, 13 Allen, 563; *Com. v. Mullen*, 97 Mass. 545; *Com. v. Curtis*, 97 Mass. 574; *Com. v. Morgan*, 107 Mass. 199; *Com. v. Nichols*, 114 Mass. 285; *Com. v. Tolliver*, 119 Mass. 300; *Burdick v. People*, 58 Barb. 51; *Fralich v. People*, 65 Barb. 48; *McGarry v. People*, 2 Lansing, 227; *Brandon v. People*, 42 N. Y. 265; *Connors v. People*, 50 N. Y. 240; *State v. Fay*, 43 Iowa, 651; *State v. Huff*, 11 Nev. 17; *Barber v. State*, 13 Fla. 675. See, however, *People v. McGungill*, 41 Cal. 429.

⁵ *Com. v. Bonner*, 97 Mass. 587; *People v. Cummins*, 47 Mich. 334. See, *contra*, *Farley v. State*, 57 Ind. 331. See

case,¹ and whether he has been concerned in other crimes, part of the same system;² though where there is no statute permitting such inquiries, and where the evidence does not go to motive or bias, answers as to collateral crimes should not be coerced.³

infra, § 474. As to New York practice see *People v. Courtney*, 1 N. Y. Cr. Rep. 557, 573; *infra*, § 472. That he can be asked as to a prior conviction see *State v. Kelsoe*, 76 Mo. 505; *State v. Lawhorn*, 88 N. C. 634; *State v. Eder*, 85 N. C. 585; though see *supra*, §§ 153, 429.

¹ *Martineau v. May*, 18 Wis. 54.

² *Brandon v. People*, 42 N. Y. 265, and cases cited *infra*.

³ *People v. Brown*, 72 N. Y. 751; *People v. Thomas*, 9 Mich. 321; *Gale v. People*, 26 Mich. 157; *Ingalls v. State*, 48 Wis. 647. See, however, *State v. Ober*, 52 N. H. 459; *Clark v. Reese*, 35 Cal. 89. *French v. Venneman*, 14 Ind. 282. See *infra*, § 463.

In *Hayward v. People*, 96 Ill. 492, it was held error to force the defendant on a trial for murder to testify on cross-examination that he had frequented saloons, and drank and played cards and billiards in them; *Walker, Scott, and Sheldon, JJ.*, dissenting.

In *McGarry v. People*, 2 Lans. 227 (*infra*, § 470), *Johnson, P. J.*, said:—

"He (the defendant) was a volunteer witness under the provisions of chapter 678 of the Laws of 1869. He was not only a volunteer, but had taken the necessary oath to enable him to testify, 'to tell the truth, the whole truth, and nothing but the truth,' upon the whole issue of traverse between himself and the People. He could not have been compelled to give evidence at all; but when he made himself a witness, under the privilege conferred upon him by this statute, he waived the constitutional protection in his favor, and subjected himself to the peril of being examined as to any and

every matter pertinent to the issue. Any other construction would render this statute the most effectual shield to crime and criminals which could possibly be devised." *McGarry v. People*, 2 Lansing, 227, 232 (*Johnson, P. J.*, 1870). In *Brandon v. People*, 42 N. Y. 265, decided in 1870, the law was thus stated: "The defendant invokes the aid of the legal principle, that on a criminal trial the character of the defendant cannot be attacked by the public prosecutor, unless the defendant himself first draws it into controversy, and that although the defendant here may have been a thief, she is nevertheless entitled to be judged by the same rules of evidence and of law, which are applied to the most virtuous person. These principles are quite correct. 1 Whart. Am. Cr. Law, 5th ed. p. 824; 5 Parker Cr. R. 105. The defendant, however, appeared before the court below in a double capacity,—that of an accused party on trial, and that of a witness. As an accused party on trial, she was entitled to the application of the rule, that her character could not be attacked unless she herself opened the question. She had the benefit of it, as the district attorney opened and closed his case without allusion to her character. She, however, chose to avail herself of the statute of 1869, which permitted her to make herself a 'competent witness' in the case. She was not compelled to take this position, the statute declaring that the failure to testify should not create any presumption against her. *Stat. supra*. She elected, however, to make herself a witness. She became and was a com-

Questions as to adultery, when this is at issue, are to be treated as are questions as to any other crime.¹

petent witness. For this purpose she left her position as a defendant, and, while upon the stand, was subject to the same rules, and called upon to submit to the same tests, which could by law be applied to other witnesses. The question was a proper one, and no suggestion of privilege being made, the objection was properly overruled. The question in *Newcomb v. Griswold* (24 N. Y. R. 298) was entirely different from the present. There was no question of an actual conviction here; and the point whether the offence could be proved by a verbal answer, or whether the record should be introduced, did not arise. The defendant was inquired of simply whether she had before been arrested for theft. Neither was the attention of the court or of the opposite counsel called to the question of the manner of proof, by record or otherwise."

In *Connors v. People*, 50 N. Y. 240, the defendant was asked on cross-examination, "How many times have you been arrested?" This was objected to, on the ground that the Constitution provides that "no man can be compelled to be a witness against himself," though there was no claim of privilege. The objection was held to have been properly overruled, on the authority of the *Brandon Case*. The court said: "If he," the defendant, "gives evidence which bears against himself, it results from his voluntary act of becoming a witness, and not from compulsion. His act was the primary cause, and, if that was voluntary, he has no reason to complain."

People v. Casey, 72 N. Y. 393, affirms the two preceding cases just

cited. *People v. Brown*, 72 N. Y. 571, is distinguished by the fact that the defendant here set up privilege, and this privilege was sustained by the court. In the course of his opinion *Church, C. J.*, said: "I am of the opinion that the cross-examination of persons who are witnesses in their own behalf, when on trial for criminal offences, should in general be limited to matters pertinent to the issue, or such as may be proved by other witnesses." See examination of these cases in 19 Alb. L. J. pp. 343, 388.

In *Crapo v. People*, 76 N. Y. 288; 19 Alb. L. J. 200, the prisoner was required to answer, under objection, the question, whether he had been arrested for bigamy. This was held error by the Court of Appeals, although the witness did not claim his privilege. It did not, so it was held, tend to impair the credibility of the prisoner as a witness. *Brandon's Case*, 42 N. Y. 265, and *Connor's Case*, 50 *ibid.* 240, distinguished. "Questions as to collateral matters tending to impeach the witness's credibility are admissible. *Parkhurst v. Lowten*, 2 Swanston, 216. This reason for allowing collateral inquiries of this nature, that otherwise the People may be surprised by the unexpected appearance of a strange witness (2 Phil. on Ev. 943, 5th Am. ed.), does not apply to the case of the accused giving testimony in his own case. Collateral questions, not necessarily tending to impeach the witness's credibility, have uniformly been excluded. *People v. Genung*, 11 Wend. 19. The single fact that the witness has been complained of and held for trial for the

¹ *Com. v. Curtis*, 97 Mass. 574.

Whether a defendant waives his privileges as to professional communications is hereafter discussed.¹

§ 433. A defendant, when a witness, may be contradicted as to matters material to the issue;² but not as to matters collateral.³ So, as we have seen, he may be contradicted by proof of prior inconsistent statements,⁴ and this without previously questioning him as to such statements.⁵ His character for truth and veracity may be impeached,⁶ and his testimony may be commented on by counsel to the same effect as the testimony of other witnesses.⁷

§ 434. A party who has been examined in his own behalf may be re-examined in rebuttal of the prosecution's testimony,⁸ and may be called to contradict, under the usual limitations, testimony offered on his own side,⁹ or to explain

commission of a crime, does not affect his moral character (*People v. Gay*, 7 N. Y. 378), because he is presumed innocent till convicted." Folger and Earl, JJ., dissenting. S. C., 15 Hun, 269.

A defendant, when a witness on an indictment for rape, cannot be asked whether he had previously visited houses of ill-fame. *Gifford v. People*, 87 Ill. 210. But where the question put on cross-examination is as to a matter which the prosecution could put in evidence as part of its case, then the defendant is not in any view privileged from answering. The defendant may, therefore, be compelled to answer as to whether he did not commit certain other crimes which are part of a system with that under trial. *State v. Wentworth*, 65 Me. 234; *Com. v. Nichols*, 114 Mass. 285. *Brandon v. People*, 42 N. Y. 265. *Supra*, § 32.

In *People v. Gale*, 50 Mich. 237, the cross-examination in such cases is said to be at the discretion of the judge.

¹ *Infra*, § 499.

² *Fralich v. People*, 65 Barb. 48;

State v. Horne, 9 Kans. 119. *Supra*, § 429.

³ *Marx v. People*, 63 Barb. 618. See *infra*, § 484.

⁴ *Supra*, §§ 429-31; *infra*, § 482; *Brubacker v. Taylor*, 76 Penn. St. 83; *Woods v. State*, 63 Ind. 353.

⁵ *Infra*, § 483; *Kreiter v. Bomberger*, 2 Weekly Notes, 685. Compare *supra*, § 429; *Foster, In re*, 24 Vt. 570; *Laramore v. Minish*, 43 Ga. 282. See *People v. Arnold*, 43 Mich. 303. As to admissibility of his evidence on subsequent trials, see *infra*, § 664; *supra*, § 430.

⁶ *Com. v. Bonner*, 97 Mass. 587; *State v. Cox*, 67 Mo. 392; *People v. Beck*, 58 Cal. 212. *Infra*, § 486. But general inquiries into moral character are precluded. *Fletcher v. State*, 49 Ind. 124. See *State v. Clinton*, 67 Mo. 380; *People v. Cummins*, 47 Mich. 335.

⁷ *State v. Harrington*, 12 Nev. 125.

⁸ *Donohue v. People*, 56 N. Y. 208; *People v. Crapo*, 76 N. Y. 288; *Rust v. Shackleford*, 47 Ga. 538.

⁹ *Hildreth v. Shepard*, 65 Barb. 265. See *infra*, § 493.

ambiguities in his own testimony.¹ And it is held in New York that he may be asked by his counsel whether he was guilty of an offence of which he is shown by the record to have been convicted in another State.² His credit, like that of all other witnesses, is for the jury.³

§ 435. In most States it is provided by the enabling statute that a failure by the defendant to offer himself as a witness is not to be taken as a presumption against him. Independently of such provisions, it is proper for the court, in all cases where the defendant declines to avail himself of the right of testifying, to hold firmly to the position that no inference is to be drawn against him from such omission.⁴ Otherwise, exposing himself to this ordeal will become obligatory, and there will be a practical abrogation of the great constitutional and juridical principle that no man is to be compelled to criminate himself. Following this view, it has been held error for the judge trying the case to decline to charge the jury that no presumption is to be drawn from such withholding.⁵ And it has been considered, under such circumstances, error, if the court, against the defendant's objection, permit the counsel for the prosecution, in addressing the jury, to comment on the omission as a circumstance against him, or a fact to be considered in determining the case.⁶

A failure on part of the defendant to offer himself as a witness is not to be treated as a presumption against him.

In Maine, however, it is held that the judge, in his charge to the jury, may call their attention to the fact, and instruct them that it is a circumstance for their consideration.⁷ And in Vermont, while it is held proper to instruct the jury that the fact that the defendant has not offered himself as a witness is not to be received

¹ *Cousins v. Jackson*, 52 Ala. 262.

² *Sims v. Sims*, 75 N. Y. 466. *Infra*, § 596 a.

³ *Supra*, § 429; *State v. Stewart*, 9 Nev. 130; *Brown v. State*, 60 Ga. 210.

⁴ See *State v. Wentworth*, 65 Me. 234; *Com. v. Nichols*, 114 Mass. 285; *Ruloff v. People*, 45 N. Y. 213. And see article by Mr. Maury in *Am. Law Rev.*, Nov. 1880.

⁵ *State v. Cameron*, 40 Vt. 555;

Beavers v. State, 58 Ind. 530; *McKenzie v. State*, 26 Ark. 334; *People v. Tyler*, 36 Cal. 522. See *State v. Grebe*, 17 Kans. 458.

⁶ *Infra*, § 435 a. As to presumption of silence, see *infra*, § 681.

⁷ *State v. Lawrence*, 57 Me. 574 (*Appleton, C. J.*, 1870); *State v. Bartlett*, 55 Me. 200; *State v. Cleaves*, 59 Me. 398.

as a presumption against him, it is intimated that it would be attempting impossibilities to say that the fact is not to be taken into consideration at all.¹ But ordinarily it is the duty of the court, if the question arises, to instruct the jury that the defendant's abstention affords no inference against him.²

§ 435 a. By some statutes counsel are prohibited from making any argument or comment on the silence of the defendant; and in such jurisdictions, if the counsel for the prosecution call attention to such silence, this is ground for new trial, even though counsel at the time is checked by the court.³ And new trials will be granted, even in States where counsel are not so prohibited, if the court permit such comments, in the face of objections from the defence.⁴ This protection, however, from comment, does not apply to cases in which the defendant, submitting himself as a witness, declines to answer particular questions on the ground of self-crimination,⁵ or fails to explain

Error for counsel to allude to non-testifying.

¹ State v. Cameron, 40 Vt. 555.

² In a remarkable trial for murder in New York, it was held that the error of the court in alluding, in its charge, to the omission of the prisoner to testify, was cured by a subsequent charge that he was not required to testify, and that there was no inference to be drawn against him from the fact of his not having testified. *Ruloff v. People*, 45 N. Y. 213; aff. S. C., 5 Lansing, 261. See comments in 19 Alb. L. J. 428.

In *Com. v. Scott*, 123 Mass. 239, the court said:—

“The absolute exemption, secured to the defendants by the Constitution and laws, from being compelled to testify, and from having their omission to do so used in any way to their detriment, could not be affected by superfluous or irregular suggestions of their counsel in the heat of argument. That exemption could only be waived by each defendant's own election to avail himself of the statute, and to go upon the stand as a witness.” See *Veatch v. State*, 56 Ind. 584, where it was held error to instruct a jury that a person

“interested are not usually as honest and candid as one not so.”

³ *Long v. State*, 56 Ind. 182. *Supra*, § 429. See *Baker v. People*, 105 Ill. 409.

⁴ *Ruloff v. People*, 45 N. Y. 213; *Crandall v. People*, 2 Lansing, 309; *Ormsby v. People*, 53 N. Y. 472; *Daily v. State*, 28 Ind. 285; *People v. Tyler*, 36 Cal. 522; *People v. Brown*, 53 Cal. 66.

In Ohio, where a defendant forebore to testify in his own behalf, and, during the argument, after closing of the evidence, contradicted the counsel for the prosecution on a question of fact, in the hearing of the jury, whereupon the counsel said to the defendant, “You had an opportunity to testify in this case and did not do so;” this was held to be no ground for a new trial, though the Ohio statute provides that refusal to testify shall not be used as a presumption against the defendant. *Calkins v. State*, 18 Oh. St. 366.

⁵ *State v. Ober*, 52 N. H. 549; citing *Com. v. Mullen*, 97 Mass. 547.

inculpatory facts.¹ Nor is counsel prohibited from commenting on a defendant's appearance and manner when testifying.²

§ 436. In Michigan, the defendant's statement is not under oath. It is optional with him whether he will avail himself of the privilege of making any statement at all. If he declines making any statement, no inference is to be drawn against him for the omission. The jury "are not to be precluded by any artificial rule from giving full weight to every consideration, or to any feature of such statement which may tend in any way to produce belief or disbelief, either of the statement itself, or of the evidence of witnesses to which it relates."⁴ Whether the defendant's testimony is to be discredited on account of his bias is for the jury as a matter of fact and not of law.⁵ The statement is technically evidence against a defendant when involving admissions.⁶

Distinctive provisions in particular States.³

The Florida Act of 1865 provides that the defendant may, *with leave of court*, make a statement under oath before the jury. Under this act it has been held error for the court, after such statement made, to charge the jury that they "cannot take such statement into consideration as evidence." For, under the act, the *court* has only to determine whether the defendant is to make the statement; the *jury* may attach to the statement such weight as they think due.⁷ Under the Act of 1870, the defendant, by making a sworn statement, does not become a witness, nor subject to the liabilities of witnesses.⁸

§ 437. *Husband and wife* cannot, under the statutes, when not specifically included, be called as witnesses for each other, except in the usual case of violence. They are excluded on grounds of public policy; and the statutes

Husband and wife not affected by statutes.

¹ *Stover v. People*, 56 N. Y. 315.

² *Huber v. State*, 57 Ind. 341. See 19 Alb. L. J. 429.

³ See a sketch of these statutes in 3 Cent. L. J. No. 49, p. 782.

In the United States courts, when there is no rehabilitating federal statute, a defendant in a criminal case cannot testify in his own behalf, although by statute his testimony is admissible in

the courts of the State. *U. S. v. Hawthorne*, 1 Dill. 422.

⁴ *De Foe v. People*, 22 Mich. 224—*Christianity, J.*, 1871. *Supra*, § 427.

⁵ *People v. Jones*, 24 Mich. 217. *Supra*, § 429.

⁶ *People v. Arnold*, 40 Mich. 710.

⁷ *Barber v. State*, 13 Fla. 675.

⁸ *Miller v. State*, 15 Fla. 591.

As to Alabama see *supra*, § 427.

do not touch this question when they only relieve from the exclusion attached to parties.¹

§ 438. *Co-defendants* may, under the statutes, be witnesses for each other.²
 Otherwise as to co-defendants. It is otherwise at common law.³

IX. ACCOMPLICES AND CO-DEFENDANTS.

§ 439. An accomplice is a competent witness for the prosecution,⁴ although his expectation of pardon depends upon the defendant's conviction,⁵ and although he is a co-defendant, provided in the latter case his trial is severed from that of the defendant against whom he is offered.⁶

Accomplices competent for prosecution.

¹ *Supra*, § 400.

² *State v. Gigher*, 23 Iowa, 318; *State v. Stewart*, 51 Iowa, 312; *Lucre v. State*, 7 Baxt. 148.

³ *U. S. v. Clements*, 3 Hughes, 509. *Infra*, § 445. For constructions attached to defendant's testimony, in cases of homicide, where he sets up self-defence, see *Burdick v. People*, 58 Barb. 51; *Com. v. Woodward*, 102 Mass. 159.

⁴ *Gilb. Ev.* 136; 1 *Hale*, 303; 2 *Hawk. P. C.* 46, s. 94; *Willes*, 423; *Com. v. Brown*, 130 Mass. 279; *Nixon v. People*, 5 *Park. C. R.* 119; *Mackesey v. People*, 6 *Park. C. R.* 114; *Lindsay v. People*, 63 *N. Y.* 143; *State v. O'Brien*, 3 *Vroom*, 414; *Noyes v. State*, 41 *N. J. L.* 418; *State v. Hudson*, 50 Iowa, 157. Compare *U. S. v. Henry*, 4 *Wash. C. C.* 428; *U. S. v. McKee*, 3 *Dill.* 546; *State v. Stanley*, 48 Iowa, 221; *People v. Gibson*, 53 *Cal.* 601; *Carroll v. State*, 5 *Neb.* 31; *Marler v. State*, 67 *Ala.* 55; *Lee v. State*, 51 *Miss.* 566; *State v. Crowley*, 33 *La. An.* 782; *State v. West*, 69 *Mo.* 401; *Russell v. State*, 11 *Tex. Ap.* 288; *People v. Lee*, 2 *Utah*, 441.

⁵ *R. v. Tonge*, *Kel.* 18; *State v. Cook*, 23 *La. An.* 45; *Casey v. State*, 37 *Ark.* 67, and cases cited *infra*.

⁶ *R. v. Gerber*, *T. & M.* 647; *Noyes v. State*, 40 *N. J. L.* (12 *Vroom*), 429.

"It makes no difference whether the accomplice has been convicted or not, or whether he be joined in the same indictment with the prisoner to be tried or not; provided he be not put upon his trial at the same time. *Hawk. P. C. b. 2, c. 46, s. 90.* Where A., B., C., and D. were indicted together, after plea, and before they were given in charge to the jury, *Williams, J.*, allowed D. to be removed from the dock and examined as a witness against his associates. *R. v. German, T. & M. 647.*" And see *R. v. Gallagher*, 13 *Cox C. C.* 61.

Whether wives of co-defendants can testify for each other is already considered, *supra*, § 391.

A prisoner who pleads guilty to an indictment, and who has been previously convicted of felony, is a competent witness against other prisoners charged in the same indictment. *R. v. Drury*, 3 *C. & K.* 190—*Rolfe*; *S. P.*, *R. v. Arundel*, 4 *Cox C. C.* 260—*Patteson*.

Two females being jointly indicted at the assizes for felony, the jury, not agreeing, was discharged by the judge from giving a verdict. At a

According to the English practice, as detailed by Mr. Roscoe,¹ it is not a matter of course to admit an accomplice to give evidence on the trial, even though his testimony has been received by the committing magistrates; but an application to the court for the purpose must be made.² The court usually considers not only whether the prisoners can be convicted without the evidence of the accomplice, but also whether they can be convicted with his evidence.³ If, therefore, there be sufficient evidence to convict without his testimony, the court will refuse to allow him to be admitted as a witness. So, if there be no reasonable probability of a conviction even with his evidence, the court will refuse to admit him as a witness. Thus, where several prisoners were committed as principals and several as receivers, but no corroboration could be given as to the receivers against whom the evidence of the accomplice was required, Gurney, B., refused to permit one of the principals to become a witness.⁴ The same distinction has been maintained in this country; it being held that the admission of an accomplice as a witness for the prosecution, upon an implied promise of pardon, rests on the discretion of the court, and not exclusively on that of the prosecution.⁴ But this limitation can be properly

subsequent assize, one was again put on her trial, and the other admitted to give evidence, without having withdrawn her plea of not guilty, and a *nolle prosequi* not having been entered. It was held that she was a competent witness. *Winsor v. R.* (in error), 7 B. & S. 490—Exch. Cham.

¹ Roscoe Crim. Ev. 8th ed. 127. In North Carolina, by statute, one of two co-defendants may be compelled to testify against the other. *State v. Smith*, 86 N. C. 705. In Massachusetts, a co-defendant voluntarily offering himself may be allowed to testify for the State after the prosecution has rested. *Com. v. Brown*, 130 Mass. 279.

² 1 Phill. Ev. 28, 9th ed.

³ *R. v. Mellor*, Staff. Sum. Ass. 1833. So in *R. v. Saunders*, Woro. Spr. Ass. 1842, on a motion to admit an accomplice, Pattenon, J., said: "I doubt

whether I shall allow him to be a witness; if you want him for the purpose of identification and there is no corroboration, that will not do." In *R. v. Salt*, Staff. Spr. Ass. 1843, where there was no corroboration of an accomplice, Wightman, J., refused to allow him to become a witness; 3 Russ. by Greav. p. 599, 4th ed.; and again in *R. v. Sparks*, 1 F. & F. 388, where the counsel for the prosecution applied for leave to call an accomplice who had pleaded guilty, Hill, J., refused to permit it until the other evidence had been given in order to see whether it was sufficient to corroborate that of the accomplice. See, to same effect, *People v. Whipple*, 9 Cow. 707; *Taylor v. People*, 12 Hun, 213.

⁴ *Ray v. State*, 1 Greene (Iowa), 316; *Wight v. Rindskoff*, 43 Wis. 344. That a *particeps criminis* in adultery is ad-

applied, so far as it requires the consent of the court, only in those cases in which the accomplice is a co-defendant; and even in such cases the court cannot intervene so as to exclude the accomplice under statutes which make co-defendants competent witnesses.¹

§ 440. An accomplice is a person who knowingly, voluntarily, and with common intent with the principal offender, unites in the commission of a crime.² The coöperation in the crime must be real, not merely apparent.³ Hence, although a woman who voluntarily is guilty of incest,⁴ or who coöperates voluntarily and deliberately with others to produce an abortion on herself, is an accomplice,⁵ it is otherwise when she is the victim of force, fraud, or undue influence.⁶ A by-stander,

An accomplice is a voluntary co-worker.

missible, see *State v. Colby*, 51 Vt. 291; and so in incest, *Freeman v. State*, 11 Tex. Ap. 92; and in an unnatural offence, *R. v. Jellyman*, 8 C. & P. 604.

"An accomplice is, in all cases, a competent witness for the prosecution, but whether in all cases he shall be permitted to become a witness, and thus earn an exemption from punishment which is the implied condition of his turning informer, and declaring the whole truth, is in the discretion of the court and of the prosecuting officer." *Allen, J., Lindsay v. People*, 63 N. Y. 153. See *Com. v. Smith*, 12 Met. 238; *Ray v. State*, 1 Greene (Iowa), 316; *Wight v. Rindskoff*, 43 Wis. 344; and *supra*, § 439.

In Arkansas the question is said to be for the discretion of the prosecuting attorney. *Runnels v. State*, 28 Ark. 121.

¹ See article in 19 Alb. L. J. 421.

² *Dunn v. People*, 29 N. Y. 523; *Rhodes v. State*, 11 Tex. 503; *Allison v. State*, 14 Tex. Ap. 122; *Hancock v. State*, 14 Tex. Ap. 392. That the wife of an accomplice requires corroboration, see *R. v. Neal*, 7 C. & P. 168. That an accomplice may be one constructively present at the commission

of a felony, see *McCarney v. People*, 83 N. Y. 408; *Mitchell v. Com.*, 33 Gratt. 845.

Parties who accepted from the defendant part of the stolen money under the impression it was a jest are not accomplices nor accessories. *Harris v. State*, 7 Lea, 124. See *Rhodes v. State*, 11 Tex. Ap. 563.

³ *U. S. v. Henry*, 4 Wash. C. C. 428; *Parham v. State*, 10 Lea, 498; *Pollock v. Pollock*, 71 N. Y. 137. That it must be established as a reality, see *Matthews v. State*, 6 Tex. Ap. 23. That participation in a prize-fight is not such accompliceship as to require corroboration, see *R. v. Hargrave*, 5 C. & P. 170. But see *R. v. Coney*, 8 Q. B. D. 534; 15 Cox C. C. 46, *infra*, § 698.

⁴ *Freeman v. State*, 11 Tex. Ap. 441.

⁵ See *People v. Josslyn*, 39 Cal. 393; *Smith v. State*, 37 Ark. 274; *contra*, *Watson v. State*, 9 Tex. Ap. 237; see comments in 25 Alb. L. J. 239.

⁶ See *R. v. Hargrave*, 5 C. & P. 170; *R. v. Boyes*, 1 B. & S. 311; *Com. v. Boynton*, 116 Mass. 343; *Dunn v. People*, 29 N. Y. 523; *State v. Hyer*, 39 N. J. L. 598; *Rafferty v. People*, 72 Ill. 37; *Com. v. Wood*, 11 Gray, 86; *State v. Briggs*, 9 R. I. 361. In *Com. v. Wood* the court say: "We think

also, does not become an accomplice by mere approval of a murder committed in his presence.¹

An *informer*, it has been held, is not technically an accomplice.² Hence one who purchases intoxicating liquor sold contrary to law, for the purpose of prosecuting the seller for an unlawful sale, is not an accomplice, so as to require distinct corroboration as such; though the jury should be instructed to receive his evidence with the greatest caution and distrust.³ But the discredit of an accompliceship does not attach to a detective who joins a criminal organization for the purpose of exposing it, even though, in order to aid in such exposure, he unites in and apparently approves its counsels,⁴ nor to an agent who purchases a libellous publication for the purpose of giving evidence against the publisher,⁵ nor to a disguised emissary who by purporting to be a friend of the parties suspected, seeks to draw from them inculpatory information.⁶ It is otherwise if he acted as a decoy, in which case his testimony is to be rigidly scrutinized.⁷

the court rightly instructed the jury that the woman was not, under the statute, technically an accomplice, for she could not have been indicted with him."

¹ State v. Cox, 65 Mo. 29.

² State v. McKean, 36 Iowa, 343; People v. Farrell, 30 Cal. 316; People v. Barric, 49 Cal. 342.

³ Com. v. Downing, 4 Gray, 29; People v. Smith, 1 N. Y. Cr. Rep. 72. See Dunn v. People, 29 N. Y. 523; Williams v. State, 55 Ga. 391; Stone v. State, 3 Tex. Ap. 675; Wright v. State, 7 Tex. Ap. 574; see People v. Smith, 28 Hun, 626.

⁴ Campbell v. Com., 84 Penn. St. 187; State v. McKean, 36 Iowa, 343. See R. v. Bernard, 1 F. & F. 240; R. v. Mullins, 3 Cox C. C. 526; Com. v. Wood, 11 Gray, 86; Com. v. Cohen, 127 Mass. 282; Berry v. People, 1 N. Y. Cr. 43, 57. As to decoys, see Wh. Cr. L. 8th ed. § 149; articles in 25 Alb. L. J. 184; 30 Am. Rep. 129; 10 Fed. Rep. 97; London Law Times, July 30, 1881.

⁵ R. v. Burdett, 4 B. & Ald. 95; Brunswick v. Harmer, 14 Q. B. 185; Swindle v. State, 2 Yerg. 581.

⁶ R. v. Young, 2 C. & K. 466; U. S. v. Bott, 11 Blatch. 346; U. S. v. Whittier, 5 Dill. 35, and other cases cited Whart. Crim. Law, 8th ed. § 149.

⁷ Saunders v. People, 38 Mich. 218. In Wright v. State, 7 Tex. Ap. 574, Winkler, J., in delivering the opinion of the court, said: "The time allowed us for investigation has afforded but few cases in other States. Cole, J., in State v. McKean, 26 Iowa, 343 (reported in 2 Green's Cr. L. R. 635), in treating of a similar subject, says: 'The authorities upon this question are few; indeed, there is but one case we have found in which the point was directly ruled. That case is Rex v. Despard, 28 Howell's State Trials, 346, 487.' There was found some difference between Despard's Case and the one the judge was considering; but the judge, in deciding McKean's Case, said: 'The court left the credibility of the witness, and the weight to be

Accompliceship is to be proved inferentially ; the question being one of fact for the jury.¹

§ 441. While, according to the English rule, a conviction on the uncorroborated testimony of an accomplice is legal,² the practice is uniform for the judge, when the question comes up, to instruct the jury that unless the accomplice be corroborated in such a way as to show the truth of his story, their duty is to acquit.³ The true course is, to use the language of Mr. Justice Talfourd,⁴ "for judges, in the exercise of a sound discretion, to direct the acquittal of a prisoner, unless the accomplice be corroborated by evidence admitting of no suspicion ; not as to the whole case, for then the testimony would be needless, but as to such parts as satisfactorily show that he has not fabricated the story. And he should be confirmed in some facts affecting the individuals whom he accuses ; for example, by showing the prisoner and the accomplice together under circumstances which were not likely to have occurred unless there had been concert between them ;⁵ because otherwise his whole narrative may be true in its circumstances, and abundantly confirmed, and yet false as to the alleged actors. But this is a mere matter for the discretion of the

given to his testimony, entirely to the consideration of the jury. Of these they were the proper judges. We do not see how we can interfere with the action of either court or jury.' In *People v. Farrell*, 30 Cal. 316, it was held that the rule that a defendant cannot be convicted of a criminal offence on the testimony of an accomplice, unless the same is corroborated, does not apply to a feigned accomplice. On these authorities we hold, in the present case, that, first, the court did not err in submitting to the jury the questions, as to whether the witness Holden was an accomplice or not ; and second, that the credibility of the witness being fairly submitted to the jury, and they having given full credence to the testimony, the conviction will not be set aside, though resting mainly, if not entirely, on the testi-

mony of a detective ; otherwise the case is one of conflict of testimony."

¹ *Com. v. Elliott*, 110 Mass. 104 ; *Com. v. Ford*, 111 Mass. 394 ; *Com. v. Glover*, 111 Mass. 395 ; *State v. Schlagel*, 19 Iowa, 169.

² See *Atwood's Case*, 1 Leach, 464 ; *Durham's Case*, 1 Leach, 478 ; *R. v. Farlee*, 8 C. & P. 106.

³ *R. v. Dawber*, 3 Stark. 34 n. ; *R. v. Jones*, 2 Camp. 131.

⁴ *Dick. Quar. Ses.* 9th ed. 504.

⁵ *R. v. Farler*, 8 C. & P. 106 ; where, in a case of night poaching, on 9 Geo. IV. c. 69, s. 9, the only confirmation of the accomplice's testimony was, that he and the prisoner were drinking together at a public house, commonly frequented by the prisoner, and left the house together when they shut up for the night.

court; and there have been instances where, on consideration, it has been deemed proper to convict and to execute prisoners on the evidence of an accomplice who was confirmed as to others of the party, but not as to those executed."¹ On the other hand, in a case of great importance, where an accomplice swearing positively to several prisoners was confirmed as to some and not as to others, Vaughan, B., recommended the jury to acquit the latter, and they were accordingly acquitted, while those as to whom the accomplice was confirmed were convicted and executed.² "You may legally convict on the evidence of an accomplice alone," said Alderson, B., to a jury, "if you can safely rely on his testimony; but I advise juries never to act on the evidence of an accomplice, unless he be confirmed as to the particular person who is charged with the offence."³ "I think it would be highly dangerous," said Gurney, B., shortly afterwards, "to convict any person of such a crime (larceny) on the evidence of an accomplice, unconfirmed with respect to the person accused."⁴ In the United States, although we have occasionally expressions to the effect that technically an accomplice's unsupported testimony will sustain a conviction,⁵ the rule is

¹ *R. v. Dawber*, 2 Stark. (N. P.) 34; *R. v. Jones*, 2 Camp. 133; *R. v. Bir-kett*, R. & R. 252; *R. v. Hastings*, 7 C. & P. 152; *R. v. Boyes*, 1 B. & S. 320.

² *R. v. Fild and others*, Berks Spring Assizes, 1828. To the same effect is *R. v. Wells*, M. & M. 326; *R. v. Moores*, 7 C. & P. 270; *R. v. Stubbs*, Dears. C. C. 555. *Infra*, § 442.

³ *R. v. Wilkes*, 7 C. & P. 272. So, also, in Vermont, *State v. Potter*, 42 Vt. 95; and in New York, *People v. Haynes*, 55 Barb. 450; 38 How. Pr. 369; *People v. Courtney*, 1 N. Y. Cr. Rep. 64; *People v. Ryland*, 1 N. Y. Cr. Rep. 123.

⁴ *R. v. Dyke*, 8 C. & P. 261; and see also *R. v. Stubbs*, 33 Eng. L. & Eq. 552 and 553; 7 Cox C. C. 48; *Dears. C. C.* 555, where it was said that the rule in the text is not one of "law," but of "practice." See *R. v. Jellyman*, 8 C. & P. 604; *Freeman v. State*, 11 Tex. Ap.

92. See *supra*, § 440. One prisoner who has pleaded guilty will not be allowed to be called as a witness against another, until the judge has heard the evidence necessary to corroborate that of an accomplice. *R. v. Sparks*, 1 F. & F. 388—Hill.

⁵ *Steinham v. U. S.*, 2 Paine C. C. 168; *Com. v. Price*, 10 Gray, 472; *Com. v. Holmes*, 127 Mass. 424; *State v. Stebbins*, 29 Conn. 463; *People v. Costello*, 1 Denio, 53; *People v. Davis*, 21 Wend. 309; *Brown v. State*, 18 Oh. St. 496; *Stocking v. State*, 7 Ind. 326; *Nevill v. State*, 60 Ind. 308; *Johnson v. State*, 65 Ind. 269; *Ayres v. State*, 88 Ind. 275; *Johnson v. State*, 65 Ind. 269; *Earl v. People*, 73 Ill. 329; *Collins v. People*, 98 Ill. 581; *State v. Brown*, 3 Strobb. 508; *Keithler v. State*, 10 S. & M. 192; *Dick v. State*, 30 Miss. 593; *White v. State*, 52 Miss. 216; *State v. Jones*, 64 Mo. 391; *State v. Betsall*, 11 W. Va. 703; *State v. Russell*, 33 La.

generally adopted that when a verdict is rendered exclusively on such testimony it should be set aside by the court, and that it is the duty of the judge on trial to advise the jury not to convict on the evidence of an accomplice who is uncorroborated as to essential elements of the case.¹ In Pennsylvania, by statute, the uncorrobo-

An. 135; *Ingalls v. State*, 48 Wis. 647.

One accomplice's testimony cannot be corroborated by another's. *Gonzales v. State*, 9 Tex. App. 374.

In *Collins v. People*, 98 Ill. 584, the following from *Cross v. People*, 147 Ill. 152, is cited with approval: "It is a matter of discretion with the court to advise, rather than a rule of law. 1 Phillips on Ev. 34, 39; McNally on Ev. 197. If a jury believe, from the testimony of an accomplice, who may have been induced to make disclosure from remorse, or from any motive, why should they not be allowed to credit him? Is he in a position different from any other witness whose credibility is to be inquired into by the jury? We can see no real difference." And it is added: "The tendency with us, at present, is to arbitrarily exclude as little as possible, but to listen and give credence to whatever tends to establish the truth. The innocent should not be convicted nor should the guilty escape punishment, by reason of any merely arbitrary rule preventing the free and full exercise of the judgment as to the truthfulness or untruthfulness of testimony, and the reliance to be placed upon it in the trial of cases. In many, probably in most, cases, the evidence of an accomplice, uncorroborated in material matters, will not satisfy the honest judgment beyond a reasonable doubt—and then it is clearly insufficient to authorize a verdict of guilty."

In *State v. Hyer*, 39 N. J. L. 598, it was said that it is the practice in our courts to advise juries against conviction

on such testimony alone, and it is unlikely that any judge in a proper case would refuse to charge the jury, as the circumstances of the case required; still should a judge refuse so to do, error could not be assigned on such refusal, it being at his discretion. To the same effect see *Ingall v. State*, 48 Wis. 647; *Olive v. State*, 11 Neb. 1; *State v. Holland*, 83 N. C. 624.

¹ U. S. v. Trow, 3 McLean, 224; U. S. v. Goldberg, 7 Biss. 175; *State v. Howard*, 32 Vt. 380; *Com. v. Bosworth*, 22 Pick. 397; *Com. v. Price*, 10 Gray, 472; *Com. v. Snow*, 111 Mass. 411; *Com. v. Scott*, 123 Mass. 222; *Com. v. Grant*, Thach. C. C. 438; *State v. Wolcott*, 21 Conn. 272; *People v. Evans*, 40 N. Y. 1; *People v. Haynes*, 55 Barb. 450; S. C., 38 How. Pr. 369; *People v. Williams*, 1 N. Y. Cr. Rep. 441; *Carroll v. Com.*, 84 Penn. St. 107; *Donelly v. Com.*, 6 Weekly Notes, 104; *Stocking v. State*, 7 Ind. 326; *State v. Willis*, 9 Iowa, 582; *State v. Schlegel*, 19 Iowa, 169; *State v. Thornton*, 26 Iowa, 79; *State v. Moran*, 34 Iowa, 453; *People v. Jenness*, 5 Mich. 305; *People v. Schweitzer*, 23 Mich. 301; *State v. Haney*, 2 Dev. & Bat. 390; *State v. Hardin*, 2 Dev. & Bat. 407; *Powers v. State*, 44 Ga. 209; *Lumpkin v. State*, 68 Ala. 56; *Marler v. State*, 68 Ala. 580; *Bowling v. Com.*, 74 Ky. 604; *George v. State*, 39 Miss. 570; *Green v. State*, 55 Miss. 454; *Hughes v. State*, 58 Miss. 355; *State v. Watson*, 31 Mo. 361; *Craft v. State*, 3 Kans. 450; *State v. Bayonne*, 23 La. An. 78; *Irvin v. State*, 1 Tex. Ap. 301. See *State v. Kellerman*, 14 Kans. 135.

rated evidence of an accomplice will not sustain a conviction.¹ And so is it in New York,² Georgia, and other States.³

§ 442. The corroboration requisite to validate the testimony of an alleged accomplice should be to the person of the accused. Any other corroboration would be delusive, since if corroboration in matters not connecting the accused with the offence were enough, a party who on the case against him would have no hope of an escape could, by his mere oath, transfer to another the conviction hanging over himself.⁴

To what
corrobor-
ation must
extend.

¹ Act of March 13, 1855. See *Ettlinger v. Com.*, 98 Penn. St. 338.

² *People v. Ryland*, 28 Hun, 568; *People v. Courtney*, 28 Hun, 589.

³ *Childers v. State*, 52 Ga. 106; *State v. Davis*, 38 Ark. 581; *Walden v. State*, 10 Tex. Ap. 400.

The distinction existing between the English practice and that obtaining in several of the American courts is more apparent than real, and may be traced to the different methods of revision which exist in England and among us. In England, except on questions reserved by the judge at the trial, the only mode of revision is by an appeal to the mercy of the crown, by which, when successful, the disgrace is not detached, but only the penalty removed. In the United States, if a conviction based solely on an accomplice's testimony be obtained, the verdict would be instantly set aside, or, at all events, the court in review would not hesitate to grant a new trial. Among the many advantages belonging to our system, perhaps one questionable practice may have grown up, and that is, of judges on trial reserving such points as the present, which it might be better for public example to summarily and definitely meet. If the question be still open, it may not be improper to suggest that, after all, the wiser and more humane course is always to tell the jury that if the accomplice be uncor-

roborated as to the person of the accused, they must acquit.

In Massachusetts, in 1877 (*Com. v. Scott*, 123 Mass. 222), it was declared to be well settled that a jury may convict upon the uncorroborated testimony of an accomplice if it satisfies them beyond a reasonable doubt of the guilt of the defendants. It was added, however, that it is the usual practice to advise the jury to acquit, if there is no other evidence; though if this rule of practice, because of its uniformity, has acquired the force of a rule of law, still there is not the same uniformity in the practice as to the kind of corroboration required. The weight of the corroborating evidence, it was held, is for the jury, and when there is such evidence upon matters material to the issue, there is no rule of law obliging the judge to instruct the jury to acquit, unless there is also corroboration of the statements connecting the defendants with the crime. The court cited *Com. v. Bosworth*, 22 Pick. 397; *Com. v. Brooks*, 9 Gray, 299; *Com. v. Price*, 10 Gray, 472; *Com. v. O'Brien*, 12 Allen, 183; *Com. v. Larrabee*, 99 Mass. 413; *Com. v. Elliot*, 110 Mass. 104; *Com. v. Snow*, 111 Mass. 411.

⁴ See cases cited, § 441; *R. v. Cramp*, 5 Q. B. D. 307; *Com. v. Drake*, 124 Mass. 21; *State v. Wolcott*, 21 Conn. 271; *Carroll v. Com.*, 84 Penn. St. 107; *Watson v. State*, 95 Penn. St. 418;

"There may be many witnesses, therefore, who give testimony which agrees with that of the accomplice, but which, if it does not serve to identify the accused parties, is no corroboration of the accomplice; the real danger being that the accomplice should relate the circumstances truly, and at the same time attribute a share in the transaction to an innocent person. It may indeed be taken that it is almost the universal opinion that the testimony of the accomplice should be corroborated as to the person of the prisoner against whom he speaks."¹ Where there is corroboration as to a part only of the defendants, the later practice, as is elsewhere seen more fully, is to direct an acquittal of the defendants to whom the

State v. Graff, 47 Iowa, 384; *State v. Hennessy*, 55 Iowa, 299; *State v. Allen*, 57 Iowa, 431; *State v. Lawlor*, 28 Minn. 216; *State v. Hing*, 16 Nev. 307; *State v. Adams*, 20 Kans. 311; *Childers v. State*, 52 Ga. 106; *Middleton v. State*, 52 Ga. 527; *McCalla v. State*, 66 Ga. 346; *State v. Smalls*, 11 S. C. 262; *Craft v. Com.*, 80 Ky. 349; *State v. Odell*, 8 Or. 30; *Hoyle v. State*, 4 Tex. Ap. 239; though see *State v. Watson*, 31 Mo. 361.

¹ Roscoe's Cr. Ev. 130; citing *Patterson, J.*, in *R. v. Addis*, 6 C. & P. 388; and, again, in *R. v. Kelsey*, 2 Lew. 45; by *Williams, J.*, in *R. v. Webb*, 6 C. & P. 595; by *Alderson, B.*, in *R. v. Wilks*, 7 C. & P. 272; and by *Lord Abinger, C. B.*, in *R. v. Farlar*, 8 C. & P. 106.

In the later case of *R. v. Stubbs*, 25 L. J. M. C. 16, *Dears. C. C.* 555, *Parke, B.*, said: "My practice always has been to tell the jury not to convict the prisoner, unless the evidence of the accomplice be confirmed, not only as to the circumstances of the crime, but also as to the person of the prisoner;" and *Creswell, J.*, added: "You may take it for granted, that the accomplice was at the committal of the offence, and may be corroborated as to the facts;

but that has no tendency to show that the parties accused were there."

What appears to be required is, that there should be some fact deposed to independently altogether of the evidence of the accomplice, which, taken by itself, leads to the inference not only that a crime has been committed, but that the prisoner is implicated in it. See *Ettinger v. Com.*, 98 Penn. St. 338. Thus, upon an indictment for receiving a sheep knowing it to have been stolen, an accomplice proved that a brother of the prisoner and himself had stolen two sheep, and that the brother gave one of them to the prisoner, who carried it into the house in which the prisoner and his father lived, and the accomplice stated where the skins were hid. On the houses of the prisoner's father and the accomplice being searched, a quantity of mutton was found in each, which had formed parts of two sheep corresponding in size with those stolen, and the skins were found in the place named by the accomplice. *Patteson, J.*, held that this was sufficient; the finding of the mutton in the possession of the prisoner in itself raising an implication of guilt on his part, which the testimony of the accomplice confirmed. *R. v. Birkett*, 8 C. & P. 732.

corroboration does not extend.¹ Nor, under a statute precluding conviction on the uncorroborated testimony of accomplices, can a

¹ *Supra*, § 441. Thus, in *R. v. Stubbs*, *supra*, *Jervis*, C. J., said: "There is another point to be noticed: when an accomplice speaks as to the guilt of three prisoners, and his testimony is confirmed as to two of them only, it is proper, I think, for the judge to advise the jury, that it is not safe to act on his testimony as to the third person in respect of whom he is not confirmed; for the accomplice may speak truly as to all the facts of the case, and at the same time in his evidence substitute the third person for himself in his narrative of the transaction."

In *Com. v. Scott*, 123 Mass. 222, the government claimed and was allowed to prove by one Edson, "that in the year 1873 said Edson, the two defendants, and one William Conner, formed a general conspiracy to rob banks; that it was a part of their plan and understanding that, in their travels through the country, they should obtain information of such banks as were insecure and feasible for robbery, and should report to each other the result of their observations; that in the summer of 1875, Edson, who was in the employ of Herring & Co., of New York, safe-makers, and had been sent by them to Northampton on business of the company, first informed himself of the practicability of robbing the Northampton National Bank, and reported the same to the defendants at Wilkesbarre, Penn., and then furnished the defendants with the means of duplicating the vault lock; that this was done in pursuance of their general conspiracy before mentioned." It was held competent for the government to show the whole history of the robbery charged, from the inception of

the scheme to its final consummation. The evidence was admitted as tending to prove the crime charged, and was not rendered incompetent because it also tended to prove the commission of other crimes. *Com. v. Choate*, 105 Mass. 451. For the same reason, the testimony of Edson as to the acts of the defendants and their co-conspirators, in making preparations for carrying out the robbery was held competent. There being evidence sufficient to be laid before the jury to prove the conspiracy, as to which the presiding justice was in the first instance to determine, it was held proper for the government to put in evidence any acts of the several conspirators in furtherance of the common purpose of the conspiracy, either before or after the robbery was committed. Accordingly, Edson having testified without objection that a few days after the robbery he met the other conspirators on business connected with the robbery, the government was permitted to show by him that the conspirators had previously arranged for calling such meetings by means of "personals" in the *New York Herald*, and that this meeting was called by a "personal" inserted by him, in reply to which another was inserted by Conner. The insertion of these "personals" were acts of two of the conspirators in carrying out the purpose of the conspiracy, and were thus competent against the defendants. The newspaper was the best evidence of their insertion, and was important to fix the date of the meeting. For the same reasons a "personal," warning the defendant Scott of the danger of his visit to Northampton for the purpose of bringing to New York the securities stolen

statement by one accomplice be ordinarily regarded as corroborative of the statement by another.¹

§ 443. Though an accomplice, when called as a witness by the State, makes a clean breast, and exhibits all the facts in the case,

from the bank, was competent, and it was held immaterial whether Scott saw it. So, the fact that Williams, a director of the bank, met Conner, one of the conspirators, and had negotiations with him relative to the return of the stolen property, was competent, and the fact that Edson took him to see Conner was admissible as a part of the transaction, as tending to corroborate Edson's testimony, that he and Conner were members of the conspiracy. The testimony of a witness called by the government, that about two days before the robbery he sold to two men in Springfield a pair of drawers and some socks, like those left by the robbers in the cashier's house (which was entered for the purpose of securing the keys of the bank), was competent, there being evidence tending to show that these two men were the defendants. Edson testified, without objection, that in August, preceding the robbery, he met the defendant Dunlap at Wilkesbarre, for the purpose of conferring together in regard to the robbery. The government introduced, against the defendant's objection, the register of the "Wyoming Valley House," of Wilkesbarre, and Edson testified to his own signature therein, under date of August 5, 1875, and that of Dunlap, under the assumed name of R. C. Hill. The court held that in any view this evidence was competent for the purpose of fixing the time when the interview took place.

The corroboration may be by facts as well as witnesses. *State v. Stanley*, 48 Iowa, 221. See *Territory v. Mahaffey*,

3 Mon. 112; *Jernigan v. State*, 10 Tex. Ap. 546.

Cross-examination is discussed, *infra*, § 444.

¹ *Heath v. State*, 7 Tex. Ap. 464; *Hannahan v. State*, 7 Tex. Ap. 664.

On the trial of an indictment for breaking into a shop at night, evidence that a party of persons, among whom the defendant and A. B. were recognized, were seen at a late hour of the night near the shop, is corroborative of an accomplice who has testified that he was then and there with the defendant and A. B. *Com. v. Elliot*, 110 Mass. 104.

Confessions may form a sufficient corroboration; *People v. Cleveland*, 49 Cal. 578; *Partee v. State*, 67 Ga. 570; even where such confession is silent acquiescence in the statement of another. *R. v. Cramp*, 14 Cox C. C. 390.

Where a witness is called, who, in the commencement of his testimony, states himself to be an accomplice of the accused, it has been held competent, before the witness is attacked, to call another witness to prove that the first had related the facts disclosed in his evidence immediately after they happened, and to state other confirmatory facts. *State v. Twitty*, 2 Hawks, 248.

But an accomplice who has testified to the defendant's guilt cannot be permitted, with a view to sustain his testimony, to narrate other instances of crime proposed to him by the defendant, though proposed at the same time, and in the same conversation. *Kinchelow v. State*, 5 Humph. 9.

however criminatory, he is not in law entitled to pardon; nor can he plead the fact that his testimony was so invited and so used, in bar of a prosecution against him for the offence he confessed when on the witness stand.¹ His claim to pardon depends exclusively on executive discretion.² The accom-

Accomplice when entitled to pardon.

¹ See, *contra*, where there is a stipulation not to prosecute, *Harden v. State*, 12 Tex. Ap. 186; Wh. Cr. Pl. & Pr. § 447.

² Whart. Cr. Pl. & Pr. § 536; Com. v. Brown, 103 Mass. 422; Com. v. Woodside, 105 Mass. 597; State v. Lyon, 81 N. C. 600.

"In the present practice (says Mr. Starkie), where accomplices make a full and fair confession of the whole truth, and are in consequence admitted to give evidence for the crown, if they afterwards give their testimony fairly and openly, although they are not of right entitled to a pardon, the usage, lenity, and practice of the court is to stay the prosecution against them, and they have an equitable title to a recommendation to the king's mercy. 2 Starkie Ev. 4th Am. ed. 15. *Particeps criminis* in such a case, when called and examined as witnesses for the prosecution, says Roscoe, have an equitable title to a recommendation for the royal mercy, but they cannot plead this in bar to an indictment against them, nor can they avail themselves of it as a defence on their trial, though it may be made the ground of a motion for putting off the trial in order to give the prisoner time to present an application for the executive clemency. Roscoe's Cr. Ev. 9th Am. ed. 597. Authorities of the highest character almost without number support that proposition, nor is it necessary to look beyond the decisions of this court to establish the correctness of the rule. *Ex parte Wells*, 18 How. 312. Special reference is made in

that case to the three ancient modes of practice which authorized accomplices, when admitted as witnesses in criminal prosecutions, to claim a pardon as a matter of right, and the court having explained the course of such proceedings, remarked that, except in those cases, accomplices, though admitted to testify for the prosecution, have no absolute claim or legal right to executive clemency. Much consideration appears to have been given to the question in that case, and the court held that the only claim the accomplice has in such a case is an equitable one for pardon, and that only upon the condition that he makes a full and fair disclosure of the guilt of himself and that of his associates, that he cannot plead it in bar of an indictment against him for the offence, nor use it any way except to support a motion to put off the trial in order to give him time to apply for a pardon." Clifford, J., U. S. v. Ford, 99 U. S. 594.

In *State v. Graham*, 41 N. J. L. 15, the court came "to the conclusion to advise the attorney-general not to enter a *nolle prosequi*. The public faith was not pledged to the defendant, either by expression or implication, that protection to this measure would be extended to him. An implied promise on the part of the court to recommend him to the mercy of the court of pardons is all that he can justly claim, and that pledge, if he should be convicted, will doubtless be redeemed. To what extent such recommendation will be efficacious, it will remain for the tribunal in which the Constitution

plice, it has been ruled, cannot when afterwards put on trial, be granted a continuance of the case, so as to enable him to apply for pardon.¹ It is the practice in England, in such cases, where the accomplice appears to have been the dupe, and where his services on the trial were valuable, to grant a pardon; though even if there be no other objection, the pardon will be withheld if he fenced on trial, or withheld part of the facts.² In some jurisdictions this is

has placed the pardoning power to decide. If the defendant should apply to be permitted to plead guilty to the crime of murder in the second degree, the court will listen to such application, and will there decide, when the matter is before it, what answer shall be given to such request. For the present, our decision is that the prosecution should not be summarily dismissed."

In this case, Beasley, C. J., stated the following rules:—

"*First.* That if an accomplice be convicted after having been made a witness by the State, and received as such by the court, and after having made an ingenuous confession, such accomplice has an equitable claim to a judicial recommendation to the mercy of the pardoning power, which cannot be withheld without a violation of an established rule of practice.

"*Second.* Such a recommendation has been, without any known exception, hitherto effective in obtaining some remission of punishment.

"*Third.* That instead of the foregoing course it is competent for the court to order the accomplice to be acquitted at trial for the purpose of qualifying him as a witness, or to accept from the defendant a plea admitting guilt to such a degree as in the opinion of the court is prerequisite, or for the court to assent to the entering of a *nolle prosequi* by the attorney-general."

For a discussion of the right of an accomplice to pardon, see 17 Alb. Law J. 420 *et seq.*

Where an accomplice who had been admitted as a witness against his companions, on a charge of highway robbery, and had conducted himself properly, was afterwards tried himself for burglary, Garrow, B., submitted the point to the judges, whether he ought to have been tried after the promise of pardon; but the judges were all of opinion, that though examined as a witness for the crown, on the application of the counsel for the prosecution, there was no legal objection to his being tried for any offence with which he was charged, and that it rested entirely in the discretion of the judge whether to recommend a prisoner in such a case to mercy. *R. v. Lee*, R. & R. 364, 1 Burns, 212; *R. v. Brunton*, *ibid.* 454, S. P. With respect to other offences, the witness is not bound to answer on his cross-examination. *Infra*, § 441; *R. v. West*, Phill. Ev. 28, 8th ed. (n.)

The United States district attorney, it is ruled, has no right to contract for the exemption of an accomplice, turning informer, from punishment. *U. S. v. Ford*, 99 U. S. 594.

¹ *Dabney's Case*, 1 Robin. Va. 696; though see *Clifford, J.*, *U. S. v. Ford*, *ut supra*; *U. S. v. Lee*, 4 McLean, 103.

² *R. v. Garside*, 2 Lew. C. C. 38; *U. S. v. Lee*, 4 McLean, 103.

When a defendant who pleaded guilt-

provided by statute. When the accomplice, after making a confession under promise of pardon, refuses to testify, the confession may be subsequently put in evidence against him.¹ Nor can he, if he disclose part of the facts, withhold the rest. He must tell the whole.²

Where the case against the accomplice is withdrawn from the jury, and he is called as a witness, this operates as a bar to a further prosecution for the same offence.³ And where an accomplice tells everything candidly and fully on the trial of his confederate, the court, when allowed by statute, may approve the entering of a *nolle prosequi* against him.

§ 444. Great latitude, from the nature of the case, is allowed in the cross-examination of an accomplice, and the most searching questions are permitted in order to test his veracity.⁴ He will be compelled to make a full statement of the matter he opens, criminate him though it may,⁵ though he will not be required to answer as to other crimes.⁶

Latitude
allowed in
cross-ex-
amining.

ty, and was called as a witness for the prosecution, fenced with the questions put to him, he was told by Baron Wood that he would be sentenced because of this fencing. *Alderson, B., R. v. Hincks*, 2 C. & K. 464; S. C., 1 Den. C. C. 84.

The admission of an accomplice as a witness for the State does not *per se* bind the State not to prosecute; and if the accomplice, "being admitted as a witness, fail to testify the whole truth in good faith, the implied promise of pardon is revoked." *Ryan, C. J.*, in *Wight v. Rindskopf*, 43 Wis. 349, citing *R. v. Budd*, 1 Leach C. C. 115; *People v. Whipple*, 9 Cow. 707. See *Runnels v. State*, 28 Ark. 121; and article in *Cent. Law J.*, June 16, 1876.

¹ *Com. v. Knapp*, 10 Pick. 478. See, to same effect, *R. v. Moore*, 2 Lew. C. C. 37; *R. v. Gilles*, 11 Cox C. C. 69.

² *Com. v. Knapp*, 10 Pick. 478; *Com. v. Price*, 10 Gray, 472; *Alderman v. People*, 4 Mich. 414; *State v. Condry*, 5 Jones (N. C.), 418. See fully, *infra*, § 470.

³ *People v. Bruzzo*, 24 Cal. 41. See *Lindsay v. People*, 63 N. Y. 153; *Ray v. State*, 1 Greene (Iowa), 316.

⁴ *Lee v. State*, 21 Oh. St. 151.

When an accomplice testifies that the defendant instigated him to commit the murder, evidence of threats made by such accomplice against the deceased are relevant to show another motive. *Marler v. State*, 67 Ala. 55.

It has been said that where the accomplice, on a former occasion, denied on oath all knowledge of the facts to which he testifies at the trial, yet this goes only to his credit; and if the jury find a verdict of conviction on his testimony, and the trial court be satisfied with the verdict, an appellate court will not set it aside. *Brown v. Com.*, 11 Leigh, 711.

⁵ *Com. v. Price*, 10 Gray, 472; *Alderman v. People*, 4 Mich. 414; *Hamilton v. People*, 29 Mich. 173. *Infra*, § 470.

⁶ *R. v. West*, Phil. Ev. 28, 8th ed. (n.); *Pitcher v. People*, 16 Mich. 142.

§ 445. At common law, an accomplice, not a co-defendant, is always a competent witness for the defendant on trial.¹ But when indicted jointly with the defendant on trial, although he has pleaded and defended separately, he is not, at common law, a competent witness for his co-defendants, unless immediately acquitted by a jury, or a *nolle prosequi* be entered; and the same rule applies to accessaries.² Whether the trial be joint or several the rule is said to be the same,³ and wherever the defendant is not permitted to testify for the others, the wife of such defendant is excluded at common law, although her husband be not then on trial.⁴ But there is high authority to the effect that in cases where the trials are separate, and where the acquittal of one defendant does not involve the acquittal of the other, the latter may be examined, if he is willing, for his co-defendant.⁵

On a joint trial, when a motion is made by one defendant for a direction to the jury to acquit another defendant on the ground that there is no evidence against him, so that he can be a witness for the party making the motion, it is for the court to determine

¹ *B. v. Bilmore*, 1 Hale P. C. 305.

See *Salander v. People*, 2 Col. T. 48.

² *Staup v. Com.*, 74 Penn. St. 463; *Kehoe v. Com.*, 85 Penn. St. 127; *Davis v. State*, 38 Md. 15, 46; *Henderson v. State*, 70 Ala. 23; *State v. Mooney*, 1 Yerg. 431; *State v. Calvin*, 1 Charlton, 151; *State v. Martin*, 74 Mo. 547.

³ *Winsor v. R. L. R.*, 1 Q. B. 390; *State v. Young*, 39 N. H. 283; *Com. v. Marsh*, 10 Pick. 57; *Com. v. Eastman*, 1 Cush. 189; *People v. Bill*, 10 Johns. 95; *People v. Donnelly*, 2 Park. C. R. 182; *People v. Williams*, 19 Wend. 377; *People v. McIntyre*, 1 Parker C. R. 372; *S. C.*, 5 Seld. 38; *Shay v. Com.*, 36 Penn. St. 305; *Staup v. Com.*, 74 Penn. St. 458; *Kehoe v. Com.*, 85 Penn. St. 127; *State v. Smith*, 2 Ired. 402; *State v. Edwards*, 19 Mo. 677; *Chandler v. Com.*, 1 Bush, 41; *State v. Mooney*, 1 Yerg. 431; *State v. Dumphrey*, 4 Minn. 438; *Brown v. State*, 24 Ark. 626.

⁴ *Supra*, § 391.

⁵ *U. S. v. Henry*, 4 Wash. C. C. 428; *Moffitt v. State*, 2 Humph. 99; *Marshall v. State*, 8 Ind. 498; *Hunt v. State*, 10 Ind. 69; *Brown v. State*, 18 Oh. St. 496; *Langlin v. Com.*, 13 Bush, 261; *Christian v. Com.*, 13 Bush, 264; *Poeteete v. State*, 9 Baxt. 261; *McKenzie v. State*, 24 Ark. 636; *People v. Labra*, 5 Cal. 183; *People v. Newberry*, 20 Cal. 439; *Garrett v. State*, 6 Mo. 1; *State v. Stotts*, 26 Mo. 307; *Blennerhasset v. State*, 1 Walk. 7; *Moss v. State*, 17 Ark. 327.

By the Code of Virginia, p. 752, § 21, it is provided that "no person, who is not jointly tried with the defendant, shall be incompetent to testify in any prosecution, by reason of interest in the subject matter thereof." See *Lazier's Case*, 10 Grattan, 717. And so in Ohio. Code Crim. Proc. 146. As to North Carolina, see *State v. Gardner*, 84 N. C. 732; *N. C.*, Act 1866, ch. 43, § 3.

whether sufficient evidence exists.¹ And no exception lies to such refusal.²

A co-defendant or accomplice, who has pleaded guilty or been convicted, provided he is not thereby rendered infamous, is a competent witness for his co-defendants, supposing the case against him to be closed.³ But as long as the case, as far as he is concerned, continues open, he is at common law disqualified in all cases in which he would have been disqualified if called on trial.⁴

A joinder of defendants, unless the offence be joint, does not work such disability.⁵

Under the statutes removing disability of defendants, one defendant may be a witness for his co-defendant, to the same effect as he could be a witness for himself.⁶

The questions of misjoinder of defendants, and of a right to a new trial after acquittal, are discussed in another volume.⁷

X. EXAMINATION OF WITNESSES.

§ 446. Witnesses may, by order of court, be sequestered, due ground being shown, in such a way as may prevent those not yet examined from hearing the testimony of witnesses on the stand.⁸ Whoever is yet to be examined,

Judge may order separation of witnesses.

¹ U. S. v. Gibert, 2 Sumner, 20; U. S. v. Wilson, 1 Bald. 78; State v. Soper, 16 Me. 293; People v. Howell, 4 Johns. 296; People v. Vermilyea, 7 Cow. 108; Com. v. Manson, 2 Ashm. 32; Bixbie v. State, 6 Ham. 86; State v. Smith, 2 Ired. 402; State v. Wise, 7 Rich. 412; Brister v. State, 26 Ala. 109.

² U. S. v. Marchant, 12 Wheat. 480; Com. v. Robinson, 1 Gray, 555. See Shay v. Com., 36 Penn. St. 305.

³ R. v. Ford, 2 Salk. 689; R. v. George, C. & M. 111; State v. Jones, 51 Me. 126; Com. v. Smith, 12 Met. 238; Carpenter v. Crane, 5 Blackf. 119; State v. Stotts, 26 Mo. 307; DeLozier v. State, 1 Head, 45; Bullard v. Noaks, 2 Pike, 45. But see U. S. v. Clements, 3 Hughes C. C. 509; State v. Turner, 1 Houst. C. C. 76.

⁴ State v. Young, 39 N. H. 283. In Kehoe v. Com., 85 Penn. St. 127, it was ruled that one who has been tried and convicted of an infamous crime, but not sentenced, in whose case motions for arrest of judgment and a new trial are pending, is not a competent witness for one who was jointly indicted with him for the same offence, but granted a separate trial.

⁵ Strawhern v. State, 37 Miss. 422.

⁶ State v. Gigher, 23 Iowa, 318. *Supra*, § 427.

⁷ Whart. Cr. Pl. & Pr. §§ 301 *et seq.*, 873-4.

⁸ Southey v. Nash, 7 C. & P. 632; Selfe v. Isaacson, 1 F. & F. 194; People v. Duffy, 1 Wheel. C. C. 123; People v. Green, 1 Parker C. R. 11; State v. Zellers, 2 Halst. 220; Erissman v. Erissman, 25 Ill. 136; Johnson v.

though a party prosecutor, is subject to this rule.¹ A witness's testimony, it is true, will not be necessarily ruled out because he remains in court, even wilfully, after being ordered to withdraw;² but he exposes himself, by his disobedience, to an attachment for contempt.³ But where the party calling the witness is to blame for the disobedience, then the witness may be excluded.⁴ To prevent a witness from being unduly influenced by the knowledge of the line to which his testimony is expected to reach, it has even been held that the court will order his withdrawal during a

State, 2 Ind. 652; *Benaway v. Conyne*, 3 Chandl. 214; *Nelson v. State*, 2 Swan, 237; *Thomas v. State*, 27 Ga. 287; *Bird v. State*, 50 Ga. 585; *State v. Sparrow*, 3 Murph. 487; *McLean v. State*, 16 Ala. 672; *State v. Brookshire*, 2 Ala. 303; *State v. Fitzsimmons*, 30 Mo. 236; *People v. Sprague*, 53 Cal. 422. See Whart. Cr. Pl. & Pr. § 569; and see *State v. Hopkins*, 50 Vt. 316; *People v. Garnett*, 29 Cal. 622.

¹ *R. v. Newman*, 3 C. & K. 252.

² *Thomas v. David*, 7 C. & P. 350; *Chandler v. Horne*, 2 M. & R. 423; *Cobbott v. Hudson*, 1 E. & B. 14; *Hopper v. Com.*, 6 Grat. 684; *Hey v. Com.*, 32 Gratt. 946; *Gregg v. State*, 3 W. Va. 705; *Laughlin v. State*, 18 Ohio, 99; *Porter v. State*, 2 Ind. 435; *Grimes v. Martin*, 10 Iowa, 347; *State v. Hare*, 71 N. C. 591; *State v. Fitzsimmons*, 30 Mo. 236; *Keith v. Wilson*, 6 Mo. 434; *State v. Salge*, 2 Nev. 321; *Davenport v. Ogg*, 15 Kans. 363; *Pleasant v. State*, 15 Ark. 624; *Betts v. State*, 66 Ga. 508; *Montgomery v. State*, 40 Ala. 684; *Bell v. State*, 44 Ala. 393; *Sartorius v. State*, 24 Miss. 602; *People v. Boscowitch*, 20 Cal. 436; *People v. Ah Duck*, 61 Cal. 387. The proper view (*Wilson v. State*, 52 Ala. 299) is, that the examination of the witness in such case is discretionary with the court. In 2 Phil. on Evid. (5th Am. ed.) 744, it is said: "If a

witness, who has been ordered to withdraw, continues in court, it was formerly considered to be in the judge's discretion whether or not the witness should be examined. But it may now be considered as settled, that the circumstance of a witness having remained in court, in disobedience to an order of withdrawal, is not a ground for rejecting his evidence, and that it merely affords matter of observation." The old rule was always to exclude the testimony. *R. v. Wylde*, 6 C. & P. 38. Compare Whart. Cr. Pl. & Pr. § 569. See *Betts v. State*, 66 Ga. 508.

³ *Chandler v. Horne*, 2 M. & Rob. 423; *Bulliner v. People*, 95 Ill. 374; *Rooks v. State*, 65 Ga. 33; *Bell v. State*, 44 Ala. 393; *People v. Boscowitch*, 20 Cal. 436; Whart. Cr. Pl. & Pr. §§ 948 *et seq.*

⁴ *Dyer v. Morris*, 4 Mo. 214; *Bulliner v. People*, 95 Ill. 374; *Bird v. State*, 50 Ga. 585.

Where, however, on a trial for murder, after the witnesses had been excluded from the room at the request of the attorneys for both parties, it was learned by the defendant that a certain person present, who had heard all the testimony, was in possession of information favorable to him, it was held to be error to exclude the testimony of such a person. *Smith v. State*, 4 Lea, 428.

legal argument in respect to his evidence.¹ But this goes too far, since it would require witnesses to leave the court whenever the counsel calling them states, as he constantly is compelled to do, what he intends to prove by questions he may put. Yet in all cases where there is reason to believe that a willing witness is waiting to catch his instructions from counsel, the witness should be excluded. The rule, however, will be made to bend as far as possible to the convenience of the witness. Thus experts and other persons engaged in assisting counsel may be permitted to remain in court until the expert testimony begins;² and to attorneys it is especially conceded that they may be excused, when personally required in court, from such withdrawal.³ And it has also been ruled that a witness whose testimony is sought to be impeached has a right to be in court, notwithstanding a rule of general exclusion.⁴

§ 447. By the old practice, when the object was to test a witness's competency, the witness was examined on the *voir dire*.⁵ It is now settled that the issue of competency can be put at any time during the examination,⁶ and hence the recent practice is to swear the witness in chief, and to proceed to examine him as to competency.⁷

Voit dire
a preliminary
test.

§ 448. "Although," says Mr. Roscoe,⁸ "a prosecutor was never in strictness bound to call every witness whose name is on the back of the indictment,"⁹ yet it is usual to do so, in order to afford the prisoner's counsel an opportunity to cross-examine them;¹⁰ and if the prosecutor would not call them, the judge in his discretion might.¹¹ The judges, however, have now laid down a rule, that the prosecutor is not bound to call witnesses merely because their

All witnesses on back of indictment must be produced, and so of all witnesses to transaction.

¹ *R. v. Murphy*, 8 C. & P. 307; *Selfe v. Isaacson*, 1 F. & F. 194; *Nelson v. State*, 2 Swan. 237.

² *Alison's Pract. Cr. L.* 489; *Taylor's Ev.* § 1260; *Com. v. Hersey*, 2 Allen, 174; *Thomas v. State*, 27 Ga. 287.

³ *Everett v. Lowdham*, 4 C. & P. 91; *Pomeroy v. Baddely*, R. & M. 430; *Powell v. State*, 13 Tex. Ap. 244.

⁴ *U. S. v. Hanway*, Phil. 1852; *Pamph. R.* 144; *S. C.*, 2 Wall. Jr. 143.

⁵ *Whart. on Ev.* § 493; *Roscoe's Ev.* 8th ed. 136. That the *voir dire* involves a *petitio principii*, see *supra*, § 362; *State v. Secrist*, 80 N. C. 450.

⁶ *Ibid.*

⁷ *Stone v. Blackburne*, 1 Esp. 37; *Jacobs v. Layburn*, 11 M. & W. 685; *Butler v. Tufts*, 13 Me. 302; *Fisher v. Willar*, 13 Mass. 379; *Seeley v. Engall*, 17 Barb. 530. See, however, *Lewis v. Moore*, 20 Conn. 211; *Howser v. Com.*, 51 Penn. St. 332, indicating a different practice.

⁸ *Crim. Ev.* 8th ed. 136.

⁹ *R. v. Simmonds*, 1 C. & P. 84; *R. v. Whitbread*, *ibid.* 84.

¹⁰ *R. v. Simmonds*, *supra*.

¹¹ *Ibid.*; *R. v. Taylor*, *ibid.* n.; *R. v. Bodle*, 6 C. & P. 186.

names are on the back of the indictment, but that the prosecutor ought to have all such witnesses in court, so that they may be called for the defence, if they are wanted for that purpose. If, however, they are called for the defence, the person calling them makes them his own witnesses."¹ The prosecution is usually bound to call all the attainable witnesses to a transaction which is the subject of examination. Thus, on a trial for murder, where the widow and daughter of the deceased were present at the time when the fatal blow was supposed to have been given, and the widow was examined on the part of the prosecution, Patteson, J., directed the daughter to be called also, although her name was not on the indictment, and she had been brought to the assizes by the other side. "Every witness," he said, "who was present at a transaction of this sort, ought to be called; and even if they give different accounts, it is fit that the jury should hear their evidence, so as to draw their own conclusion as to the real truth of the matter."² But

¹ *R. v. Woodhead*, 2 C. & K. 520, per Alderson, B. And see *R. v. Cassiday*, 1 F. & F. 79; from which it appears that Parke, B., Cresswell, J., and Lord Campbell, C. S., agree in this ruling. See *Morrow v. State*, 57 Miss. 836.

The court, it is held, has no power to oblige a prosecutor to give to a defendant the additions and places of residence of witnesses named on the back of an indictment. *R. v. Gordon*, 2 Dowl. 417; S. C., 12 Law J. M. C. 84.

As to the practice of indorsing witnesses on indictment, before presentment to grand jury, see Whart. Crim. Pl. & Pr. § 358. That the judge will require all the indorsed witnesses to be called only in extreme cases, see *R. v. Edwards*, 3 Cox C. C. 82; though see, as holding that the defendant may insist on this, *R. v. Bailey*, 2 Cox C. C. 191.

Though the counsel for the prosecution may content himself with putting into the box a witness whose name is on the back of the bill, without asking

him any questions on the part of the prosecution, yet it is better that he should be examined, whether his evidence is favorable to the prosecution or not, as the only object of the investigation is to discover the truth. *R. v. Bull*, 9 C. & P. 22.

² *R. v. Holden*, 8 C. P. 609. See, also, *R. v. Stroner*, 1 C. & K. 650. "And it seems," continues Mr. Roscoe (*Criminal Ev.* 136), "that the same course should be pursued even when the party is a near relative of the prisoner, as a brother (*R. v. Chapman*, 8 C. & P. 559); or a daughter (*R. v. Orchard*, *ibid.* n.)." In *R. v. Holden*, it appeared that three surgeons had examined the body of the deceased, and that there was a difference of opinion among them. Two of them were called for the prosecution, but the third was not, and, as his name was not on the indictment, the counsel for the prosecution declined calling him. Patteson, J., said: "He is a material witness who is not called on the part of the prosecution, and as he is in court I

this is not necessary when it would produce an oppressive accumulation of proof.¹

§ 449. Sworn interpreters, in criminal as well as in civil-cases, are to be appointed by the court where the witnesses do not understand the English language. It may be added that the accuracy of the interpretation of the sworn interpreter may be impeached, and is ultimately to be determined by the jury.² A witness, without being specially sworn, may interpret foreign terms used by himself.³ When a witness can only speak in a whisper, the court may appoint a suitable person to repeat to the jury what is said by the witness.⁴

Interpreters to be sworn.

§ 450. A court of record has power to commit for contempt a witness who refuses to answer a question determined by the court to be proper.⁵ The same practice exists where the witness refuses to be sworn, or misbehaves when giving evidence.⁶

Witness refusing to answer punishable by attachment.

§ 451. A witness will not be relieved from the costs and penalties of an attachment by the allegation that his testimony was irrelevant, and that therefore he did not attend court, or did not answer.⁷ But if it appear, on hearing of the rule, that his testimony would be irrelevant, especially if he be a public officer whose attendance would be detrimental to other branches of the public service, then the court

Witness is no judge of materiality of his testimony.

shall call him for the furtherance of justice." He was accordingly examined by the learned judge.

of Chinese, see *People v. Ah Wee*, 48 Cal. 236.

That the prosecution should call all persons cognizant of the facts is laid down in *Hurd v. People*, 25 Mich. 405; *People v. Gordon*, 40 Mich. 716; *State v. Smallwood*, 75 N. C. 104; and see *Whart. Crim. Pl. & Pr.* § 565; *State v. Magoon*, 50 Vt. 338. But redundant testimony need not be thus called. *Winsett v. State*, 56 Ind. 26.

³ *Kuhlman v. Medlinka*, 29 Tex. 385.

⁴ *Conner v. State*, 25 Ga. 515.

¹ *Infra*, § 749.

² *U. S. v. Gibert*, 2 Sumner, 19; *Schnier v. People*, 23 Ill. 17. As to New York practice see *Leetch v. Ins. Co.*, 2 Daly, 518. As to interpretation

⁵ *Whart. Crim. Law*, 8th ed. §§ 967-8; *Broom & Hadley's Com.* iv. 364 (Am. ed. ii. 567); *R. v. Charlesworth*, 2 F. & F. 332; *U. S. v. Coolidge*, 2 Gall. 364; *U. S. v. Caton*, 1 Cranch C. C. 150; *People v. Kelly*, 24 N. Y. 74; *Holman v. Austin*, 34 Tex. 668.

⁶ *May, Law of Parl.* 405; 4 Bl. Com. 284.

⁷ *Scholes v. Hilton*, 10 M. & W. 16; *Chapman v. Davis*, 3 M. & G. 609; *S. C.*, 4 Scott N. R. 319.

will refuse the attachment.¹ The question of relevancy is for the court.²

§ 452. The trial court, at any period of the examination, may put questions to the witness for the purpose of eliciting facts bearing on the issue; and a witness may be even recalled for this purpose, or a witness not called by the parties³ may be called and examined by the court.⁴ Nor is the court, as to evidence, bound by the rule excluding leading questions.⁵ But an answer not in itself evidence, brought out by a question from the court, may be ground for reversal.⁶

§ 453. A witness, examined as such in a court of justice, is so far privileged that he is not liable to suit for words spoken by him in answer to questions put by counsel, with the allowance, either express or implied, of the court.⁷ And in England this protection was extended in 1876 to volunteer explanations, which, out of court, would have been libellous.⁸

Witness
privileged
as to an-
swers.

Examina-
tion gov-
erned by
rules in
civil suits.

§ 454. It would unduly swell this volume to enter upon an exposition of the rules adopted by the courts for the examination and cross-examination of witnesses. These rules will be found discussed in my work on Evidence in Civil Issues.⁹

¹ *Dicas v. Lawson*, 1 C., M. & R. 934; 7 Dowl. 693. See *supra*, § 350.

² *Tippins v. Coates*, 6 Hare, 16.

³ *State v. Lee*, 80 N. C. 483.

⁴ *R. v. Holden*, 8 C. & P. 609.

⁵ Whart. on Ev. § 281; *R. v. Watson*, 6 C. & P. 653; *Middleton v. Barned*, 4 Exch. 243; *Com. v. Galavan*, 9 Allen, 271; *Palmer v. White*, 10 Cush. 321; *Epps v. State*, 19 Ga. 102. The questions, however, must grow out of the facts of the case. *Spenks v. State*, 57 Ala. 42.

⁶ *People v. Lacoste*, 37 N. Y. 192.

⁷ It should also be mentioned that, during the progress of the trial, the judge may question the witnesses, and that, even though the counsel for the prosecution has closed his case, and the counsel for the defendant has taken an objection to the evidence, the judge

may make any further inquiries of the witness that he thinks fit, in order to answer the objection. *R. v. Remnant*, R. & R. 136. Where, after the examination of witnesses to facts on behalf of a prisoner, the judge (there being no counsel for the prosecution) called back and examined a witness for the prosecution, it was held that the prisoner's counsel had a right to cross-examine again if he thought it material. *R. v. Watson*, 6 C. & P. 653." Archbold's C. P. 17th ed. (1871) 296.

⁸ *Revis v. Smith*, 18 C. B. 126; *Henderson v. Broomhead*, 4 H. & N. 569; *Kennedy v. Hilliard*, 10 Ir. L. R. N. S. 195.

⁹ *Seaman v. Netherclift*, L. R. 1 C. P. D. 540.

¹⁰ See Whart. on Ev. as follows:—
The court has discretion as to cumu-

§ 454 a. It has been shown that while, as a rule, leading questions are not permitted, exceptions are recognized where witnesses

lation of witnesses, and examination, § 505. See *Burroughs v. State*, 17 Fla. 643.

So as to mode and tone of examination, § 506.

A witness cannot be asked as to conclusion of law, § 507.

The conclusion of a witness as to motives admissible, § 508.

The opinion of witness cannot ordinarily be asked, § 509.

A witness may give substance of conversation or writing, § 514.

Vague impressions of facts on the part of a witness are inadmissible, § 515.

A witness may refresh his memory by memoranda, § 516. See *Harvey v. State*, 40 Ind. 516; *Chute v. State*, 19 Minn. 271.

Such memoranda are inadmissible if unnecessary, § 517.

Not fatal that the witness has no recollection independent of notes, § 518.

It is not necessary that notes should be independently admissible, § 519.

Memoranda of witness admissible if primary and relevant, § 520.

Notes in such case must be primary, § 521.

It is not necessary that the writing should be by witness, § 522.

It is inadmissible if subsequently concocted, § 523.

Depositions may be used to refresh the memory of the witness, § 524.

The opposing party is not entitled to inspect notes which fail to refresh memory of the witness, § 525.

The opposing party may put the whole notes in evidence if used, § 526.

Cross-examination.

On cross-examination leading questions may be put, § 527.

Closeness of cross-examination is at the discretion of the court, § 528. See also *Davison v. People*, 90 Ill. 222.

A witness can usually be cross-examined only on the subject of his examination in chief, § 529.

His memory may be probed by pertinent written instruments, § 531.

But collateral points cannot be introduced to test memory, § 532. *Archbold's C. P.* 17th ed. 296.

In *Ram on Facts*, 3d Am. ed. 147, we have the following:—

“A cross-examination intended to destroy, or at least weaken, the evidence given on the examination in chief, very often ends in confirming or strengthening it. The knowledge of this frequent result of cross-examination was probably the ground of Lord Eldon's observation on interrogating a prosecutor: ‘He was wont to say jocularly, that he had been a most effective advocate for prisoners; for that he had seldom put a question to a prosecutor.’ *Life of Lord Eldon*, by Twiss, vol. i. p. 106. Equal caution was used by O'Connell in cross-examining witnesses for a prosecution: ‘There is one, the most difficult, it is said, and certainly the most anxious and responsible part of an advocate's duties, in which O'Connell is without a rival at the Irish bar—I allude to his skill in conducting defences in the Crown Court. . . . Though habitually so bold and sanguine, he is here a model of forethought and undeviating caution. In his most rapid cross-examinations, he never puts a dangerous question.

are unwilling; where they are of weak memory; where a witness is called to contradict; and where such a mode of questioning is logically consistent with a fair and honest development of the case.¹ There are peculiar reasons why these distinctions should be kept in mind in criminal cases. In such trials, while there are undoubtedly willing witnesses, and while there may be occasionally witnesses so stupid or so corrupt as to be ready at once to adopt any statements suggested in the questions of counsel, the main difficulty in the way of a fair and full development of the facts arises from the anxiety of conscientious and humane witnesses not to say anything, where life or liberty is at stake, which they are not required to tell. In the nervous tension and physical discomfort, also, so often attendant on criminal trials, even the coolest witness, supposing his testimony, as with the highest order of witnesses is often the case, not to have been previously arranged with the assistance of counsel, may forget at the moment of examination some material incidents; and even when his testimony has been prearranged, his memory at the critical moment may fail. It would be a perversion of justice to hold that in such cases counsel are to be precluded from suggesting to witnesses associations which may bring out the facts still undetailed. We have already noticed how dependent memory is on association;² and there are few cases in which association, essential as it is to the grouping of incidents, is so apt to be paralyzed as those in which conscientious and intelligent witnesses, in the heat and confusion of a crowded courtroom, with a consciousness that on their testimony depends the fate of a fellow being on the one side, and the due maintenance of public justice on the other side, are called upon, on the solemnity of an oath, to tell what they know about a particular transaction. They have no test which enables them to decide what part of their recollections may be admissible, and what is inadmissible. They know that they cannot tell everything, for even to their minds "everything"

He presses a witness upon collateral facts, and beats him down by argument and jokes and vociferation; but wisely presuming his client to be guilty, until he has the good luck to escape conviction, he never affords the witness an opportunity of repeating his original

narrative, and perhaps, by supplying an omitted item, of sealing the doom of the accused.' Curran's Sketches of the Irish Bar, vol. i. p. 174."

¹ Whart. on Ev. §§ 498 *et seq.*

² *Supra*, §§ 373, 378.

includes a great deal that is irrelevant and immaterial. They have to select the material facts, in their own knowledge, bearing on the contested issue; but when they undertake to marshal these facts, their memory falters, and needs to be prompted by the suggestion of the proper associations. Cases of this kind are readily distinguishable from those of the ready and corrupt witness, to prevent the prompting of whom the rule before us was made.¹ Ordinarily the allowance of leading questions is at the discretion of the court. At the same time when it appears that by undue liberty in this respect justice has suffered, and a conviction unjustly obtained, a new trial will be granted.²

¹ "It is a general rule, that in a direct examination of a witness he shall not be asked leading questions, or, in other words, questions framed in such a manner as to suggest to the witness the answers required of him. To this rule, however, there are a few exceptions. To identify a person whom the witness has already described, the person may be pointed out to him, and he may be asked, in direct terms, if that be the person he meant. *R. v. Watson*, 2 Stark. 116; *R. v. De Berenger*, 1 Stark. Ev. 125. Where a witness swears to a certain fact, and another witness is called for the purpose of contradicting him, the latter may be asked, in direct terms, whether that fact ever took place. *Courteen v. Touse*, 1 Campb. 43. Again, if the witness appear evidently to be hostile to the party who has called him, the counsel may put leading questions to him, having first obtained permission of the court to do so. *Peake Ev.* 198; 2 *Phil. Ev.* 462; *Clarke v. Saffery*, Ry. & M. 126; and see *Bastin v. Carew*, *ibid.* 127; *R. v. Chapman*, 8 C. & P. 558; *R. v. Ball*, 8 C. & P. 745. And, lastly, questions which are merely introductory to others that are material are in general allowed to be asked, in direct terms, without objection."

Arch. C. P. 17th ed. p. 396. And see *U. S. v. Angell*, 11 Fed. Rep. 34.

The American authorities are collected in *Whart. on Ev.* §§ 498 *et seq.* See, also, *Carpenter's Ment. Phys. Art.* 343; *Porter on the Human Intellect*, § 278, as quoted in the 8th edition of this work, § 454.

Archbishop Whately likens the resistance of the memory to attempts to force it to the stupefaction of a pointer dog who, when he has lost his scent, is whipped in order to make him find it. The only way by which he can again hit upon it is by letting him wander to and fro, engaged by new objects, when suddenly, if due time be given, the lost scent will be perceived. So with the memory. We cannot force ourselves to recall the name we have forgotten by persistently thinking about its object. We can only remember it by disengaging our mind, and then striking upon some association by which the missing fact may be recalled.

The difference between fact and opinion is discussed by Dr. Whewell, *Phil. of Inductive Sciences*, Book i. chap. i. §§ 10, 11; Appendix to *Ram on Facts*, 3d Am. ed. And see *Calvert v. State*, 14 Tex. Ap. 157.

² *Coon v. People*, 99 Ill. 368; though see *Green v. Gould*, 3 Allen, 466.

§ 455. Another point, falling under this head, occurs so frequently in criminal practice, that it is proper it should be here discussed in detail. A witness, we must here specially notice, is not to be permitted to testify as to a conclusion of law. Sometimes this is so far pressed as to involve the assumption that a witness cannot be asked as to conclusions of fact. The error of this assumption will be seen when we remember that there are few statements of fact that are not conclusions of fact.¹ It is otherwise as to conclusions of law, which, when relating to domestic law, are for the court to draw and not for witnesses.² Among such conclusions of law legal responsibility is one of the most conspicuous. A witness, no matter how skilful, is not to be permitted to testify as to whether or no a party is responsible to the law;³ or whether certain facts constitute in law an agency.⁴ Law, in the sense here used, embraces whatever conclusions belong properly to the court. Thus it is inadmissible for a witness to give conclusions as to documents which it is the province of the court to interpret.⁵

§ 456. Motive, so far as concerns the action of another, is to be inferred from facts. The facts from which the inferences are to be drawn are to be detailed by the witnesses. For the jury the work of inference is to be reserved,⁶ even though the testimony offered relates to the action of a person in a dying condition, incapable of fully expressing himself.⁷ Yet where a party is examined as to his own conduct, he may be asked as to his motive, or condition of mind, his testimony to such motive being based not on inference but on consciousness.⁸

¹ See *supra*, §§ 7 *et seq.*

² See Whart. on Ev. § 507.

³ *R. v. Richards*, 1 F. & F. 87; *Joyce v. Ins. Co.*, 45 Me. 168; *Peterson v. State*, 47 Ga. 524; *State v. Klinger*, 46 Mo. 224. See *supra*, §§ 417 *et seq.*

⁴ *Short Mt. Coal Co. v. Hardy*, 114 Mass. 191; *Prov. Tool Co. v. Man. Co.*, 120 Mass. 35. See *Fairchild v. Bascomb*, 35 Vt. 398.

⁵ Whart. on Ev. § 507. See *Whizernart v. State*, 71 Ala. 383.

⁶ *Zantzing v. Weightman*, 2 Cranch

C. C. 478; *Whitman v. Freeze*, 23 Me. 185; *State v. Mairs*, 1 Cox, 453; *Ballard v. Lockwood*, 1 Daly, 158; *Shepherd v. Willis*, 19 Ohio, 142; *Gilman v. Riopelle*, 18 Mich. 145; *State v. Garvey*, 11 Minn. 154; *Hudgins v. State*, 2 Ga. 173; *Hawkins v. State*, 25 Ga. 207; *Peake v. Stout*, 8 Ala. 647; *Clement v. Cureton*, 36 Ala. 120.

⁷ *Griggs v. State*, 59 Ga. 738.

⁸ *Supra*, § 431; Whart. on Ev. §§ 482, 508; *Dill v. State*, 6 Tex. Ap. 113.

§ 457. That a witness's opinion is admissible is a settled rule, though much difficulty exists as to the meaning of the term. What is *opinion*? "Did A. shoot B.?" C., a by-stander, answers, "My opinion is that he did; I saw the pistol aimed; I heard the report; I saw the flash; I saw B. fall down, as I supposed, dead; from all this I infer that A. shot B." This is all inference on the part of the witness; yet it is admissible.¹ On the other hand, it has been held inadmissible to ask a witness his opinion as to whether a defendant, who was alleged to have acted in self-defence, was at the time in imminent danger;² or as to whether the deceased would have been likely to use weapons in a difficulty;³ or as to whether a certain physician had acted honorably towards his professional brother;⁴ or as to what is a reasonable load for a horse;⁵ or as to the effect of particular charges in an account;⁶ or as to the effect of certain acts on the credit of a firm;⁷ or as to the probable effect of certain acts in saving a burning house;⁸ or as to the religious sense of a dying declarant;⁹ or as to the conjectural losses of certain business operations;¹⁰ or as to whether the condition of a third person indicates disease.¹¹ Nor can a witness be asked whether he did not exercise great care in the discharge of a certain duty;¹² as to whether a particular alteration of machinery was technically a repair;¹³ as to whether a certain person acted fairly;¹⁴ as to whether a certain person could have left a room when the witness was asleep in it;¹⁵ as to whether a certain person "looked excited;"¹⁶ as to whether the deceased showed an intention to kill the prisoner;¹⁷ as to whether

Opinion of witness cannot ordinarily be asked.

¹ See *supra*, §§ 7-18.

² *State v. Rhoads*, 29 Oh. St. 171. See *Haynie v. Baylor*, 18 Tex. 498.

³ *Bingham v. State*, 6 Tex. Ap. 565.

⁴ *Ramadge v. Ryan*, 9 Bing. 333; though see *Greville v. Chapman*, 5 Q. B. 731, a case of doubtful authority.

⁵ *Oakes v. Weston*, 45 Vt. 430.

⁶ *U. S. v. Willard*, 1 Paine, 539.

⁷ *Donnell v. Jones*, 13 Ala. 490; *Thomas v. Isett*, 1 Greene, 470.

⁸ *Gibson v. Hatchett*, 24 Ala. 201.

⁹ *State v. Brunetto*, 13 La. An. 45.

¹⁰ *Bider v. Ins. Co.*, 20 Pick. 259.

¹¹ *Ashland v. Marlboro*, 99 Mass. 47;

though in *Parker v. St. Co.*, 109 Mass. 506, it was held that a non-expert could testify as to another's probable health. See, also, cases cited to § 459.

¹² *Bryant v. Glidden*, 39 Me. 458.

¹³ *Bigelow v. Collamore*, 5 Cush. 226.

¹⁴ *Zantsinger v. Weightman*, 2 Cranch C. C. 478.

¹⁵ *Bennett v. State*, 52 Ala. 370; *supra*, § 382. See *Com. v. Cooley*, 6 Gray, 350.

¹⁶ *Gassenheimer v. State*, 52 Ala. 314. See *Ames v. Snider*, 69 Ill. 376.

¹⁷ *Hawkins v. State*, 25 Ga. 207.

a certain person "looked downcast;"¹ as to whether an engine appeared capable of drawing a train;² as to whether a certain bridge was safe;³ as to whether certain conduct indicated adultery;⁴ or recent sexual intercourse;⁵ as to whether a certain disorderly house was a nuisance;⁶ as to how long it would take to gather a certain number of cattle within a certain inclosure;⁷ as to whether a certain house was a bawdy-house;⁸ as to whether a certain person's conduct would have particular effects;⁹ as to whether certain language would have particular effects;¹⁰ as to what certain cries indicated;¹¹ as to whether certain conduct was negligent, or otherwise;¹² as to whether certain conduct was honest;¹³ as to whether the wind would have certain effects in extending a fire;¹⁴ as to whether in a particular case there was danger to life;¹⁵ as to whether a gate of a drawbridge should be shut at night;¹⁶ as to whether certain injuries could have been avoided;¹⁷ as to whether a party was so intoxicated as to be incapable of forming an intent;¹⁸ as to whether hair came from the head of a certain person, this statement not being based on comparison.¹⁹

§ 458. The true line of distinction is this: an inference necessarily involving certain facts may be stated without the facts, the inference being an equivalent to a specification of the facts; but when the facts are not necessarily involved in the inference (*e. g.*, when the inference may be sustained upon any one of several distinct phases of fact, none

¹ *McAdory v. State*, 59 Ala. 92; but see *Culver v. Dwight*, 6 Gray, 44; *State v. Hudson*, 50 Iowa, 157, and cases cited *infra*, § 460.

² *Sisson v. R. R.*, 14 Mich. 489.

³ *Crane v. Northfield*, 33 Vt. 124.

⁴ *Cameron v. State*, 14 Ala. 546; *Cox v. Whitfield*, 18 Ala. 738.

⁵ *McKnight v. State*, 6 Tex. Ap. 158.

⁶ *Smith v. Com.*, 6 B. Monr. 21.

⁷ *Tyler v. State*, 11 Tex. Ap. 388.

⁸ See on this topic fully, Whart. Crim. Law, 8th ed. § 1451.

⁹ *Richards v. Richards*, 37 Penn. St. 225.

¹⁰ *Johnson v. Ballew*, 2 Porter, 29.

¹¹ *Messner v. People*, 45 N. Y. 1. But see *infra*, § 459.

¹² *Lynch v. Smith*, 104 Mass. 53; *Tuttle v. Lawrence*, 119 Mass. 276; *Croft v. Ferry Co.*, 36 Barb. 201; *Teall v. Barton*, 40 Barb. 137; *Taylor v. Monnot*, 4 Duer, 116; *Livingston v. Cox*, 8 W. & S. 61; *Otis v. Thom*, 23 Ala. 469. See *Penn. R. v. Henderson*, 51 Penn. St. 315.

¹³ *Johnson v. State*, 35 Ala. 370.

¹⁴ *State v. Watson*, 65 Me. 74.

¹⁵ *State v. Rhoads*, 29 Oh. St. 171.

¹⁶ *Nowell v. Wright*, 3 Allen, 166.

¹⁷ *Winters v. R. R.*, 39 Mo. 468. See *Patterson v. Colebrook*, 29 N. H. 94.

¹⁸ *Armor v. State*, 63 Ala. 173.

¹⁹ *Knoll v. State*, 55 Wis. 249. See *infra*, §§ 779, 804.

of which it necessarily involves), then the facts must be stated.¹ In other words, when the opinion is the mere short-hand rendering of the facts, then the opinion can be given, subject to cross-examination as to the facts on which it is based.²

§ 459. Opinion, so far as it consists of a statement of an effect produced on the mind, becomes primary evidence, and hence admissible whenever a condition of things is such that it cannot be reproduced and made palpable in the concrete to the jury.³ Eminently is this the case with regard to noises,⁴ and smells;⁵ to questions of identification, where

So as to
noises,
smells, and
identifica-
tions.

¹ See cases given in Whart. on Ev. § 510; and see, also, *State v. Hopkins*, 50 Vt. 316; *McKnight v. State*, 6 Tex. Ap. 158.

² *Taylor v. R. R.*, 48 N. H. 304; *Sherman v. Blodgett*, 28 Vt. 149; *Parsons v. Ins. Co.*, 16 Gray, 463; *Clearwater v. Brill*, 61 N. Y. 625; *Ardesco v. Gilson*, 63 Penn. St. 146; *Sorg v. Congregation*, 63 Penn. St. 156; *King v. Fitch*, 2 Abb. (N. Y.) App. 508; *Selden v. Bank*, 3 Minn. 166; *State v. Miller*, 53 Iowa, 84; *Montgomery v. Scott*, 34 Wis. 338; *Moon v. State*, 68 Ga. 687; *Lewis v. State*, 49 Ala. 1; *Avary v. Searcy*, 50 Ala. 54; *Ray v. State*, 50 Ala. 104; *Sparr v. Wellman*, 11 Mo. 230; *Sayfarth v. St. Louis*, 52 Mo. 449; *State v. Folwell*, 14 Kans. 110; *State v. Harrington*, 12 Nev. 125. See *Chicago v. Greer*, 9 Wall. 726; and see *State v. Moelcher*, 53 Iowa, 310; *State v. Stackhouse*, 24 Kan. 445.

³ *Com. v. Sturtivant*, 117 Mass. 122; *Safford v. Grout*, 120 Mass. 20; *Com. v. Piper*, 120 Mass. 186; *Kearney v. Farrell*, 28 Conn. 317; *People v. Eastwood*, 14 N. Y. 562; *Townsend v. Brundage*, 6 Thomp. & C. 527; *Dubois v. Baker*, 40 Barb. 556; *Brennan v.*

People, 15 Ill. 511; *State v. Langford*, Busbee, 436; *Woodward v. Gates*, 38 Ga. 205; *Patrick v. The Adams*, 19 Mo. 73; *Eyerman v. Sheehan*, 52 Mo. 221; *Albright v. Corley*, 40 Tex. 105; *Underwood v. Waldron*, 33 Mich. 232.

⁴ *State v. Shinborn*, 46 N. H. 497; *Leonard v. Allen*, 11 Cush. 241, where the meaning of tones of voice and gestures was asked. But see *Messner v. People*, 45 N. Y. 1, cited *supra*, § 457. In *Hardensburg v. Cockroft*, 5 Daly, 79, it was said a witness could not be asked as to how far a voice could be heard.

"It has been said," remarks Mr. Starkie, "that a witness must not be examined in chief as to his *belief* or *persuasion*, but only as to his knowledge of the fact, since judgment must be given *secundum allegata et probata*; and a man cannot be indicted for perjury who falsely swears as to his persuasion or belief. As far as regards mere belief or persuasion which does not rest upon a sufficient and legal foundation, this position is *correct*, as *where a man believes a fact to be true merely because he has heard it said to be so*; but, with respect to persuasion or belief as founded on facts within the

⁵ *Kearney v. Farrell*, 28 Conn. 317; *Conner v. State*, 6 Tex. Ap. 455. See Max Müller's *Lectures on Language*, vol. ii. Lect. i.

Thus a witness may say that a smell was that of chloroform. *Conner v. State*, 6 Tex. Ap. 455.

a witness is allowed to speak as to his opinion or belief,¹ and to the question whether a party believed himself at the time to be in great danger of death.²

§ 460. This is also the case as to matters with which the witness is specially acquainted, but which cannot be specifically described.³ Thus a witness has been permitted to testify that certain parties were attached to each other;⁴ that a grasp by one person of another was friendly;⁵ that a culvert was "steep right down, a culvert that I thought a dangerous place;"⁶ that an engine was running at an estimated speed;⁷ that a third person was sick or disabled;⁸ that the defend-

So as to facts which cannot be expressed in the concrete.

actual knowledge of the witness, the position is not true. On questions of identity of persons and of handwriting, it is every day's practice for witnesses to swear that they believe the person to be the same, or the handwriting to be that of a particular individual, although they will not swear positively; and the degree of credit to be attached to the evidence is a question for the jury. With regard to the second objection, it has been decided that a man who falsely swears that he thinks or believes may be indicted for perjury." 1 Stark. Ev. 153.

In *Underwood v. Waldron*, 33 Mich. 232, it was said by Cooley, J., that "in many cases it is difficult to separate a description of the indications from an opinion on them; nor is a witness always expected to do so. If a man were to come upon the track of a recent rain or snow storm, he would hardly be stopped in giving an account of it as a witness if he were to say, among other things, that the storm appeared to have come from a particular direction, because such a storm, as every one knows, must usually, for a time, leave behind it some very conclusive indications of the direction it had taken." See to the same general effect, *Stewart v. State*, 19 Oh. St. 302.

¹ *Fryer v. Gathercole*, 13 Jur. 542;

Tichborne Case, Pamph.; *State v. Pike*, 49 N. H. 398; *Com. v. Pope*, 103 Mass. 446; *Com. v. Williams*, 105 Mass. 63; *State v. Babb*, 76 Mo. 501; *Woodward v. State*, 4 Baxter, 322; *Cooper v. State*, 23 Tex. 331; *People v. Rolfe*, 61 Cal. 540; *Powell's Evidence* (4th ed.), 102. *Supra*, § 13; *infra*, § 802. That a mere "impression" is not an opinion, see *People v. Williams*, 29 Hun, 520. *Infra*, § 462. As to age, see 3 Whart. & St. Med. Jur. (4th ed.) § 65. *Supra*, §§ 236, 311. As to identification of hairs, see *infra*, § 804. That opinion as to correspondence of foot prints with shoes is admissible, see *State v. Reitz*, 83 N. C. 633. *Infra*, § 796.

² *Supra*, § 431; *Dill v. State*, 6 Tex. Ap. 110.

³ *Kearney v. Farrell*, 28 Conn. 317; *Bennett v. Fall*, 26 Ala. 605; *Cole v. Varner*, 31 Ala. 244; *Innis v. The Senator*, 4 Cal. 5. See *State v. Stickley*, 41 Iowa, 232; *Polk v. State*, 62 Ala. 237.

⁴ *Trelawney v. Colman*, 2 Stark. 192; *Robertson v. Stark*, 15 N. H. 114; *McKee v. Nelson*, 4 Cow. 355.

⁵ *Blake v. People*, 73 N. Y. 586.

⁶ *Lund v. Tyngsboro*, 9 Cush. 36.

⁷ *Detroit R. R. v. Van Steinburg*, 17 Mich. 99.

⁸ *State v. Knapp*, 45 N. H. 148;

ant (or the deceased in cases of homicide) was of fierce temper and great strength;¹ that a particular wagon made certain tracks which were in question;² that a horse appeared unwell or unsound, or was or was not diseased;³ that a cow was in good condition;⁴ that a dog had a bad temper;⁵ that certain pictures were good likenesses;⁶ that the witness did all in his power to effect a particular result;⁷ that certain hairs on a club appeared to the naked eye human, and

Whittier v. Franklin, 46 N. H. 23; Knidcott, J., Com. v. Sturtivant, 119 Mass. 132; Thompson v. Shalkop, 71 Penn. St. 161; Norton v. Moore, 3 Head, 480; Brown v. Lester, Ga. Dec. part i. 77; Milton v. Rowland, 11 Ala. 732; Autauga Co. v. Davis, 32 Ala. 703; Barker v. Coleman, 35 Ala. 221; Stone v. Wilson, 37 Ala. 279; Elliott v. Van Buren, 33 Mich. 49.

¹ *Supra*, § 69; State v. Knapp, 45 N. H. 148.

² State v. Folwell, 14 Kans. 105.

³ Willis v. Quimby, 31 N. H. 485; Spear v. Richardson, 34 N. H. 428; State v. Avery, 44 N. H. 392; Johnson v. State, 37 Ala. 457. See these cases approved in Pike v. State, 49 N. H. 426.

⁴ Joy v. Hopkins, 5 Denio, 84.

⁵ Matteson v. State, 55 Ala. 224.

⁶ Barnes v. Ingalls, 39 Ala. 193.

⁷ Brink v. Han. Ins. Co., 80 N. Y. 108; 9 Rep. 518.

In this case Church, C. J., said:—

“It is urged that it is not competent for a witness to testify to the very conclusion of fact which the jury are to pass upon. But there are questions of this character which the trial judge may allow without committing a legal error. In general, facts should be stated and inferences left to the jury. But here it might be difficult to draw a correct conclusion from the facts stated, or rather the fact of diligence might be left uncertain from the facts stated. In such a case it is not legal error to allow such a question. Whether a person transacted a specified business as soon

as he could, is a fact peculiarly within his own knowledge. A person is to walk a mile as soon as he can. From the fact that it occupied half an hour, a jury would be puzzled to determine whether he did it as soon as he could or not. Besides, the question was not whether the proofs of loss were presented as soon as possible, which was the question for the jury, but whether the witness individually did all he could to have them presented. The question held incompetent in *Carpen-ter v. Eastern Trans. Co.*, 71 N. Y. 580; was quite different. There the question was whether another person, in the opinion of the witness, omitted or neglected any duty in respect to a certain matter. In the case at bar it was sought to prove a fact, not an opinion, within the knowledge of the witness. While it would not have been a legal error to have sustained the objection, I am of opinion, under the circumstances of this case, that it was not legal error to overrule it.

“The object of all examinations in judicial tribunals is to elicit truth; and there are many cases where the form of questions and the manner of examination must be left to the discretion of the trial judge. No injustice could have been done, because the answer would not be likely to prevail against facts which might be drawn out on cross-examination or proved by other witnesses inconsistent with it.”

That reputation as to character is based on opinion, see *supra*, §§ 54, 486.

to resemble the hair of the deceased;¹ that a certain substance was "hard pan;"² that certain distances or weights were to be estimated in a particular way;³ that certain persons were insane,⁴ or drunk,⁵ or otherwise; that certain obviously dangerous wounds caused death;⁶ that a liquor looked like whiskey;⁷ that a color was of a certain hue;⁸ that a certain person "acted as if she felt very sad;"⁹ that a certain person "appeared to be in fear;"¹⁰ that, on being held to answer, he "looked as if he felt badly;"¹¹ that the appearance of a blood-stain indicated the spirt came from below, though the witness had never experimented with blood or other fluid in this relation.¹² And, as a general rule, "duration, distance, dimension, velocity, etc., are often to be proved only by the opinion of witnesses, depending as they do upon many minute circumstances which cannot be fully detailed."¹³ And in addition to the rule already given that opinion is admissible when it is fact in short-hand, we may hold that it is not necessary for a witness to be an expert, to enable him to give his opinion as to a matter depending upon special knowl-

¹ *Com. v. Dorsey*, 103 Mass. 413.

² *Currier v. R. R.*, 34 N. H. 498.

³ *Hackett v. R. R.*, 35 N. H. 390; *Eastman v. Amoskeag Co.*, 44 N. H. 143; *Fulsome v. Concord*, 46 Vt. 135; *Campbell v. State*, 23 Ala. 44; *Rawles v. James*, 49 Ala. 183.

⁴ See *supra*, § 417; *Gahagan v. R. R.*, 1 Allen, 187; *People v. Eastwood*, 14 N. Y. 562; *Stanley v. State*, 26 Ala. 26.

⁵ *Ibid.*; *Aurora v. Hillman*, 90 Ill. 61; *Choice v. State*, 31 Ga. 370, 424; *Pierce v. State*, 53 Ga. 365.

⁶ *State v. Smith*, 22 La. An. 468; *Everett v. State*, 62 Ga. 65. And so that certain wounds could not have been self-inflicted. *Ib.* But see, *contra*, *Rush v. State*, 61 Ala. 213.

⁷ *Com. v. Dowdican*, 114 Mass. 257; see *Carson v. State*, 69 Ala. 235.

⁸ *Com. v. Owens*, 114 Mass. 252.

⁹ *Culver v. Dwight*, 6 Gray, 444; but see *Johnson v. State*, 17 Ala. 460; *McAdory v. State*, 59 Ala. 92.

¹⁰ In *Brownell v. People*, 38 Mich.

736, *Campbell, C. J.*, said: "There is no doubt that evidence of the opinions of witnesses, that Brownell (the defendant in a homicide case) appeared to be in fear, should not have been shut out. The case of *People v. Lilly*, 38 Mich. 270, decided since the trial below, covers so much of this case as to make it useless to enlarge on this point and some others."

¹¹ *State v. Hudson*, 50 Iowa, 157; but see *McAdory v. State*, 59 Ala. 92.

¹² *Com. v. Sturtivant*, 117 Mass. 122, where the question is ably discussed by *Endicott, J.*; *Greenfield v. People*, 85 N. Y. 75; *Richardson v. State*, 7 Tex. Ap. 487. So that certain spots on the defendant's horse a short time after the murder were blood, though no chemical examination was made. *Dillard v. State*, 58 Miss. 368.

¹³ *Kingman, C. J.*, *State v. Folwell*, 14 Kans. 110; citing *Poole v. Richardson*, 3 Mass. 330. See, also, *Com. v. Malone*, 114 Mass. 295.

edge, when he states the facts on which he bases his opinion.¹ It is otherwise as to matters concerning which the jury can themselves form opinions, in which case witnesses cannot state opinions which do not themselves involve the facts from which they are drawn.²

§ 461. It is sufficient, when the spoken words of another are to be testified to, to give their substance; the witness swearing to the material accuracy and completeness of the substance.³ A witness, however, cannot be permitted to say what is the impression left on him by a conversation, unless he swears to such impressions as recollections and

Witness
may give
the sub-
stance of
conversa-
tions or
writings.

¹ *Currier v. R. R.*, 34 N. H. 498; *Richardson v. Hitchcock*, 28 Vt. 149; *O'Neill v. Lowell*, 6 Allen, 110; *Browning v. R. R.*, 2 Daly, 117; *Iselin v. Peck*, 2 Robt. (N. Y.) 629; *Penn. R. v. Henderson*, 51 Penn. St. 315; *Dailey v. Grimes*, 27 Md. 440; *Panton v. Norton*, 18 Ill. 496; *Thomas v. White*, 11 Ind. 132; *Indianapolis v. Huffer*, 30 Ind. 235; *Detroit R. R. v. Van Steinburg*, 17 Mich. 99; *Sowers v. Dukes*, 8 Minn. 23; *Brackett v. Edgerton*, 14 Minn. 174; *Cochran v. Miller*, 13 Iowa, 128; *Barker v. Coleman*, 35 Ala. 221; *Blackman v. Johnson*, 35 Ala. 252; *Alabama R. R. v. Burkett*, 42 Ala. 83; *People v. Sanford*, 43 Cal. 29.

In *Com. v. O'Brien*, 134 Mass. 198, which was a complaint for selling intoxicating liquors to a minor, it was held that a witness who testifies to the fact of the sale and the general appearance of the person to whom the sale was made, may give his opinion as to the age of such person.

"After carefully describing," said Devens, J., "the appearance, dress, and manner of the girl to whom the sale was testified by him to have been made, and which was alleged by the complaint to have been made, the witness who thus testified was permitted to give his opinion as to her age. This inquiry came fully within the excep-

tion to the general rule that witnesses cannot give opinions, by which they have been permitted to express opinions on questions of identity, as applied to persons, things, or handwriting, and to give their judgment as to the size, weight, or color of objects, or their estimate of time or distance. As there is much that cannot be reproduced or made palpable to a jury, the witness in such matters, in the words of Mr. Justice Endicott, in *Commonwealth v. Sturtivant*, 117 Mass. 122, 133, is permitted to give the 'conclusion of fact to which his judgment, observation, and common knowledge has led him in regard to a subject matter which requires no special learning or experiment, but which is within the knowledge of men in general.'"

² *Cannell v. Ins. Co.*, 59 Me. 582; *Morris v. East Haven*, 41 Conn. 252; *Messner v. People*, 45 N. Y. 1; *Ames v. Snider*, 69 Ill. 376; *Bissell v. Wert*, 35 Ind. 54; *Eaton v. Woolly*, 28 Wis. 628; *State v. Thorp*, 72 N. C. 186; *Gavisk v. R. R.*, 49 Mo. 274; *Shepherd v. Hamilton Co.*, 8 Heisk. 380; *Largan v. R. R.*, 40 Cal. 272.

³ *U. S. v. White*, 5 Cranch C. C. 457; *U. S. v. Macomb*, 5 McLean, 286; *Brown v. Com.*, 73 Penn. St. 321; *Summons v. State*, 5 Oh. St. 325; and other cases cited Whart. on Ev. § 461.

not inferences.¹ But what a witness did in consequence of a conversation he may be allowed to prove.²

§ 462. The same distinction applies to other objects. The limit-
edness both of human observation and of human expres-
sion forbids the reproduction of any fact exactly ;³ it is
enough if a witness swears to events and objects accord-
ing to the best of his recollection and belief.⁴ But it is
no objection to the admissibility of such evidence that the witness
uses the term "impression," if he testifies to what he believes,
however distrustful he may be as to perfect accuracy.⁵ It is for
the jury to determine how far such "impressions" are reliable.⁶
So a witness is allowed to state why certain facts are impressed on
his memory, if such reasons are not for other grounds admissible.⁷
Impressions, however, which are conjectural and uncertain, cannot
be detailed.⁸ The distinction is this: Impressions which are pri-
mary, and for which no substituted proof is conceivable, can be
put in evidence, whereas an impression which is merely a secondary
idea of that of which a more accurate idea is obtainable, cannot be
received.

§ 463. A witness will not be compelled to answer any question
the reply to which would supply evidence by which he could be
convicted of a criminal offence.⁹ The privilege, as thus stated,

¹ *Morris v. Stakes*, 21 Ga. 552; *Look-
ett v. Minns*, 27 Ga. 207; *Bell v. Troy*,
35 Ala. 104; *Crews v. Threadgill*, 35
Ala. 334; *Helm v. Cantrell*, 59 Ill. 528;
Yost v. Devault, 9 Iowa, 60.

² *Whaley v. State*, 11 Ga. 123.

³ *Supra*, § 378.

⁴ *Whart. on Ev.* § 462.

⁵ *Ibid.*; *McLean v. Clark*, 47 Ga. 24.

⁶ *Duvall v. Darby*, 38 Penn. St. 56;
Crowell v. Bank, 3 Oh. St. 406; *Mc-
Rae v. Morrison*, 13 Ired. (L.) 46;
Beverly v. Williams, 4 Dev. & B. (L.)
236.

⁷ *Thomas v. State*, 27 Ga. 287; *Bell
v. Troy*, 35 Ala. 104.

⁸ *Clark v. Bigelow*, 16 Me. 246;
Lewis v. Brown, 41 Me. 448; *Hum-
phreys v. Parker*, 52 Me. 502; *Teb-
betts v. Flanders*, 18 N. H. 284;

Wheeler v. Blandin, 24 N. H. 168;
State v. Flanders, 38 N. H. 324; *Ives
v. Hamlin*, 5 Cush. 534; *Wiggins v.
Holly*, 11 Ind. 2; *State v. Thorp*, 72
N. C. 186; *Woodward v. State*, 4 Baxt.
322; *Wells v. Shipp*, 1 Walk. Miss.
383; *People v. Wreden*, 59 Cal. 392;
McKnight v. State, 6 Tex. Ap. 159;
cited *supra*, §§ 457-8.

⁹ 1 Stark. Ev. 165, 166; *Phil. & Am.
on Ev.* 913, 914; 1 *Phil. Ev.* 277;
Cowen & Hill's Note, 516, to 1 *Phil.
Evid.* 267, and cases therein cited;
Paxton v. Douglass, 19 Ves. 225; *Mac-
bride v. Macbride*, 4 Esp. 242; *R. v.
Lewis*, 4 Esp. 225; *R. v. Friend*, 13
How. St. Tr. 16; *R. v. Maccolesfield*, 16
How. St. Tr. 1146; *Cates v. Hardacre*,
3 Taunt. 424; *R. v. Slaney*, 5 C. & P.
213; *R. v. Pegler*, 5 C. & P. 521; *Ma-*

extends to inculpatory documents,¹ and to marital relations; and hence neither husband nor wife is compelled to answer questions involving the other's criminality.² Refusal to answer, however, may be used as a presumption against a witness so refusing.³ Should answers as to guilt be extorted, these answers, as will hereafter be seen, cannot be used against the party thus compelled to answer.⁴

Witness will not be compelled to criminate himself.

§ 464. Although, as we will presently see, exposure to civil liability is no ground for excuse, a witness will be relieved from giving to a question a reply which might expose him to a forfeiture of his estate.⁵ Nor does it make a difference that the penalties, in a penal prosecution, are limited to a fine.⁶ Thus a party will be protected from giving an answer which exposes him to a prosecution for usury.⁷

Nor to expose himself to a fine or to forfeiture.

loney v. Bartley, 3 Camp. 210; *Chester v. Wortley*, 7 C. B. 410; 1 Burr's Trial, 244; *Neale v. Cunningham*, 1 Cranch C. C. 76; *U. S. v. Moses*, 1 Cranch C. C. 170; *U. S. v. Strother*, 3 Cranch C. C. 432; *U. S. v. McCarthy*, 18 Fed. Rep. 87; *Low v. Mitchell*, 18 Me. 372; *State v. Blake*, 25 Me. 350; *State v. K.*, 4 N. H. 562; *Coburn v. Odell*, 30 N. H. 540; *Chamberlain v. Wilson*, 12 Vt. 491; *Brown v. Brown*, 5 Mass. 320; *Com. v. Kimball*, 24 Pick. 366. See *Phelin v. Kenderdine*, 20 Penn. St. 354; *People v. Mather*, 4 Wend. 229; *People v. Rector*, 19 Wend. 569; *Southard v. Rexford*, 6 Cow. 254; *Tappan, In re*, 9 How. Pr. 394; *Byass v. Sullivan*, 21 How. Pr. 50; *Warner v. Lucas*, 10 Ohio, 336; *Howel v. Com.*, 5 Grat. 664; *Poindexter v. Davis*, 6 Grat. 481; *Listre v. Boker*, 6 Blackf. 439; *Printz v. Cheney*, 11 Iowa, 469; *Hopkins v. Olin*, 23 Wis. 309; *Simmons v. Holster*, 13 Minn. 249; *State v. Edwards*, 2 N. & McC. 13; *Higdon v. Heard*, 14 Ga. 255; *Pleasant v. State*, 15 Ark. 624; *State v. Marshall*, 36

Mo. 400; *Lea v. Henderson*, 1 Cold. 146. In New York, by the Revised Code, the protection is limited to cases of felony. Rev. Code, § 1854. As to how far a defendant will be compelled to exhibit his person so as to supply evidence against him, see *supra*, § 315; *Day v. State*, 63 Ga. 667; *State v. Ah Chuey*, 14 Nev. 79.

¹ See Whart. on Ev. § 751. *Byass v. Sullivan*, 21 How. (N. Y.) Pr. 50.

² *Cartwright v. Green*, 8 Ves. 405; *R. v. All Saints*, 6 M. & S. 200. See *supra*, § 402.

³ *Andrews v. Frye*, 104 Mass. 234. *Infra*, § 478. But see *State v. Bailey*, 54 Iowa, 414, *contra*.

⁴ *Infra*, § 665.

⁵ *Parkhurst v. Lowten*, 1 Mer. 401; *Uxbridge v. Staveland*, 1 Ves. Sr. 56.

⁶ *Anderson v. State*, 7 Ohio (Part II.), 250. But see *infra*, § 468.

⁷ *Bank of Salina v. Henry*, 2 Denio, 155; *Curtis v. Knox*, 2 Denio, 341; *Henry v. Bank*, 3 Denio, 593. See *Parkhurst v. Lowten*, 1 Mer. 401; and see *infra*, § 467.

§ 465. The privilege just stated cannot be interposed by a party to the issue. It must be claimed by the witness in order to be available,¹ and, as will be seen,² the witness, if he disclose part of a transaction in which he was criminally concerned, cannot hold back the rest.³ The judge is not bound to notify the witness of his privilege in this relation,⁴ though he may, at his discretion, give an intimation to this effect.⁵

Privilege
must be
claimed by
witness.

¹ *R. v. Adey*, 1 M. & Rob. 94; *Thomas v. Newton*, M. & M. 48, n.; *Fisher v. Ronalds*, 12 C. B. 764; *Marston v. Downes*, 1 A. & E. 34; *State v. Wentworth*, 65 Me. 234; *State v. Foster*, 3 Foster (N. H.), 348; *Com. v. Shaw*, 4 Cush. 594; *Ward v. People*, 6 Hill (N. Y.), 144; *Hanoff v. State*, 37 Ohio St. 178; *State v. Bilansky*, 3 Minn. 246; *State v. Patterson*, 2 Ired. L. 346; *Newcomb v. State*, 37 Miss. 383; *White v. State*, 52 Miss. 216; *Sodusky v. McGee*, 5 J. J. Marsh. 621; *Clark v. Reese*, 35 Cal. 89. That witness may waive his privilege, see *People v. Arnold*, 40 Mich. 710.

As to privilege of party, see *supra*, § 432.

"In *R. v. Garbett*, 1 Den. 236, it was held that a witness is not compellable to answer a question if the court be of opinion that the answer might tend to criminate him. It was also held in the same case, that the court may compel a witness to answer any such question; but that if the answer be subsequently used against the witness in a criminal proceeding and a conviction obtained, judgment will be respited and the conviction reversed. See *infra*, § 470. In a later case, *Fisher v. Ronalds*, 12 C. B. 762, Maule, J., and *Jervis, C. J.*, held, that it is for the witness to exercise his own judgment, and to say whether the answer will criminate him, and that if he thinks

that it will, he may refuse to answer. This view was doubted by *Park, B.*, in a later case (*Osborne v. London Dock Co.*, 10 Ex. 698), where the learned judge indicated his adhesion to the doctrine of *R. v. Garbett*. The Court of Queen's Bench, however, has since held that a witness can only claim the right of refusing to answer a question when the court is satisfied that there is any real danger of a prosecution if he does answer. *R. v. Boyes*, 1 B. & S. 311." *Powell's Evidence*, 4th ed. 109.

"It is settled that it is no ground for a witness to refuse to go into the box, that the question will criminate him and that he will refuse to answer it. The privilege can be claimed only by the witness himself, after he has been sworn and the objectionable question put to him. *Boyle v. Wiseman*, 19 Ex. 647. And the witness must pledge his oath that he believes the answer will tend to criminate him." *Powell's Ev.* 4th ed. 109.

² *Infra*, § 470.

³ *People v. Freshour*, 55 Cal. 375; *supra*, § 432.

⁴ *Atty.-Gen. v. Radloff*, 10 Exch. 88.

⁵ *Fisher v. Ronalds*, 12 C. B. 764; *R. v. Boyes*, 2 Post. & F. 158; *Foster v. Pierce*, 11 Cush. 437; *Com. v. Price*, 10 Gray, 472; *Mayo v. Mayo*, 119 Mass. 292.

§ 466. We have several rulings to the effect that a witness cannot be compelled to give a link to a chain of evidence by which his conviction of a criminal offence can be furthered.¹ This proposition, however, cannot be maintained to its full extent, since there is no answer which a witness could give which might not become part of a supposable concatenation of incidents from which criminality of some kind might be inferred. To protect the witness from answering, it must appear from the nature of the evidence which the witness is called

Danger of
prosecu-
tion
must be
real.

¹ *Cates v. Hardacre*, 3 Taunt. 424; *Maoullum v. Turton*, 2 Y. & J. 183; *Harrison v. Southcote*, 1 Atk. 518; *King v. King*, 2 Roberts, 153; *Parkhurst v. Lowten*, 2 Swanst. 215; *People v. Mather*, 4 Wend, 229; *Southard v. Rexford*, 6 Cow. 254; *Bank of Salina v. Henry*, 2 Denio, 155; *Lea v. Henderson*, 1 Cold. 146.

The question arose on Burr's trial (1 Burr's Trial, 424) in the following shape: A paper being produced to the court in cipher, a witness (Mr. Willie) was asked, "Did you copy this paper?" He objected, that if any paper he had written would have any effect on any other person, it would as much effect himself. Mr. Wirt insisted that, as the witness had sworn, in a previous deposition, that he did not understand the cipher, the mere act of copying could not implicate him. Willie was then asked, "Do you understand its contents?" It was admitted by the witness that the question *per se* might be innocent, but should he answer, the prosecution might go on gradually, until it at last obtained matter enough to criminate him. The counsel for the prosecution admitted that, if they had followed with a question as to what were the contents of the letter, the objection might be valid. But they as yet had not. If he answered that he did understand the letter, his answer to the other question might amount to self-crimination; but if he did not understand it, it could not criminate him. The question was again changed, "Do you know this letter to be written by Aaron Burr, or any one under his authority?" Marshall, C. J., said that was a proper question. The witness still refused to answer, as it might criminate him. The question was then argued, when the chief justice remarked, that the proposition contended for on the part of the witness, that he was to be the sole judge of the effect of his answer, was too broad; while that on the other side, that a witness can never refuse unless the answer will *per se* convict him of a crime, was too narrow. He is not compellable to disclose a single link in the chain of proof against him. If the letter contained evidence of a treason, a question determinable on other testimony by his acquaintance with it when written, he might probably be guilty of misprision of treason; and the court ought not to compel his answer. If it relate to the misdemeanor (setting on foot an unlawful military expedition against Mexico), the court were not apprised that such knowledge would affect the witness. The conclusion was, that the question which respected the present knowledge of the cipher, as it would not affect him in any view, must be answered.

to give, that there is reasonable ground to apprehend that, should he answer, he would be exposed to a criminal prosecution. The witness, as will presently be seen, is not the exclusive judge as to whether he is entitled on this ground to refuse to answer.¹ The question is for the discretion of the judge, and in exercising this discretion he must be governed as much by his personal perception of the peculiarities of the case as by the facts actually in evidence. But in any view the danger to be apprehended must be real, with reference to the probable operation of law in the ordinary course of things, and not merely speculative, having reference to some remote and unlikely contingency.²

Danger of prosecution in a foreign court may be considered as giving this privilege.³

§ 467. A witness cannot excuse himself on the ground that his answer would expose him to civil liability.⁴

Exposure
to civil
liability no
excuse.

Nor mere
police lia-
bility, nor
liability as
vendee of
liquor.

§ 468. The privilege cannot be claimed when the question touches acts to which, from their slight and remote culpability, public prosecutions are not directed, especially when the answer is one which public policy requires to be made. This is peculiarly the case with prosecutions under the liquor laws. Thus, a witness will be compelled to answer whether or not he purchased

liquor of a man charged with selling it by small measures; nor can he shelter himself from the question by the position that, by buying the liquor, he became an accessory to the misdemeanor of selling it, and thereby a principal.⁵ The question in such cases is, would the witness's answer that he purchased liquor or other contraband article expose him to a prosecution? If not, he may be compelled to answer when the question is material.⁶

¹ *Infra*, § 469.

² *R. v. Boyes*, 1 B. & S. 311; 9 Cox C. C. 32; 2 F. & F. 157; *People v. Kelly*, 24 N. Y. 74; *Wroe v. State*, 20 Oh. St. 460, and cases cited *supra*, § 465.

³ *U. S. v. McRea*, L. R. 3 Ch. App. 79, by *Ld. Chelmsford*; though see *King of Two Sicilies v. Wilcox*, 1 Sim. N. S. 301.

⁴ See cases in *Whart. on Ev.* § 537. See *supra*, § 464.

⁵ *Com. v. Willard*, 22 Pick. 476;

State v. Rand, 51 N. H. 361; *Com. v. Downing*, 4 Gray, 29; *State v. Wright*, 4 Jones (N. C.), 308; though see *Doran's Case*, 2 Pars. 467, and *State v. Bonner*, 2 Head, 135, under statutes. *Whart. Crim. Law*, 8th ed. § 1829.

⁶ As to the characteristics of police offences see *Whart. Crim. Law*, 8th ed.

§ 23 a.

§ 469. The witness is not the sole judge of his liability. The liability must appear reasonable to the court, or the witness will be compelled to answer.¹ Thus a witness may be compelled to answer as to conditions which he shares with many others (*e. g.*, whether he was in the neighborhood of a homicide on a particular day, when such neighborhood includes a city), though not as to conditions which would bring the crime in inculpatory nearness to himself.² But in order to

Court determines as to privilege.

¹ *Osborn v. Dock Co.*, 10 Exch. 698; *Sidebottom v. Adkins*, 27 L. J. Ch. 152; *R. v. Boyes*, 1 B. & S. 311; *Fernandez, Ex parte*, 10 C. B. (N. S.) 3, 39; *Reynolds, Ex parte*, L. R., 20 Ch. D. 294; 46 L. T. (N. S.) 143, *aff. on App.* 46 L. T. (N. S.) 508; *Com. v. Brainerd*, Thach. C. C. 146; *Grannis v. Branden*, 5 Day, 260; *Jackson v. Humphrey*, 1 Johns. 498; *People v. Mather*, 4 Wend. 229; *Southard v. Bexford*, 6 Cow. 254; *Real v. People*, 42 N. Y. 270; *Galbreath v. Kichelberger*, 3 Yeates, 515; *Vaughan v. Perrine*, 2 Penn. (N. J.) 144; *Winder v. Dufferffer*, 2 Bland, 166; *Ward v. State*, 2 Mo. 98; *Territory v. Nugent*, 1 Mart. 114; *Richman v. State*, 2 Greene (Iowa), 532; *Kirschner v. State*, 9 Wis. 140; *State v. Lonsdale*, 48 Wis. 348; *Floyd v. State*, 7 Tex. 215. See, however, *Temple v. Com.*, 75 Va. 892; *State v. Edwards*, 2 Nott & McC. 13; *Archbold's C. P.* (ed. of 1871), 277.

² *R. v. Boyes*, 1 B. & S. 311; 9 Cox C. C. 22; *Wroe v. State*, 20 Oh. St. 460. *Supra*, § 466.

The English cases on this point are thus recapitulated in *Roscoe on Cr. Ev.* 8th ed. 148:—

"In *Fisher v. Ronalds*, 12 C. B. 765; 74 E. C. L. R., it was necessary to decide the point, but Maule, J., said, 'It is for the witness to exercise his discretion, not the judge. The witness might be asked, "Were you in London on such a day?" and though

apparently a very simple question, he might have good reason to object to answer it, knowing that, if he admitted that he was in London on that day, his admission would complete a chain of evidence against him which would lead to his conviction. It is impossible that the judge can know anything about that. The privilege would be worthless, if the witness were required to point out how his answer would tend to criminate him.' It was equally unnecessary to decide the point in *Osborne v. The London Dock Company*, 10 Ex. R. 701, but the question was a good deal discussed, the opinion of Parke, B., clearly inclining to the view that the witness ought to satisfy the court that the effect of the question will be to endanger him. The learned baron states that this was the opinion of the majority of the judges who considered the case of *R. v. Garbett*, 1 Den. C. C. 236, though they expressly refrained from deciding the point; and he also cites the opinion of Lord Truro, who, in the case of *Short v. Mercier*, 3 Mac. & Y. 205, said, 'A defendant, in order to entitle himself to protection, is not bound to show to what extent the discovery sought might affect him, for to do that he might oftentimes of necessity deprive himself of the benefit he is seeking; but it will satisfy the rule if he states circumstances consistent on the face of them with the existence of the peril alleged, and which also ren-

claim the protection of the court the witness is not required to disclose all the facts, as this would defeat the object for which he claims protection.¹ It is not, indeed, enough for the witness to say that the answer will criminate him.² It must appear to the court, from all the circumstances, that there is a real danger; though this the judge, as we have seen, is allowed to gather from the whole case, as well as from his general conception of the relations of the witness.³ Upon the facts thus developed it is the province of the court to determine whether a direct answer to a question may criminate.⁴

der it extremely probable.' In *Sidbottom v. Adkins*, 3 Jur. N. S. 631; 27 L. J. Ch. 152, Stuart, V. C., compelled a witness to answer questions, although he swore that he should thereby subject himself to a criminal prosecution. In *Adams v. Lloyd*, 3 Hurlst. & Nor. 351, Pollock, C. B., admits the right of the judge to use his discretion, but seems to think that he ought to be satisfied by the oath of the witness, if there are no circumstances in the case which lead him to doubt the real necessity for protection. In the last case on the subject, *R. v. Boyes*, *supra*, the Court of Queen's Bench, after consideration, held that 'to entitle a party called as a witness to the privilege of silence, the court must see from the circumstances of the case, and the nature of the evidence which the witness is called upon to give, that there is reasonable ground to apprehend danger to the witness from his being compelled to answer.'

"It will thus be seen that in all cases where the point has directly arisen, it has been held that the bare oath of the witness, that he is endangered by being compelled to answer, is not to be endangered as necessarily sufficient; but that the judge is to use his discretion whether he will grant the privilege or not. Of course the witness must always pledge his oath that he will incur risk, and there are

innumerable cases in which a judge would be properly satisfied with this without further inquiry, but, if he is not satisfied, he is not precluded from further investigations."

¹ *R. v. Garbett*, 2 C. & K. 495; *Fisher v. Ronalds*, 12 C. B. 762; *Mexican & S. Amer. Co., Ex parte*, 4 De Gex & J. 220; 27 Beav. 474.

² *R. v. Boyes*, 9 Cox, 32; 1 B. & S. 311; *Osborn v. Dock Co.*, 10 Exch. 701; *Fernandez, Ex parte*, 10 C. B. N. S. 3. See, however, *contra*, *Warner v. Lucas*, 10 Ohio, 336; *Poole v. Perritt*, 1 Speers, 128.

³ See *Vaillant v. Dodemead*, 2 Atk. 524; *R. v. Boyes*, 1 B. & S. 311.

⁴ *Grannis v. Branden*, 5 Day, 260; *Jackson v. Humphrey*, 1 Johns. 498; *People v. Mather*, 4 Wend. 229; *Southard v. Rexford*, 6 Cow. 254; *Real v. People*, 42 N. Y. 270; *Vaughn v. Perrine*, 2 Penn. (N. J.) 534; *Galbraith v. Eichelberger*, 3 Yeates, 515.

"To entitle a witness to the privilege of not answering a question as tending to criminate him, the court must see, from the circumstances of the case and the nature of the evidence which the witness is called to give, that there is reasonable ground to apprehend danger to the witness from his being compelled to answer. If the fact of the witness being in danger is once made to appear, great latitude should be allowed to him in judging of

§ 470. A witness who voluntarily and intentionally opens an account of a transaction exposing him to a criminal prosecution is ordinarily obliged to complete the narrative. He cannot, for instance, state a fact, and afterwards refuse to give the details.¹ Even a party who becomes a witness cannot, after waiving his rights, decline a cross-examination, on the ground that it exposes a criminality which he has already discovered.² But there is high authority to hold that a witness may at any time avail himself of the protection of the court and refuse further answers, unless he has previously waived his privilege by a partial answer.³

Waiver
of part
waives all.

the effect of any particular question. The danger to be apprehended must be real and appreciable, with reference to the ordinary operation of law, in the ordinary course of things, and not a danger of an imaginary character, having reference to some barely possible contingency. *R. v. Boyes*, 1 B. & S. 311; 9 Cox C. C. 32; 2 F. & F. 167. The witness may claim the protection of the court at any stage of the inquiry, although he may already have answered without objection some questions tending to criminate him. *R. v. Garbett*, 2 C. & K. 474. The witness himself is not the sole judge whether his evidence will bring him into danger; the judge must see, from the circumstances of the case and the nature of the evidence, whether there really is reasonable ground to apprehend danger to him from his being compelled to answer. *Osborn v. London Dock Co.*, 10 Exch. 698; 24 L. T. Exch. 140; *Sidebottom v. Adkins*, 27 L. T. Ch. 152; *R. v. Boyes*, 1 B. & S. 311; 30 L. T. Q. B. 301; *Ex parte Fernandez*, 10 C. B. (N. S.) 3, 39, 40; 30 L. T. (C. P.) 321." *Archbold's C. P.* (ed. of 1871) 277. See *Wroe v. State*, 20 Oh. St. 460.

¹ *Supra*, § 443; *East v. Chapman*, 1 M. & M. 46; 2 C. & P. 573; *Low v.*

Mitchell, 18 Me. 372; *State v. K.*, 4 N. H. 562; *State v. Foster*, 23 N. H. 348; *Com. v. Knapp*, 10 Pick. 178; *Com. v. Price*, 10 Gray, 472; *Com. v. Howe*, 13 Gray, 26; *Com. v. Pratt*, 126 Mass. 462; *Norfolk v. Gaylord*, 28 Conn. 309; *People v. Carroll*, 3 Park. C. R. 73; *People v. Lohman*, 2 Barb. 216; *Alderman v. People*, 4 Mich. 414; *People v. Freshour*, 55 Cal. 375. As to accomplices, see *supra*, § 444.

² *State v. Ober*, 52 N. H. 459; *Com. v. Lannan*, 13 Allen, 563; *Com. v. Mullen*, 97 Mass. 545; *Com. v. Morgan*, 107 Mass. 199; *McGarry v. People*, 2 Lansing, 227; *Burdick v. People*, 58 Barb. 51; *Fralich v. People*, 65 Barb. 48; *Connors v. People*, 50 N. Y. 240; *Barber v. State*, 13 Fla. 675; *Whart. on Ev.* § 483; *supra*, §§ 429, 430.

³ *R. v. Garbett*, 2 C. & K. 274; S. C., 1 Den. C. C. 235; 2 Cox C. C. 448; overruling *Dixon v. Vale*, 1 C. & P. 278; *East v. Chapman*, 2 C. & P. 572; *Ewing v. Osbaldiston*, 6 Sim. 808. As according with *R. v. Garbett* may be cited *Cozzens, Ex parte*, Buck. 531. See *supra*, § 465.

The fact that the witness testified before the grand jury will not prevent him from asserting his privilege. *Temple v. Com.*, 75 Va. 892.

§ 471. If there be a pardon issued by the proper authorities, so as to relieve the witness from any penal responsibility for the offence as to which he is asked, he will be compelled to answer;¹ and so when the Statute of Limitations has interposed a bar.² Statutes of indemnity and special amnesty have the same effect, when they do not conflict with local constitutions.³ Where a constitution simply secures the witness from being a "witness against himself," indemnity statutes have been held to preclude the witness from setting up privilege;⁴ and the same ruling has been made under a similar provision in the Constitution of the United States, and under the distinctive provision of the Revised Statutes.⁵ In Massachusetts, however, where the Constitution provides that no person "shall be compelled to accuse or furnish evidence against himself," a statute which is not coextensive with the constitutional provision does not divest the witness of his common law rights.⁶

§ 472. We must again notice the important distinction between questions in chief whose object is to bring out facts important to the maintenance of public justice, and questions in cross-examination whose object is merely to harass a witness. A crime has been committed, for instance, and a person who may have been lurking in the neighborhood for an immoral purpose in no way connected

¹ *R. v. Boyes*, 2 F. & F. 157; S. C., 377; *U. S. v. McCarthy*, 16 Rep. 388; 9 Cox C. C. 32; 1 B. & S. 311; *R. v. Maloney*, 9 Cox C. C. 26; *R. v. Charlesworth*, 2 F. & F. 326.

² *Roberts v. Allott*, 1 M. & M. 192; *Parkhurst v. Lowten*, 1 Mer. 400; *Williams v. Farrington*, 2 Cox Ch. R. 202; *Davis v. Reid*, 5 Sim. 443; *People v. Mather*, 4 Wend. 229; *Close v. Olney*, 1 Denio, 319; *Moloney v. Dows*, 2 Hilt. (N. Y.) 247; *U. S. v. Smith*, 4 Day, 121; *Weldon v. Burch*, 12 Ill. 374; *Floyd v. State*, 7 Tex. 215. As to the constituents of a pardon, see *Whart. Cr. Pl. & Pr.* § 520.

³ See *R. v. Strachan*, 7 Cox, 65; *R. v. Skeen*, 8 Cox, 143; *R. v. Buttle*, 11 Cox, 566; *Fernandez, Ex parte*, 10 C. B. N. S. 3; *R. v. Hulme*, L. R. 5 Q. B. 377; *U. S. v. McCarthy*, 16 Rep. 388; 18 Fed. Rep. 87; *People v. Kelley*, 24 N. Y. 74; *Wilkins v. Malone*, 14 Ind. 153; *Frazer v. State*, 58 Ind. 8; *Douglas v. Wood*, 1 Swan, 393; *State v. Quarles*, 13 Ark. 307. See *State v. Henderson*, 47 Ind. 127; *Kendrick v. Com.*, 8 Va. L. J. 299; *Clark v. Reese*, 35 Cal. 89. That the statute must cover the case specifically, see *Temple v. Com.*, 75 Va. 892.

⁴ *State v. Rowell*, 58 N. H. 314; *People v. Kelley (Hackley, In re)*, 24 N. Y. 74.

⁵ *U. S. v. Brown*, 1 Sawyer, 531; *U. S. v. Williams*, 15 Int. Rev. Rec. 199; *U. S. v. McCarthy*, 18 Fed. Rep. 87.

⁶ *Emery's Case*, 107 Mass. 172. See *Whart. on Ev.* § 547. *Infra*, § 479.

with that crime, is called as a witness. He is asked where he was at the period in question; and he declines to answer on the ground that his answer would expose him, not, indeed, to prosecution, but to disgrace, as where the effect would be to show his presence at the time in a house of bad character. He could not be excused from answering on this ground, but he would be excused from answering this or similar questions, when collateral to the issue, put to him on cross-examination for the mere purpose of wounding his feelings, or bringing him into disgrace.¹ And the reason is that every man is entitled to such a measure of oblivion for the past as will protect him from having it ransacked by mere volunteers; and aside from this general sanction, if witnesses were to be compelled to answer fishing questions as to any scandals in their past lives, the witness-box would become itself a scandal which no civilized community would tolerate. Allow unqualified liberty in this respect, and no witness, no matter how respectable, could be sworn, without being required, if it should please the opposing party, to have even the most remote passages of his past life explored, and without being himself compelled to narrate any events in that life which were discreditable; no matter for how long a time such discredit had been atoned for by penitence, by reformation, and by correction of the wrong. Such inquisitions, however, the courts have refused to permit; and it has hence been held, not only, as we shall see, that parties are bound by collateral answers they wring from a witness as to his history; but that the witness will not be compelled to answer such questions when they are introduced only in order to discredit him, and are not essential to the merits of the case of the party asking them.²

¹ See cases *infra*, § 475.

² *R. v. Hodgson*, R. & R. 211; *Dodd v. Norris*, 4 Camp. 519; *Friend's Case*, 4 St. Tr. 225; *Lewis's Case*, 4 Esp. 225; *McBride v. McBride*, 4 Esp. 242; *U. S. v. Dickinson*, 2 McLean, 325; *State v. Staples*, 47 N. H. 113; *State v. Ward*, 48 Conn. 429; *Smith v. Castles*, 1 Gray, 108; *People v. Herrick*, 13 Johns. 82; *Lohman v. People*, 1 Comst. 379; S. C., 2 Barb. 217; *Lewis, In re*, 39 How. (N. Y.) Pr. 155; *State v. Bailey*, 1 Penn. (N. J.) 304; *Vaughn v. Perrine*, 2 Penn. (N. J.) 534; *Resp. v. Gibbs*, 3 Yeates, 429; *Galbreath v. Eichelberger*, 3 Yeates, 515; *Houser v. Com.*, 51 Penn. St. 332; *Howell v. Com.*, 5 Grat. 664; *Forney v. Ferrell*, 4 W. Va. 729; *Canada v. Curry*, 73 Ind. 246; *Leach v. People*, 53 Ill. 311; *Toledo R. R. v. Williams*, 77 Ill. 354; *Hayward v. People*, 96 Ill. 492; *State v. Garrett*, Busbee, 357; *Merriman v. State*, 3 Lea, 393; *Campbell v. State*,

§ 473. But even on cross-examination, a witness cannot ward off answering a question material to the issue on the ground that it imputes disgrace to himself, if such disgrace does not amount to crimination.¹ "No doubt such questions may be oppressive and odious. They may constitute a means of gratifying personal malice of the basest kind, and of deterring witnesses from coming forward to discharge a duty to the public. At the same time it is impossible to devise any rule for restricting the statute which at present exists on the subject, without doing cruel injustice."² Thus in a prosecution for bastardy, a witness, introduced by the defendant to prove that the prosecutrix had sexual intercourse with another man about the time of begetting of the child, has been compelled to answer whether he had such intercourse with her, she having denied that she had such intercourse with any one

Witness may be compelled to answer questions imputing disgrace when such questions are material to the issue.

23 Ala. 44; *Marx v. Bell*, 48 Ala. 497; *Harper v. R. R.*, 47 Mo. 567. See *Johnson v. State*, 61 Ga. 305; *Saunders v. People*, 38 Mich. 213.

By the N. Y. Code, Civ. Prac. § 832, and Penal Code, § 714, it is admissible to ask a witness whether he has been in prison; though how far such a statute is constitutional in cases in which the defendant sets up privilege has not been determined. Prior to the code such questions, as we have seen, were admitted, but answers would not be enforced when privilege was set up. *People v. Brown*, 72 N. Y. 571. See *People v. Noelke*, 1 N. Y. Cr. Rep. 495; *People v. Hovey*, 1 N. Y. Cr. Rep. 180, 283, where the question was allowed. And see *supra*, § 432.

¹ See *Am. Law Rev. Jan. 1877*, 396. *R. v. Boyes*, 9 Cox C. C. 32; *Com. v. Curtis*, 97 Mass. 574; *Burnett v. Phallon*, 11 Abb. (N. Y.) Pr. 157; *People v. Noelke*, 1 N. Y. Cr. Rep. 252; *Hunt v. McCalla*, 20 Iowa, 20; *Ragland v. Wickware*, 4 J. J. Marsh. 530; *Rowe, Ex parte*, 7 Cal. 184; *Clark v. Reese*,

35 Cal. 89; *Ward v. State*, 2 Mo. 98; *Clementine v. State*, 14 Mo. 112. In *Candell v. Pratt*, 1 M. & M. 108, the witness was asked, on cross-examination, whether she was not cohabiting in a state of incest with a particular individual; Best, C. J., interfered to prohibit the question; it was urged by Spankie, Sergeant, that he had a right to put questions tending to degrade a witness, for the purpose of trying his character. Best, C. J.: "I do not forbid the question on that ground; I, for one, will never go that length. Until I am told by the House of Lords I am wrong, the rule I shall always act upon is, to protect witnesses from questions, the answers to which may expose them to punishment; if they are protected beyond this, from questions that tend to degrade them, many an innocent man would unjustly suffer. This question may subject her to punishment; I think, therefore, it ought not to be put."

² 1 Steph. Cr. L. 433.

but the defendant.¹ So in an action for enticing away the plaintiff's wife, where the answer was that the wife was driven from home by her husband's immorality, it was held that the plaintiff, when examined as a witness, could be compelled to answer as to such immorality.² And though there is a preponderance of authority to the effect that a prosecutrix in rape cannot be compelled to answer whether she has had sexual relations with others than the defendant, on the ground of the immateriality of the question, yet it is generally agreed that she will be compelled to answer as to prior sexual relations with the defendant, the point being material to the issue of consent.³

§ 474. In a leading case,⁴ Lord Ellenborough, C. J., compelled a witness to answer whether he had not been confined for theft in jail; and, on the witness's appealing to the court, said, "If you do not answer I will send you there." In this country there has been some hesitation in permitting a question the answer to which not merely imputes disgrace, but touches on matters of record;⁵ but the tendency now is, if the question be given for the purpose of honestly discrediting a witness, to require an answer.⁶

Witness may be asked whether he has been in prison.

¹ *Hill v. State*, 4 Ind. 112.

² *Taylor v. Jennings*, 7 Rob. (N. Y.) 581. But see *Dodd v. Norris*, 4 Camp. 419.

³ See Whart. Crim. Law, 8th ed. § 568, for authorities. *Donaldson v. State*, 10 Tex. Ap. 307.

⁴ *Frost v. Holloway*, 1 Stark. on Ev. 197. See *Ward v. Sinfield*, 43 L. T. (N. S.) § 253.

⁵ See *Griswold v. Newcomb*, 24 N. Y. 298; *Real, In re*, 55 Barb. 186. *Supra*, § 153. See, to effect that witness is not compelled to answer, *People v. Abbott*, 19 Wend. 192; *Lohman v. People*, 1 Comst. 379; S. C., 2 Barb. 216; *People v. Blakely*, 4 Parker C. R. 177; *Johnson v. State*, 48 Ga. 116.

⁶ *Com. v. Bonner*, 97 Mass. 587; *Real v. People*, 42 N. Y. 270; *Howser v. Com.*, 51 Penn. St. 332; *State v. March*, 1 Jones (N. C.), 526; *State v.*

Garrett, Busbee, 357; *Wilbur v. Flood*, 16 Mich. 40; *People v. Cummins*, 47 Mich. 334; *People v. Manning*, 48 Cal. 335; *People v. Chin*, 51 Cal. 597 (by statute). In *Real v. People*, 42 N. Y. 270, it was said by Grover, J.: "My conclusion is, that a witness upon cross-examination may be asked whether he has been in jail, the penitentiary, or state prison, or any other place that would tend to impair his credibility, and how much of his life he has passed in such places. When the inquiry is confined as to whether he has been convicted, and of what, a different rule may perhaps apply. This involves questions as to the jurisdiction and proceedings of a court of which the witness may not be competent to speak. This was the point involved in *Griswold v. Newcomb*, 24 N. Y. 298, and the only point in that case. Here the

§ 475. It is held in Massachusetts, that the rule precluding questions to a witness as to his religious belief is unaffected by the statute removing disability on account of religious disbelief, but permitting evidence of such disbelief in order to affect credibility.¹ In New York a different conclusion is reached, under the Constitution of 1848, which permits atheists to testify.² That such questions cannot be put to affect competency we have already seen.³

§ 476. A witness will ordinarily be compelled to answer any questions which would probe the accuracy of his memory.⁴ Answers, also, may be compelled to any questions as to the witness's corrupt or interested leanings in the case,⁵ or as to his means of in-

inquiry was simply whether and how long the witness had been in the penitentiary. This the witness knew and could not be mistaken about. . . . The extent of the cross-examination of this character is somewhat in the discretion of the court, and must necessarily be so to prevent abuse." In *State v. Pike*, 65 Me. 111, it was held that a witness, having testified on cross-examination that he had been in prison, could be asked what this was for. Ordinarily convictions must be proved by record. *Clement v. Brooks*, 13 N. H. 92; *Com. v. Quin*, 5 Gray, 478; *Newcomb v. Griswold*, 24 N. Y. 298; *Stout v. Russell*, 2 Yeates, 334; *People v. Reinhardt*, 39 Cal. 449. *Supra*, § 153.

In *State v. Huff*, 11 Nev. 19, it was held that a witness could only be asked as to convictions that affect credit, and not as to one for assault and battery. And see, to same general effect, *Brown v. People*, 15 N. Y. Sup. Ct. 562.

That a witness may explain under oath the circumstances of a conviction in another State, put in evidence to affect his credit, see *infra*, §§ 489, 596 a.

"Everybody recollects the famous question on the trial of Orton, which

has generally been held unjustifiable, mainly on the ground that the relations between the sexes have no direct bearing on the probability of the witness telling the truth." *Lond. Law J.* 1876, cited *Whart. on Ev.* § 542.

Sir James Stephen, in his *Digest of the Law of Evidence*, expounds the law as follows: "When a witness is cross-examined he may be asked any questions which tend (1) to test his accuracy, veracity, or credibility; or (2) to shake his credit by injuring his character. He may be compelled to answer any such question, however irrelevant it may be to the facts in issue, and however disgraceful the answer may be to himself, except in the case provided for in article 120, namely, when the answer might expose him to a criminal charge or penalty."

¹ *Com. v. Burke*, 16 Gray, 33.

² *Stanbro v. Hopkins*, 28 Barb. 265.

³ *Whart. on Ev.* § 396. *Supra*, § 362.

⁴ *Supra*, § 376; *Kelsey v. Ins. Co.*, 35 Conn. 225; *People v. Morrgan*, 29 Mich. 5; *McFarlin v. State*, 41 Tex. 23; and see *infra*, § 485; *Yarborough v. State*, 71 Ala. 376.

⁵ *State v. Dee*, 14 Minn. 35; *Scott v. State*, 64 Ind. 400. This has been

formation;¹ and to matters connected with the *res gestae* a witness may be compelled to answer questions, no matter how much charged with disgrace.² And while courts have refused to permit a witness to be examined as to past irrelevant misconduct, yet questions have been permitted tending to search his conscience for such recent infamy as leaves his testimony entitled to little respect.³ The same rule applies to questions probing veracity.⁴ But if a criminal conviction is put in evidence to discredit a witness, he may be asked as to the collateral incidents of such conviction.⁵

And so of questions as to motive or veracity or to the *res gestae*.

§ 477. A witness may also be compelled to answer questions concerning his relationship to the prosecution or the defence, his interest in the suit, his capacity of discernment and expression, his motives, and his prejudices, so far as concerns the parties in the litigation or the question involved.⁶ He may be thus required to explain whatever would show bias on his part or incapacity to testify accurately.⁷ He may be asked, for instance, whether he did not belong to a secret society whose object was to suppress a sect to which the defendant belonged, the defendant being on trial for a riot in which sectarian prejudice was involved.⁸ And as to the character of his relations to the defendant he may always be asked.⁹ But he cannot, un-

Witness may be cross-examined as to bias.

pushed to a great extent by *Best, J.*, in *Cundell v. Pratt*, M. & M. 108; and by Lord Tenterden, in *Roberts v. Allatt*, M. & M. 192. See *infra*, § 477; *State v. Tosney*, 26 Minn. 262.

¹ *Pannell v. Com.*, 86 Penn. St. 260.

² *Supra*, § 472; *infra*, § 485; *Cundell v. Pratt*, 1 M. & M. 108; U. S. v. *White*, 5 Cranch C. C. 38; *People v. Mather*, 4 Wend. 250-4; *Berne v. Mitnacht*, 2 Sweeney, 582; *Hill v. State*, 4 Ind. 112; *Foster v. People*, 18 Mich. 266.

³ *Cundell v. Pratt*, M. & M. 106; *Roberts v. Allatt*, M. & M. 192; *Real v. People*, 42 N. Y. 270.

⁴ *Ordway v. Haynes*, 50 N. H. 159; *Boles v. State*, 46 Ala. 204.

⁵ *Supra*, § 474; *infra*, §§ 489, 596 a.

⁶ *State v. Glynn*, 51 Vt. 577; *People*

v. Noelke, 1 N. Y. Cr. Rep. 252; *Patmore v. State*, 61 Ga. 379; *Sylvester v. State*, 71 Ala. 17.

⁷ See *supra*, § 376. For cases see *Whart. on Ev.* § 545; *Fincher v. State*, 58 Ala. 215; *Saunders v. People*, 38 Mich. 218; *Ryan v. People*, 79 N. Y. 593. That in such case he is entitled to explain, see *Beasley v. People*, 89 Ill. 571.

⁸ *People v. Christie*, 2 Park. C. R. 579.

⁹ See cases *infra*, § 485; *Langhorne v. Com.*, 76 Va. 1012; *Scott v. State*, 64 Ind. 400; *Daffin v. State*, 11 Tex. Ap. 76. But see *Blunt v. State*, 9 Tex. Ap. 234.

In *Mayer v. People*, 80 N. Y. 364, 21 Alb. L. J. 336, F., an uncle and former employer of defendant, gave evi-

less for the purpose of contradicting him on cross-examination, be inquired of as to the details of such relations.¹

§ 478. The inferences which arise from the refusal by a witness to answer questions involving alleged crimination are exclusively inferences of fact,² having no support in technical jurisprudence.³ On the one hand, a pure man of great sensitiveness may indignantly refuse to tolerate such a question; but if, on the other hand, the witness is not known to be a pure man of great sensitiveness, his refusal to answer will be naturally presumed to arise from the fact that if he answered the answer would be discreditable.⁴

§ 479. A witness's answers to questions relating to his previous conduct are regarded as so far collateral that they cannot be contradicted by the party cross-examining, unless they go to matter which the law permits to be shown for the purpose of impairing credibility.⁵ Even a party, when cross-examined as a witness as to previous misconduct similar to that under trial, concludes the party cross-examining him by his answers, unless such mis-

dence tending to show the innocence of defendant, and also testified to a fact which, if true, would naturally induce the witness to believe him innocent. On cross-examination he was asked if he had not said to anybody that defendant and his partner "had been guilty of a great wrong;" that "they had acted as thieves," etc. It was ruled by the Court of Appeals (Church, C. J., and Danforth, J., diss.) that the questions were proper on cross-examination.

¹ *Butler v. State*, 34 Ark. 480.

² "Where a witness," says Mr. Roscoe (Cr. Ev. 8th ed. 158), "is entitled to decline answering a question, and does decline, the rule is said by Holroyd, J., to be, that his not answering ought not to have any effect with the jury. *R. v. Watson*, 2 Stark. 157. So where a witness demurred to answer a question, on the ground that he had been threatened with a prosecution re-

specting the matter, and the counsel in his address to the jury remarked upon the refusal, Abbott, C. J., interposed and said that no inference was to be drawn from such refusal. *Rose v. Blakemore*, Ry. & Moo. N. P. C. 384. A similar opinion was expressed by Lord Eldon, *Lloyd v. Passingham*, 16 Ves. 64. See the note, Ry. & Moo. N. P. C. 385. And it was said by Bayley, J., in *R. v. Watson*, 2 Stark. 135, 'If the witness refuse to answer, it is not without its effect with the jury. If you ask a witness whether he has committed a particular crime, it would perhaps be going too far to say that you may discredit him if he refuse to answer; it is for the jury to draw what inferences they may.'

³ See Taylor's Ev. § 1321; *Andrews v. Fry*, 104 Mass. 234.

⁴ See *infra*, § 749.

⁵ Whart. on Ev. § 479; *State v. Parish*, 83 N. C. 613.

duct would be itself relevant as part of the case of the cross-examining party.¹ And when a witness, being asked whether she had not when in service taken things not belonging to her, answered "no;" this was held irrebuttable.² But this principle applies only to the witness's *answers*. Whether the *questions* can be put is elsewhere discussed.³

§ 480. How far a witness's answer, drawn from him by compulsion in a court of justice, can be used against him in another suit, will be discussed in a future chapter.⁴

Compelled answer cannot be used against witness.

XI. IMPEACHING AND SUSTAINING WITNESS.

§ 481. The rules relative to impeaching and sustaining witnesses are the same in criminal as in civil practice, and are discussed at large in my work on Evidence in Civil Issues.⁵ In the present volume we must confine ourselves to noticing only such of these rules as are of more frequent application in the practice of criminal courts.

Rules in criminal the same as in civil cases.

§ 482. A witness called by the opposing party can be discredited by proving that on a former occasion he made a statement inconsistent with his statement on trial, provided such statement be material to the issue;⁶ though a witness, after testifying to criminating facts, cannot be asked whether he has not previously said that in his

Opposing witness may be contradicted by proving that he formerly stated differently.

¹ Tolman v. Johnstone, 2 F. & F. 66; His character for truth and veracity Stokes v. People, 53 N. Y. 164. may be attacked. Ibid. § 561.

² Stokes v. People, 53 N. Y. 164. Questions to be confined to this issue.

³ Whart. on Ev. §§ 533, 559. See Ibid. § 563.

Shepard v. Parker, 36 N. Y. 517. Bias of witness may be shown. Ibid. § 566.

⁴ See *infra*, § 664. Infamous conviction may be proved as affecting credibility. Ibid. § 567.

⁵ Party cannot discredit his own witness. Whart. on Ev. § 549. Impeaching witness may be attacked and sustained. Ibid. § 568.

A party's witnesses are those whom he voluntarily examines in chief. Whart. on Ev. § 550. Impeached witness may be sustained. Ibid. § 569.

But usually must be first asked as to statements. Ibid. § 555. But not ordinarily by proof of former consistent statement. Ibid. § 570.

Witness cannot be contradicted on matters collateral. Ibid. § 559. May be corroborated at discretion of court. Ibid. § 571.

By old practice conflicting witnesses could be confronted. Ibid. § 560. ⁶ Whart. on Ev. § 551; Smith v.

Witness's answer as to motives may be contradicted. Ibid. § 561.

opinion the defendant was not guilty.¹ The statement which it is intended to contradict must involve facts in evidence. If confined to opinion, when opinion is not at issue, or to other irrelevant matters, the cross-examining party is bound by the answer.² A statement of opinion, however, that goes to show bias, is so far relevant that a denial of its expression is admissible.³ So the opinion of an expert when material may be discredited by proof that he had previously expressed a contradictory opinion.⁴ Nor is the right thus to contradict limited to matters arising in the examination in chief. It extends to matters originating in the cross-examination; and then, if such matters are material, contradiction by this process is equally permissible.⁵ Thus, when the prosecuting witness, on the trial of an indictment for an indecent assault on her when driving, on being asked on cross-examination whether she had not said to the defendant, subsequent to the event in litigation, that she would kiss him if he would take her to drive, denied she had said so, it was held that she could be contradicted by calling a witness to prove that she had made such a statement.⁶ A witness, also, may be contradicted by proof of prior contradictory statements before a

Weeks, 54 Iowa, 411; *State v. Lawlor*, 28 Minn. 216; *Warder v. Fisher*, 48 Wis. 358. See *Cannon v. State*, 57 Miss. 147. It is no ground for refusing to admit them that they were made at a time when he was under arrest. *Reyes v. State*, 10 Tex. Ap. 1.

¹ *Com. v. Mooney*, 110 Mass. 99; *State v. Maxwell*, 42 Iowa, 208.

² *Greenl. Ev.* § 449; *Elton v. Larkins*, 5 C. & P. 385; *U. S. v. Holmes*, 1 Cliff. 98; *Brckett v. Weeks*, 43 Me. 291; *Dewey v. Williams*, 43 N. H. 384; *Sumner v. Crawford*, 45 N. H. 416; *Combs v. Winchester*, 49 N. H. 13; *Fletcher v. R. R.*, 1 Allen, 9; *Com. v. Mooney*, 110 Mass. 99; *Howard v. Ins. Co.*, 4 Denio, 502; *Bearss v. Copley*, 10 N. Y. 93; *Ford v. Com.*, 16 Grat. 547; *Kennedy v. Com.*, 14 Bush, 341; *Patten v. People*, 18 Mich. 314; *Lewis v. State*, 4 Kans. 296; *State v. Lawlor*, 28 Minn. 216; *State v. Marler*, 2 Ala. 43; *Smith v. State*, 9 Ala. 980; *Garrett v. State*,

6 Mo. 1; *People v. Devine*, 44 Cal. 452. See *State v. Reed*, 60 Me. 550; *Munshower v. State*, 55 Md. 19; *McKern v. Calvert*, 59 Mo. 244; *State v. Hughes*, 71 Mo. 633; *McNeill v. Arnold*, 22 Ark. 477; *Griffith v. State*, 37 Ark. 324.

³ *Chapman v. Coffin*, 14 Gray, 454; *O'Neill v. Lowell*, 6 Allen, 110; *Emerson v. Stevens*, 6 Allen, 112; *Couillard v. Duncan*, 6 Allen, 440; *Gaines v. Com.*, 50 Penn. St. 319; *Beaubien v. Cicotte*, 12 Mich. 459; *Robinson v. Blakeley*, 4 Rich. 586. See *supra*, §§ 457-60.

⁴ *Saunderson v. Nashua*, 44 N. H. 492.

⁵ *Hogan v. Cregan*, 6 Robt. (N. Y.) 138.

⁶ *Com. v. Bean*, 111 Mass. 438. To the same effect, *Fries v. Brugler*, 12 N. J. L. 79. See, however, as qualifying above, *State v. Patterson*, 2 Ired. L. 346; *Dunn v. Dunn*, 11 Mich. 284.

grand jury;¹ or by proof that he now states facts which on a former trial he omitted to state.² And generally, whenever, on a former occasion, it was the duty of the witness to state the whole truth, it is admissible to show that the witness, in his statement, omitted facts sworn to by him at the trial.³

§ 483. As a basis for impeaching evidence of this class, it is usually requisite to ask the witness, on cross-examination, whether he has not made such prior contradictory statements. The question to this effect should specify, so it is said, the person to whom the alleged contradictory statements were made, and as far as possible the circumstances. Only upon a denial, direct or qualified, by the witness, that such statements were made, can proof of them be offered.⁴ But the substance of the alleged conflicting statement is all that need be put to the witness,⁵ though there must be a specification sufficient to enable the witness to recall the facts.⁶ In some

Usually
witnesses
must first
be asked
as to such
statements.

¹ See *infra*, § 510; *Burdick v. Hunt*, 43 Ind. 381.

² *Briggs v. Taylor*, 35 Vt. 57. See *Nye v. Merriam*, 35 Vt. 438; *People v. Morine*, 61 Cal. 307.

³ *Whart. on Ev.* § 554; *Hayden v. Stone*, 112 Mass. 346; *Perry v. Breed*, 117 Mass. 165.

⁴ *Angus v. Smith*, 1 M. & M. 473; *Crowley v. Page*, 7 C. & P. 789; *R. v. Shellard*, 9 C. & P. 277; *R. v. Holden*, 8 C. & P. 606; *The Queen's Case*, 2 B. & B. 313; *M'Kenney v. Neil*, 1 Mo-Lean, 540; *Downer v. Dana*, 19 Vt. 338; *Everson v. Carpenter*, 17 Wend. 419; *Palmer v. Haight*, 2 Barb. 210; *Franklin Bank v. Navigation Co.*, 11 Gill & J. 28; *Abel v. Shields*, 7 Mo. 120; *Weaver v. Traylor*, 5 Ala. 564; *Weinzorpfen v. State*, 7 Blackf. 186; *Regnier v. Cabot*, 2 Gilman, 34; *State v. Kinley*, 43 Iowa, 294; *Sealey v. State*, 1 Kelly, 213; *Drennen v. Lindsey*, 15 Ark. 359; *Treadway v. State*, 1 Tex. Ap. 668; *People v. Devine*, 44 Cal. 452; *People v. Ah Yute*, 60 Cal. 95. See for other cases *Whart. on Ev.*

§ 555. That they may be received when witness said, on cross-examination, he was not aware of having made them, see *Payne v. State*, 60 Ala. 80.

A witness cannot be asked a question irrelevant to the issue for the purpose of laying a predicate to impeach him. *Washington v. State*, 63 Mo. 189. See *Brite v. State*, 10 Tex. Ap. 368; *Atwell v. State*, 63 Ala. 61; *State v. Angelo*, 32 La. An. 407. See more fully *infra*, § 484.

If the witness be contradicted by his deposition given before the examining court, it may be shown in order to explain discrepancies that it was not read over to him. *Grosse v. State*, 11 Tex. Ap. 364.

⁵ *Patchin v. Ins. Co.*, 13 N. Y. 268; *Bennett v. O'Byrne*, 23 Ind. 604; *State v. Hoyt*, 13 Minn. 132; *Edwards v. Sullivan*, 8 Ired. 302; *Nelson v. Iverson*, 24 Ala. 9; *Armstrong v. Huffstutler*, 19 Ala. 51.

⁶ *Pendleton v. Empire Co.*, 19 N. Y. 13; *Joy v. State*, 14 Ind. 139. *Supra*, § 461.

jurisdictions, however, it is not considered requisite to ask a witness beforehand whether he had not made a prior different statement;¹ in other cases it has been left to the discretion of the court.²

At common law, as we have seen, when the statements are in writing, they must be first shown to the witness.³

Parties, when appearing as witnesses, may be in like manner contradicted.⁴

On re-examination the impeached witness may be asked as to the details of the alleged contradiction.⁵

§ 484. When a witness is cross-examined on a matter collateral to the issue, his answer cannot be subsequently contradicted by the party putting the question.⁶ "The test of whether a fact inquired of in cross-examination is collateral is this, Would the cross-examining party be en-

Witness cannot be contradicted on matters collateral.

¹ U. S. v. White, 5 Cranch C. C. 457; Howland v. Conway, 1 Abb. Adm. 281; Ware v. Ware, 8 Greenl. 42; Wilkins v. Babbershall, 32 Me. 184; New Portland v. Kingfield, 55 Me. 172; Titus v. Ash, 24 N. H. 319; Cook v. Brown, 34 N. H. 460; Hedge v. Clapp, 22 Conn. 262. See Brown v. Bellows, 4 Pick. 188; Gould v. Norfolk Co., 9 Cush. 338; Com. v. Hawkins, 3 Gray, 463.

² See Sharp v. Emmett, 5 Whart. 288; McAteer v. McMullen, 2 Barr, 32; Kay v. Fredrigal, 3 Barr, 221; State v. Hoyt, 13 Minn. 132.

³ *Supra*, § 156; and compare Downer v. Dana, 19 Vt. 338; Bryan v. Walton, 14 Ga. 185; Molyneaux v. Collier, 30 Ga. 731; Hughes v. Wilkinson, 35 Ala. 453. See Samuels v. Griffith, 13 Iowa, 103; Bradford v. Barclay, 39 Ala. 33.

⁴ Gibbs v. Linabury, 22 Mich. 479. See *supra*, § 433.

⁵ State v. Winkley, 14 N. H. 480. See, as to effect on credit, Dunn v. People, 29 N. Y. 523.

⁶ R. v. Watson, 2 Stark. R. 149; U. S. v. Dickinson, 2 McLean, 325; U. S. v. White, 5 Cranch C. C. 38; State v.

Kingsbury, 58 Me. 239; State v. Reed, 60 Me. 550; State v. Benner, 64 Me. 267; State v. Thibreau, 30 Vt. 100; Com. v. Buzzell, 16 Pick. 153; Com. v. Farrar, 10 Gray, 6; Rosenweig v. People, 63 Barb. 634; Stokes v. People, 53 N. Y. 164; People v. Ware, 1 N. Y. Cr. Rep. 166; Schenley v. Com., 36 Penn. St. 29; Langhorn v. Com., 76 Va. 1012; Fogleman v. State, 32 Ind. 145; Cokely v. State, 4 Iowa, 477; Patten v. People, 18 Mich. 314; People v. Knapp, 42 Mich. 467; People v. Broughton, 49 Mich. 339; State v. Staley, 14 Minn. 105; Murphy v. Com., 23 Grat. 960; State v. Patterson, 2 Ired. 346; State v. Pully, 63 N. C. 8; State v. Roberts, 81 N. C. 605; State v. Elliott, 68 N. C. 124; Rosenbaum v. State, 33 Ala. 354; Butler v. State, 34 Ark. 480; People v. Devine, 44 Cal. 452. But see State v. Whittingham, 33 La. An. 537; State v. Gregory, id. 737.

Where a witness for the prosecution, on cross-examination, denied that the prosecutor paid him for coming from another State to be a witness, it was held, that the defendant could not introduce evidence to prove his declara-

titled to prove it as a part of his case, tending to establish his plea?"¹ This limitation, however, only applies to answers on cross-examination. It does not affect answers to the examination in chief.²

§ 485. A witness's answers as to motives are not open to the criticism that has been applied to his answers as to prior misconduct. Hence, as has been already seen, it has been held that a witness may be asked whether he has not a strong interest in the case or hostility to the defendant,³ and if he denies such interest or bias, that he may be contradicted by evidence of his own statements, or of other implicative acts.⁴ The same rule applies to questions as to quarrels between the witness and the party against whom he is called.⁵ It is true that we have cases disputing this conclusion;⁶ but it is hard to see how evidence which goes to the root of a

Witness's
answer as
to motives
may be
contra-
dicted.

tion that he had been so paid. *State v. Patterson*, 2 Ired. 346.

But where the sole witness to the commission of an offence swore that she did not know the prisoner at the time, evidence was admitted for the defence that she had in fact known him for years. *R. v. Dennis*, 3 F. & F. 502. That an answer that the witness had never been in prison is material, see *People v. Courtney*, 1 N.Y. Cr. Rep. 484.

¹ *Sharswood, J., Hildeburn v. Curran*, 65 Penn. St. 63; and see *Woodward v. Easton*, 118 Mass. 403; *People v. Crouse*, 86 N. C. 617; *Davis v. State*, 87 N. C. 514; *State v. Taylor*, 88 N. C. 694. As to how far such contradiction may be extended, at the discretion of the court, see *Powers v. Leach*, 26 Vt. 270; *Nuzum v. State*, 88 Ind. 599.

In *State v. Patterson*, 74 N. C. 157, it was held that a woman's answer, in a bastardy suit, that she had never had sexual intercourse with A., was conclusive. As to materiality of such questions in rape, see *supra*, § 473. Compare *Com. v. Pease*, 110 Mass. 412; *State v. Parish*, 83 N. C. 613.

² *State v. Sargent*, 32 Me. 429; *Hastings v. Livermore*, 15 Gray, 10; *Whitney v. Boston*, 98 Mass. 312. See *State v. Petty*, 21 Kan. 51.

³ *Supra*, § 475.

⁴ *People v. Austin*, 1 Parker C. R. 154; *Gaines v. Com.*, 50 Penn. St. 319; *Scott v. State*, 64 Ind. 400.

A witness, who testifies in a criminal case in favor of the defendant, may be asked, on cross-examination, if he has offered a certain person money to be a surety on the defendant's bail bond. *Com. v. Gallagher*, 126 Mass. 54.

⁵ *R. v. Yervin*, 2 Camp. 638; *R. v. Martin*, 6 C. & P. 562; *Thomas v. David*, 7 C. & P. 350; *Queen's Case*, 2 B. & B. 311; *Davis v. Keyes*, 112 Mass. 436; *Beardsley v. Wildman*, 41 Conn. 515; *People v. Austin*, 1 Park. C. R. 154; *Gaines v. Com.*, 50 Penn. St. 327; *Geary v. People*, 22 Mich. 220.

⁶ *Harrison v. Gordon*, 2 Lew. C. C. 150; *R. v. Holmes*, L. R. 1 C. C. 237; *Harris v. Tippet*, 2 Camp. 637; *State v. Patterson*, 2 Ired. 346. As to the materiality of bias and motive see *supra*, § 376.

witness's impartiality can be regarded as collateral to the issue.¹ We have already seen how the perceptive as well as the reproductive powers of the mind are swayed by prejudice. That a witness was under the influence of such prejudice is a fact without cognizance of which his testimony cannot be properly weighed.

§ 486. A witness may be discredited by evidence attacking his character for truth and veracity.² Particular independent facts, though bearing on the question of veracity, cannot, however, be put in evidence for this purpose.³ Thus, evidence has been rejected of facts going to show a witness's want of religion;⁴ though it is held that it may be proved that a witness had declared that he would swear to anything.⁵ General character for "badness," or "infamy," is, for still stronger reasons, inadmissible.⁶ And it has been held inadmissible, in order to attack veracity, to prove the bad character of a female witness for chastity, or to show that she is a prostitute;⁷ or to

Witness's
character
for truth
may be
attacked.

¹ *Supra*, §§ 376, 476-7. See U. S. v. Schindler, 18 Blatchf. C. C. 227.

² *R. v. Rockwood*, 13 How. St. Tr. 210; *R. v. Brown*, L. R. 1 C. C. 70; *U. S. v. Vansickle*, 2 McLean, 219; *U. S. v. White*, 5 Cranch C. C. 38; *Starks v. People*, 5 Denio, 106; *Bluitt v. State*, 12 Tex. Ap. 39. As to mode of proving character, *supra*, §§ 57, 63. See *Hamilton v. People*, 29 Mich. 173.

That it is not allowable to prove by particular instances that the witness has a propensity to lie, see *Com. v. Kennon*, 130 Mass. 39; *supra*, § 65.

³ *Supra*, § 61; *R. v. Rockwood*, 13 How. St. Tr. 210; *U. S. v. Masters*, 4 Cranch C. C. 469; *U. S. v. Vansickle*, 2 McLean, 219; *State v. Bruce*, 24 Me. 71; *Crane v. Thayer*, 18 Vt. 162; *Com. v. Churchill*, 11 Met. 538; *Com. v. Kennon*, 130 Mass. 39; *Bakeman v. Rose*, 18 Wend. 146; *Johnson v. People*, 3 Hill (N. Y.), 178; *Southworth v. Bennett*, 58 N. Y. 659; *Crichton v. People*, 6 Park. C. R. 363; *Conley v. Meeker*, 85 N. Y. 618; *Uhl v. Com.*, 6 Grat. 706; *State v. Boswell*, 2 Dev. 209; *Nugent v. State*, 18 Ala. 521;

Moore v. State, 68 Ala. 360; *Craig v. State*, 5 Oh. St. 605; *Walker v. State*, 6 Blackf. 1; *Ketchingman v. State*, 6 Wis. 426; *Taylor v. Com.*, 3 Bush, 508; *Newman v. Mackin*, 21 Miss. 383. See *Stape v. People*, 85 N. Y. 390.

Thus the credit of a witness cannot be impeached by showing that he has committed an infamous crime of which he has not been convicted. *Webb v. State*, 29 Oh. St. 351.

⁴ *Halley v. Webster*, 21 Me. 361. See *supra*, § 362.

⁵ *Newhal v. Wadhams*, 1 Root, 504; *Anon.*, 1 Hill (S. C.), 251.

⁶ *State v. Bruce*, 11 Shepl. 71; *Com. v. Churchill*, 11 Met. 538; *State v. Sater*, 8 Iowa, 420; *Kilburn v. Muller*, 22 Iowa, 498; *State v. O'Neil*, 4 Ired. 88; *People v. Yslas*, 27 Cal. 630; though see *Carpenter v. Wall*, 11 Ad. & El. 803; *Wright v. Paige*, 36 Barb. 143; *State v. Boswell*, 2 Dev. 209; *State v. Shields*, 13 Mo. 236; *State v. Breeden*, 58 Mo. 507; *State v. Grant*, 76 Mo. 237; *Gilham v. State*, 1 Head, 38; *Anderson v. State*, 34 Ark. 257; *Smith v. State*, 58 Miss. 867.

⁷ *R. v. Martin*, 6 C. & P. 562; *R. v.*

prove habits of intemperance, which do not affect the perceptive or narrative powers.¹

§ 487. As a preliminary question the impeaching witness should be asked as to his opportunities of acquaintance with the impeached witness's general reputation for truth and veracity in the community in which he has lived,² but as to character in other respects no inquiries can be made.³

Questions to be limited by time and place.

It is inadmissible to ask what character the impeached witness had in a neighborhood in which he did not then reside;⁴ or resided at a period long prior to the trial.⁵ But evidence of bad reputation for veracity four years previous to the trial is held admissible to impeach a witness who had no fixed domicile, and had been out of the State over a year of the time, and whose residence at the place of such reputation was as long as at any other.⁶ A stranger sent into a community to learn the character of a witness is not competent to testify to such character.⁷ "Character," in the sense in which it is used in the questions so authorized, is to be viewed as convertible with "reputation."⁸ It is ordinarily sufficient if the

Hodgson, R. & R. 211; *Low v. Mitchell*, 6 Shepl. 372; *Wilds v. Blanchard*, 7 Vt. 141; *Com. v. Churchill*, 11 Met. 530, overruling *Com. v. Murphy*, 14 Mass. 387; *Com. v. Billings*, 97 Mass. 405; *Jackson v. Lewis*, 13 Johns. 504; *Kilburn v. Mullen*, 22 Iowa, 498; *State v. Larkin*, 11 Nev. 314; *Pleasant v. State*, 15 Ark. 624; *People v. Yelas*, 27 Cal. 630. See *Indianapolis R. R. v. Anthony*, 43 Ind. 183.

¹ *Thayer v. Boyle*, 30 Me. 375; *Hoitt v. Moulton*, 21 N. H. 586. See *supra*, §§ 57-63.

² *Teese v. Huntingdon*, 23 How. 2; *U. S. v. Vansickle*, 2 McLean, 219; *State v. Randolph*, 24 Conn. 363; *People v. Mather*, 4 Wend. 229; *Langhorne v. Com.*, 76 Va. 1012; *Bucklin v. State*, 20 Ohio, 18; *Stokes v. State*, 18 Ga. 17; *Pleasant v. State*, 15 Ark. 624; *State v. Clark*, 9 Oreg. 466. See *Com. v. Lawler*, 12 Allen, 585; and other cases cited Whart. on Ev. § 487.

³ *Kidwell v. State*, 63 Ind. 383. As

to how far, in rape, the prosecutrix may be cross-examined as to unchastity, see Whart. Crim. Law, 8th ed. § 568.

⁴ *Conkey v. People*, 5 Park. C. R. 31; *Griffin v. State*, 14 Oh. St. 55; *Campbell v. State*, 23 Ala. 44; and other cases cited Whart. on Ev. § 487.

⁵ *State v. Howard*, 9 N. H. 485; *Rogers v. Lewis*, 19 Ind. 405; *Aurora v. Cobb*, 21 Ind. 492; *Keator v. People*, 32 Mich. 485; *Young v. Com.*, 6 Bush, 307; *Mitchell v. Com.*, Ky. 1880. See *Com. v. Billings*, 97 Mass. 405; *People v. Abbott*, 19 Wend. 192, as indicating limits as to time.

⁶ *Keator v. People*, 32 Mich. 481.

⁷ *Reid v. Reid*, 17 N. J. Eq. 101.

⁸ *Supra*, § 58; Whart. on Ev. §§ 49, 564. See *Strong, J., Knode v. Williamson*, 17 Wall. 588; and *supra*, §§ 57, 63, 488, to the position that disparaging facts cannot be introduced. It is also inadmissible to prove the opinion of third parties as to the witness. *Com.*

witness says he can speak the general sense of those of the community who are acquainted with the impeached witness, or among whom the impeached witness moves;¹ and as to his capacity to speak in this relation he may be examined at the outset.² Supposing the impeaching witness be shown to be competent to express an opinion, he may then be asked whether he would believe the impeached witness on his oath.³ But it has been held not essential, in order to throw discredit on the impeached witness, that the impeaching witness should state that he would not believe the impeached witness on his oath.⁴ The impeaching witness, who has sworn to the bad character of the impeached witness for truth, may be asked on cross-examination whom he had heard thus disparage the impeached witness;⁵ and what other grounds he had for his conclusion.⁶ The court may, at its discretion, limit the number of impeaching witnesses to be examined.⁷

v. Lawler, 12 Allen, 585; *Com. v. 185*; *Keator v. People*, 32 Mich. 484; *Rogers*, Sup. Ct. Mass. 1884, 17 Rep. 558. And compare *State v. Parks*, 3 Ired. 296; *State v. Speight*, 69 N. C. 72.

¹ *Kimmel v. Kimmel*, 3 S. & R. 336; *Dave v. State*, 22 Ala. 23; *Elam v. State*, 25 Ala. 53; *Ward v. State*, 28 Ala. 53. See *State v. Lee*, 22 Minn. 407.

The impeaching witness must speak directly to the reputation in the community. What he has heard others say of the reputation will not do. *Furnish v. Com.*, 14 Bush, 180.

That the fact that nothing is said against the character of the witness is admissible to sustain his reputation for veracity, see *Davis v. Frank*, 33 Grat. 413; *State v. Grate*, 68 Mo. 22. *Supra*, § 58.

² *Wetherbee v. Norris*, 103 Mass. 565; *Com. v. Rogers*, Sup. Ct. Mass. 1884, 17 Rep. 558.

³ *R. v. Brown*, 10 Cox C. C. 453; *S. C., L. R. 1 C. C. 70*; *Mawson v. Hart-sink*, 4 Eap. 103; *Gass v. Stinson*, 2 Sumner, 610; *People v. Mather*, 4 Wend. 229; *People v. Rector*, 19 Wend. 569; *Bogle v. Kreitzer*, 46 Penn. St. 465; *Hamilton v. People*, 29 Mich. 484.

⁴ *People v. Tyler*, 35 Cal. 353.

⁵ *Bates v. Barbour*, 4 Cush. 197; *Weeks v. Hull*, 19 Conn. 376; *Lower v. Winters*, 7 Cow. 263; *People v. Annis*, 13 Mich. 511; *State v. Perkins*, 66 N. C. 126. *Infra*, § 470.

⁶ *Titus v. Ash*, 24 N. H. 319; *Pierce v. Newton*, 13 Gray, 428; *Bullard v. Lambert*, 40 Ala. 204.

⁷ *Bunnell v. Butler*, 23 Conn. 65; *Bissell v. Cornell*, 24 Wend. 354; *Gray v. St. John*, 35 Ill. 222; *Cox v. Pruitt*, 25 Ind. 90.

§ 488. After ground has been duly laid by cross-examination, it is admissible to impeach a witness by showing his bias, under conditions which have been already stated.¹ Bias may be shown. When the object is to prove hostile declarations or acts, the witness, as we have seen,² must first be cross-examined as to such declarations or acts, so that he may have an opportunity for explanation. A witness cannot, it is said, be asked if he is not prejudiced against a particular party. He must be asked as to particular facts or conditions.³ So a witness may be impeached by proof that he stated, after having testified, that he had been hired so to do.⁴

§ 489. In most States, as we have seen,⁵ a conviction of an infamous crime no longer renders a person incompetent as a witness. The record of conviction, however, by the law of several jurisdictions, may be put in evidence in order to impeach credibility.⁶ Infamous conviction may be proved as affecting credibility. Such conviction, as has been stated, must be proved by record;⁷ though it is admissible to ask a witness whether he has not been in the penitentiary.⁸ A verdict of guilty, without judgment, is not a "conviction."⁹ But a pardon does not preclude such conviction from being put in evidence.¹⁰

¹ *Supra*, §§ 475-7, 485.

² *Supra*, § 477.

³ *People v. Stackhouse*, 49 Mich. 76; see *Whart. on Ev.* § 566.

⁴ *McGinnis v. Grant*, 42 Conn. 77.

⁵ *Supra*, § 363.

⁶ *U. S. v. Biebusch*, 1 McCrary C. C. 42; *State v. Watson*, 65 Me. 74; *Com. v. Knapp*, 9 Pick. 496; *Com. v. Gorham*, 99 Mass. 420; *Real, In re*, 55 Barb. 186; *Donahue v. People*, 56 N. Y. 208; *Bartholomew v. People*, 104 Ill. 601. See *Dickinson v. Dustin*, 21 Mich. 561; *Glenn v. Clove*, 42 Ind. 62; *Jefferson R. R. v. Riley*, 39 Ind. 368; *Johnson v. State*, 48 Ga. 116; *People v. McLane*, 60 Cal. 412.

Under the Massachusetts General Statutes the conviction of any crime may be shown for this purpose. *Com. v. Hall*, 4 Allen, 305. But see *Langhorne v. Com.*, 76 Va. 1012.

⁷ *Supra*, §§ 153, 474.

⁸ *Supra*, § 474; *Real v. People*, 42 N. Y. 270, cited *supra*, § 474. See *Driscoll v. People*, 47 Mich. 413.

⁹ See cases cited *supra*, § 365.

¹⁰ The authorities to this effect are well grouped in the following opinion:—

"If the king pardon these offenders, they are thereby rendered competent witnesses, though their credit is to be still left to the jury, for the king's pardon takes away *poenam et culpam in foro humano* . . . but yet it makes not the man always an honest man."

2 Hale P. C. 278; *King v. Castlemain*, 7 How. St. Tr. 1109, 1110; *King v. Rookwood*, 13 How. St. Tr. 185, 186; 1 Stark. Ev. 99; *Peake Ev.* 132; *McNally Ev.* 232, 234; *Gilbert Ev.* (by Lofft, ed. of 1791) 260; 1 Phillips Ev. (old ed.) 29; 1 Gr. Ev. § 377; 2

When a record of conviction is offered for the purpose of discrediting (not excluding) a witness, it may be impeached.¹

§ 490. The character of an impeaching witness for truth and veracity may be itself attacked,² and may be sustained by countervailing proof.³ And the impeaching witness may be required to specify

Saund. Pl. & Ev. 1275; 1 Arch. Crim. Pr. & Pl. 155; 1 Arch. N. P. 29; Bac. Abr. Pardon (H.); 3 Wooddeson, Lectures on Laws of Eng. 284; 2 Harg. Jurid. Arguments, 221, 233, 260, 267; 2 Russell on Cr. 975, note; Roscoe Cr. Ev. 137, note; 2 Am. L. Reg. N. S. 488; U. S. v. Jones, 2 Wheel. C. C. 451; Baum v. Clause, 5 Hill, 196; Carpenter v. Nixon, 5 Hill, 260; Newcomb v. Griswold, 24 N. Y. 300; Gardner v. Bartholomew, 40 Barb. 325; Com. v. Green, 17 Mass. 515, 550, 551; Com. v. Rogers (Pamph. Rep.), 39, 148, 179, 180, 231, 249, 256, 271; Hoffman v. Coster, 2 Whart. 453, 462; Howser v. Com., 51 Penn. St. 322, 340; Anglea v. Com., 10 Grant, 696, 698, 699, 703, 704; 2 Hume Cr. L. 344; Glassford Ev. 413.

"A person convicted of an offence known in law as infamous is incapacitated to be a witness, because, when his guilt is established by conviction, his general character for truth is shown to be so bad that his testimony would be useless or dangerous. 1 Gr. Ev. § 372; 1 Stark. Ev. 94. That is the theory of the common law. The conviction is an impeachment and condemnation of his general character for truth. A pardon is not presumed to be granted on the ground of innocence or total reformation. Cook v. Middlesex, 3 Dutcher, 326, 331, 333; 4 Bl. Com. 397, 400; 3 Inst. 233, 238; 2 Hawk. P. C. c. 37, s. 8; Com. v. Halloy, 44 Penn. 210. It removes the disability, but does not change the common law principle, that the conviction of an infamous offence is evidence

of bad character for truth. The general character of a person for truth, bad enough to destroy his competency as a witness, must be bad enough to affect his credibility when his competency is restored by the executive or legislative branch of the government.

"If the party against whom an infamous person is offered as a witness had the election of using the conviction as a ground of exclusion, or of an attack upon the credit of the witness, the testimony of the witness might be warped by the fear of impeachment and the hope of avoiding it; and that may be sufficient reason for not allowing such election.

"When the character of a pardoned witness is impeached by the record of his conviction, it would seem that his character may be sustained by appropriate evidence." Doe, J., Curtis v. Cochran, 50 N. H. 244.

¹ Sims v. Sims, 75 N. Y. 466. See *supra*, § 154; *infra*, § 596 a.

² Long v. Lamkin, 9 Cush. 361; Starks v. People, 5 Denio, 106; State v. Brant, 14 Iowa, 180; State v. Moore, 25 Iowa, 128; State v. Cherry, 63 N. C. 493. See Mitchell v. Com., 78 Ky. 219. As to impeaching by showing contradictory statements, see *supra*, § 482; State v. Lawlor, 28 Minn. 216.

³ Lemons v. State, 4 W. Va. 755. See State v. Howard, 9 N. H. 485; Davis v. State, 38 Md. 15, 50; Stratton v. State, 45 Ind. 468; State v. Perkins, 66 N. C. 126; Durham v. State, 45 Ga. 516.

the persons who have spoken disparagingly of the impeached witness.¹

Impeaching witness may be attacked and sustained.

§ 491. Under the same general conditions as those expressed as limiting the impeaching of witnesses, the party calling a witness may sustain him by calling witnesses to show that his reputation for truth and veracity is good, and that the sustaining witnesses would believe him on his oath,² and it has been held that the inquiries, in such case, may range over the witness's whole prior history in other places.³ Such rebutting evidence is made admissible by the mere fact that the impeaching party examines an impeaching witness as to the impeached witness's character for truth, though the impeaching witness answers favorably.⁴ It is further held that such evidence may be admitted on particular discrediting facts being developed against the witness in his cross-examination,⁵ especially when he is in the situation of a stranger, testifying to isolated facts.⁶ *A fortiori* is this the case when the opposing party introduces, as part of his case, evidence directly reflecting on the veracity of the witness.⁷ Thus a witness's character is so far impeached by putting in evidence his conviction of a felony, that evidence is admissible of his good reputation for truth.⁸ A mere conflict of testimony, however, will not

Impeached witness may be sustained.

¹ Weeks v. Hull, 19 Conn. 376; Lower v. Winters, 7 Cow. 263; State v. Perkins, 66 N. C. 126.

⁶ Merriam v. R. R., 20 Conn. 354. See Brown v. Mooers, 6 Gray, 451.

² R. v. Murphy, 19 How. St. Tr. 724; R. v. Clarke, 2 Stark. 241; Com. v. Ingraham, 7 Gray, 46; Frazer v. People, 54 Barb. 306; People v. Davis, 21 Wend. 309; Lemons v. State, 4 W. Va. 755; Harris v. State, 30 Ind. 131; Clem v. State, 33 Ind. 419; State v. Nelson, 58 Iowa, 208; State v. Cherry, 63 N. C. 493; and other cases cited Whart. on Ev. § 491.

⁷ Prentiss v. Roberts, 49 Me. 127; Isler v. Dewey, 71 N. C. 14.

³ Moss v. Palmer, 15 Penn. St. 51; Stratton v. State, 45 Ind. 468; State v. Lanier, 79 N. C. 622; Burrell v. State, 18 Tex. 713.

⁸ 2 Phil. Ev. 5th Am. ed. 95; State v. Roe, 12 Vt. 111; Paine v. Tilden, 20 Vt. 554. See, however, Doe v. Harris, 7 Car. & P. 330; People v. Amanacus, 50 Cal. 233.

⁴ Com. v. Ingraham, 7 Gray, 46.

⁵ See Harrington v. Lincoln, 4 Gray, 563; People v. Rector, 19 Wend. 569; Lewis v. State, 35 Ala. 380; People v. Ah Fat, 48 Cal. 62.

On the other hand, it is held that the testimony of a witness, upon cross-examination, that he had been tried for a crime in another State and acquitted, does not authorize the party calling him to introduce evidence of his general character for truth and integrity. Whether such evidence would be admissible, if it had not appeared that he was acquitted on that trial, was doubted. Harrington v. Lincoln, 4 Gray, 563.

justify introduction of evidence to back up the witnesses thus conflicting.¹ Nor can such testimony be received, so it has sometimes been ruled, merely upon proof of prior conflicting statements of the witness.² Whether, after a record of a conviction has been introduced in order to discredit a witness, it is admissible to sustain him by evidence of his innocence of the offence of which he was convicted, is elsewhere considered.³ In any view, general good character as distinguished from reputation for truth, cannot be proved.⁴ If it should appear that he was *acquitted* on a criminal trial, exculpatory evidence is, as we have seen, inadmissible.⁵

The witness may be recalled to substantiate his own testimony.⁶

§ 492. When a witness is assailed on the ground that he narrated the facts differently on former occasions, while on reëxamination it is competent for him to give the circumstances under which the narration was made,⁷ it is ordinarily incompetent to sustain him by proof that on other occasions his statements were in harmony with those made on the trial.⁸ On the other hand, where the opposing case is that the witness testified under corrupt motives, or where the impeaching evidence goes to charge the witness with a recent fabrication of his testimony, it is but proper that such evidence should be rebutted.⁹ Thus where on an indictment for perjury a witness for the prose-

¹ *State v. Ward*, 49 Conn. 429; *Starks v. People*, 5 Denio, 106; *Johnson v. State*, 21 Ind. 329. See, however, *People v. Schweitzer*, 23 Mich. 301; *Davis v. State*, 38 Md. 15, 50; *Smith v. State*, 58 Miss. 867; *Wade v. Thayer*, 40 Cal. 478; and *Whart. on Ev.* § 491. See *State v. Cooper*, 71 Mo. 436.

² *Brown v. Mooers*, 6 Gray, 451; *Stamper v. Griffin*, 12 Ga. 450; *Newton v. Jackson*, 23 Ala. 335. See, however, *Paine v. Tilden*, 20 Vt. 554; *Sweet v. Sherman*, 21 Vt. 23; *Webb v. State*, 29 Oh. St. 351.

³ *Infra*, § 596 a. See *Gardner v. Bartholomew*, 40 Barb. 325.

⁴ *Heywood v. Reed*, 4 Gray, 574; *People v. Gay*, 7 N. Y. 378.

⁵ *Harrington v. Lincoln*, 4 Gray, 63.

⁶ *State v. George*, 8 Ired. 324.

⁷ *State v. Reed*, 62 Me. 129.

⁸ *Whart. on Ev.* § 492; *R. v. Parker*, 3 Dougl. 242; *Berkeley Peerage Case*, cited 2 Ph. Ev. 445; *U. S. v. Holmes*, 1 Cliff. 98; *State v. Kingsbury*, 58 Me. 238; *Sidelinger v. Bucklin*, 64 Me. 371; *Com. v. Jenkins*, 10 Gray, 485; *Robb v. Hackley*, 23 Wend. 50; *People v. Finnegan*, 1 Parker C. R. 147; *Com. v. Carey*, 2 Brewst. 404; *State v. Thomas*, 3 Strobb. 269; *People v. Mead*, 50 Mich. 228; *Nichols v. Stewart*, 20 Ala. 358; *State v. Vincent*, 24 Iowa, 570. As taking a laxer view, see *U. S. v. Neverson*, 1 Mack. (U. S.) 152.

⁹ *Taylor's Ev.* § 1330; 1 Stark. Ev. 253; 3 Rus. on Cr. 593; 2 Phil. Ev. § 445; *Henderson v. Jones*, 10 S. & R. 410; *Cooke v. Curtis*, 6 H. & J. 86;

cution swore that B. (the defendant in a trial for arson) was not at the place of the burning at the time of the fire, but was confronted at his cross-examination by his testimony to the contrary on the arson trial, it was held that as he had been thus discredited, he might be sustained by showing that he had made to C., immediately after the arson, a statement in harmony with that made by him on the perjury trial, though the particulars of the statement were inadmissible.¹

In prosecutions for rape, the fact that the prosecutrix, immediately after the offence, made complaint, is also admissible, as part of the evidence in chief.² And so, it is argued, as to other outrages; though the prevalent opinion is to the contrary.³

Stolp v. Blair, 68 Ill. 543; *Coffin v. Anderson*, 4 Blackf. 395; *Daily v. State*, 28 Ind. 285; *Clark v. Bond*, 29 Ind. 555; *State v. Vincent*, 24 Iowa, 570; *State v. George*, 8 Ired. 324; *State v. Dove*, 10 Ired. 469; *March v. Harrell*, 1 Jones, 329; *Lyles v. Lyles*, 1 Hill Ch. (S. C.) 76; *People v. Doyell*, 48 Cal. 85.

In Indiana it has been held that if a witness be impeached by proof of his having previously made statements inconsistent with his testimony, he may be corroborated by evidence of other statements made by him in accordance with his testimony. *Coffin v. Anderson*, 4 Blackf. 395; *Beauchamp v. State*, 6 Blackf. 300; *Harris v. State*, 30 Ind. 131. And the right is not limited to declarations before the impeached declarations. *Brookbank v. State*, 55 Ind. 169. But if he has not been so impeached, he cannot be corroborated in that way. *Coffin v. Anderson*, 4 Black. 395; *Clark v. Bond*, 29 Ind. 555.

See, also, *French v. Merrill*, 6 N. H. 465; *Hotchkiss v. Ins. Co.*, 5 Hun, 91; *Com. v. Wilson*, 1 Gray, 83; *Dossett v. Miller*, 3 Sneed, 72; *Jackson v. Etz*, 5 Cow. 314; *State v. Dennin*, 32 Vt. 158; *Maitland v. Bank*, 40 Md. 540; *Deshon v. Ins. Co.*, 11 Met. 199.

¹ *R. v. Neville*, 6 Cox C. C. 69. See discussion in *London Law T. May* 25, 1878.

² *Supra*, § 273; *Whart. Crim. Law*, 8th ed. § 566. See *State v. De Wolf*, 8 Conn. 93; *Conkey v. People*, 5 Parker C. R. 31, where such statements were received in corroboration of her testimony.

³ *Supra*, § 273. "The same rule," it is said in *Roscoe, Crim. Ev.* 26, "applies to other cases as to rape; namely, that where a person has been in any way outraged, the fact that this person made a complaint is good evidence, both relevant and admissible. Thus, in *R. v. Wink*, 6 C. & P. 397, upon an indictment for robbery, evidence was given (without objection) by the prosecutor, that he made a complaint the next morning to a constable. He also stated (no objection being made) that he mentioned the name of a person, as the name of one of the persons who had robbed him, but this seems objectionable. The counsel for the prosecution then proposed to ask whose name was mentioned, but *Patterson, J.*, refused to permit it, adding, 'but, when you examine the constable, you may ask him whether, in consequence of the prosecutor mentioning a name to him, he went in search of any person, and

XII. REEXAMINATION.

§ 498. A party, when matters testified to on his own side require explanation,¹ or when new matter is introduced by the opposing

if he did, who that person was.' Cresswell, J., in the case of *R. v. Osborne*, Car. & M. 622, objects to the latter part of this *dictum*; but the questions suggested are certainly very common, and rarely objected to, and indeed they hardly seem objectionable. On an indictment for shooting at the prosecutor, Patterson, J., held that evidence was admissible to show that the prosecutor, immediately after the injury, had made communication of the fact to another, but that the particulars could not be given in evidence. *R. v. Ridsdale*, York Spring Assizes, 1837; Stark Ev. 469, n. But see *supra*, § 273.

"There is a case of *R. v. Foster*, 6 C. & P. 325, in which the prisoner was charged with manslaughter. A wagoner was called, who stated that immediately after the accident he went up to the deceased and asked him what was the matter. It was objected that the reply of the deceased, which went to explain the cause of the accident, was not evidence; but Gurney, B., said that it was the best possible testimony that, under the circumstances, could be adduced to show what it was that had knocked the deceased down; and he added that the case of *Aveson v. Lord Kinnaid* (*infra*, p. 30) bore strongly upon the point. A somewhat similar case is that of *Thompson et ux. v. Trevaunion*, Skin. 402, where, in an action for an assault upon the wife, Holt, C. J., allowed what the wife said 'immediate upon the hurt received, and before that she had time to devise and contrive anything for her own advantage,' to be given in evidence. But it is added that these two cases are difficult to reconcile with established prin-

ciples. It is to be observed that both extend to the particulars of what was said; and, though they were both made in close proximity to the event to which they profess to relate, it seems very questionable, indeed, whether that ground alone, as is presumed by Lord Holt, is sufficient to render them admissible." In this criticism, Cockburn, C. J., in a pamphlet already cited (*supra*, § 263), concurs.

¹ The rule with regard to reexaminations is thus laid down by Abbott, C. J., in *The Queen's Case*, 2 B. & B. 297: "I think the counsel has a right, on reexamination, to ask all questions which may be proper to draw out an explanation of the sense and meaning of the expressions used by the witness on cross-examination, if they be in themselves doubtful; and also of the motive by which the witness was induced to use those expressions; but he has no right to go further, and introduce matter new in itself, and not suited to the purpose of explaining either the expressions or the motives of the witness. ● distinguish between a conversation which a witness may have had with a party to a suit, whether criminal or civil, and a conversation with a third person. The conversations of a party to the suit, relative to the subject matter of the suit, are in themselves evidence against him in the suit; and if a counsel chooses to ask a witness as to anything which may have been said by an adverse party, the counsel for that party has a right to lay before the court all that was said by his client in the same conversation; not only so much as may explain or qualify the matter introduced by the

interest, has a right in rebuttal to examine his witnesses, though as to new matter of his own he cannot ordinarily reexamine.¹ Party may reexamine witness.

§ 494. The trial judge may, at his discretion, permit a witness to be recalled in order to be reexamined by the party recalling him.² As a matter of discretion, however, this is not reviewable by the appellate court,³ unless it ap- Witness may be recalled.

previous examination, but even matter not properly connected with the part introduced upon the previous examination,—provided only that it relate to the subject matter of the suit; because it would not be just to take part of a conversation as evidence against the party, without giving the party at the same time the benefit of the entire residue of what he said on the same occasion." In *Prince v. Samo*, 7 A. & E. 627, the Court of Queen's Bench said they could not assent to the doctrine laid down in the above case; and they held, that when a statement made by a party to a suit, in giving evidence on a former trial, has been got out in cross-examination, only so much of the remainder of the evidence is allowed to be given on reexamination as tends to qualify or explain the statement made on cross-examination. Recognized in *Sturge v. Buchanan*, 10 A. & E. 605; *State v. Geddicke*, 43 N. J. L. 271.

When one of the plaintiff's witnesses stated on cross-examination facts not strictly evidence, but which might prejudice the plaintiff, it was held that, unless the defendant applied to strike them out of the judge's notes, the plaintiff was entitled to reexamine upon them. *Blewitt v. Tregoning*, 3 A. & E. 554.

¹ See *Whart. on Ev. § 572*; and see *Queen's Case*, 2 B. & B. 297; *R. v. St. George*, 9 C. & P. 488; *Prince v. Samo*, 7 A. & E. 627; *S. C.*, 3 N. & P. 139;

Com. v. Wilson, 1 Gray, 337; *Baxter v. Abbott*, 7 Gray, 71; *Campbell v. State*, 23 Ala. 44; *State v. Denis*, 19 La. An. 119; *State v. Scott*, 24 La. An. 161; *People v. Keith*, 50 Cal. 137.

"It is within the discretion of the court to permit any question to be asked on re-direct examination which it was proper to have admitted on the examination in chief." *Cooley, J., Hemmens v. Bentley*, 32 Mich. 89. See *Anderson v. State*, 42 Ga. 9; *Donnelly v. State*, 26 N. J. L. 463; *Stockwell v. Holmes*, 33 N. Y. 53; *Whart. Cr. Pl. & Pr. §§ 564 et seq.*

² 2 Phil. Ev. 408; *Bevan v. McMahon*, 2 Sw. & Tr. 55; *Phetipplace v. Sayles*, 4 Mason, 312; *U. S. v. Wilson*, 1 Bald. 78; *Com. v. Moulton*, 4 Gray, 39; *Com. v. Dam*, 107 Mass. 210; *State v. Alford*, 31 Conn. 40; *Webb v. State*, 29 Oh. St. 351; *State v. Ruhl*, 8 Clarke (Iowa), 447; *State v. Porter*, 34 Iowa, 241; *Thomas v. State*, 27 Ga. 287; *State v. Haynes*, 71 N. C. 79; *State v. Linney*, 52 Mo. 40; *State v. Jones*, 64 Mo. 391; *Dove v. State*, 3 Heisk. 348; *People v. Cotta*, 49 Cal. 632. See *Whart. Cr. Pl. & Pr. § 566.*

³ *People v. Mather*, 4 Wend. 229; *Covanhoven v. Hart*, 21 Penn. St. 495; *Howell v. Com.*, 5 Grat. 664; *White v. Bailey*, 10 Mich. 155; *Williams v. Allen*, 40 Ind. 295; *Ross v. Hayne*, 3 Greene, 211; *State v. Rorabacher*, 19 Iowa, 154; *State v. Haynes*, 71 N. C. 79; *State v. Silver*, 3 Dev. 332; *Colclough v. Rhodus*, 2 Rich. 76; *Jesse v.*

pear that the error goes to the merits of the case.¹ So a witness may, at the discretion of the court, be permitted to return to the stand, after dismissal, to correct his testimony.² A witness may also be recalled at the request of the jury.³

§ 495. Whenever explanation is required of answers on re-examination, then the cross-examining party may re-cross-examine, confining himself to the new matter introduced on the re-examination.⁴ It is, however, at the discretion of the court to close such re-cross-examination when the party seeking it has had abundant prior opportunity to draw out his case.⁵

Re-cross-examination permitted at discretion of court.

XIII. PRIVILEGED COMMUNICATIONS.

§ 496. A lawyer is not permitted to disclose communications made to him by his client in the course of their professional relations.⁶ Nor is the privilege in any way affected by the statutes making parties witnesses;⁷ though there is, as we will see, a conflict of authority whether a party making himself a witness can refuse to answer as to his confidential communications to his counsel.⁸ Nor does the privilege cease to operate because a friend was present with the client at the interview.⁹

Lawyer not permitted to disclose communications of client.

State, 20 Ga. 156; *Bigelow v. Young*, 30 Ga. 121; *Gayle v. Bishop*, 14 Ala. 552; *Freleigh v. State*, 8 Mo. 606; *German Bk. v. Kerlin*, 53 Mo. 382; *Cotton v. Jones*, 37 Tex. 34. That a witness may be recalled even after the case is closed, see *State v. Alford*, 31 Conn. 40; *Com. v. Moulton*, 4 Gray, 39; *Com. v. Dam*, 107 Mass. 210.

¹ *People v. Cole*, 43 N. Y. 508; *Thompson v. State*, 37 Tex. 121; *Edmonson v. State*, 7 Tex. Ap. 116. See *Whart. Cr. Pl. & Pr.* § 566.

² *Kingston v. Tappen*, 1 Johns. Ch. 368; *Walker v. Walker*, 14 Ga. 242; *Dunn v. Pipes*, 20 La. An. 276.

³ *Van Huss v. Rainbolt*, 2 Coldw. 139.

⁴ *Wood v. McGuire*, 17 Ga. 303.

⁵ *Com. v. Nickerson*, 5 Allen, 518; *State v. Hoppiss*, 5 Ired. 406.

⁶ *Whart. on Ev.* § 495; *Cromack v. Heathcote*, 2 B. & B. 4; *Skinner v. R. R. L. R.*, 9 Exch. 298; *Woolley v. R. R. L. R.*, 4 C. P. 602; *Branford v. Branford*, 48 L. J. P. D. A. 40; *Maxham v. Place*, 46 Vt. 434; *Britton v. Lorenz*, 45 N. Y. 57; *Graham v. People*, 63 Barb. 468; *Bacon v. Frisbie*, 89 N. Y. 394; *Bowers v. State*, 29 Oh. St. 542; *Jenkinson v. State*, 5 Blackf. 465; *Orton v. McCord*, 33 Wis. 205; *Chahoon v. Com.*, 21 Grat. 822; *State v. Hazleton*, 15 La. An. 72.

⁷ *Montgomery v. Pickering*, 116 Mass. 227; *Brand v. Brand*, 39 How. (N. Y.) Pr. 193; *Barker v. Kuhn*, 38 Iowa, 395. See *supra*, § 427.

⁸ *Infra*, § 499; *Woburn v. Henshaw*, 101 Mass. 193.

⁹ *Bowers v. State*, 29 Oh. St. 542.

The privilege does not extend to knowledge possessed by the lawyer which he obtained as to matters as to which he had not been consulted professionally by his client.¹ And it does not cover matters of record, or matters spread before the public eye by the client's own action.²

§ 497. A formal retainer is not necessary to constitute a relationship whose communications the law will treat as inviolable.³ It is enough, to enable the protection of the law to apply, that a legal adviser is sought for the purpose of confidential professional advice, "with a view either to the prosecution of a claim, or a defence against a claim;"⁴ and this privilege extends to consultations with a prosecuting attorney with regard to the institution of a prosecution.⁵ An attorney, however, has been compelled to testify as to non-confidential statements made to him, before retainer, by one who

Not necessary that relationship should be formally instituted.

¹ *Greenough v. Gaskell*, 1 M. & K. 98; *State v. Douglass*, 20 W. Va. 770.

A., being charged with embezzlement, retains B., a barrister, to defend him. In the course of the proceedings, B. observes that an entry has been made in A.'s account book, charging A. with the sum said to have been embezzled, which entry was not in the book at the commencement of B.'s employment. This being a fact observed by B. in the course of his employment, showing that a fraud has been committed since the commencement of the proceedings, is not protected from disclosure in a subsequent action by A. against the prosecutor in the original case for malicious prosecution. *Brown v. Foster*, 1 H. & N. 736. *Stephen's Ev. art.* 115.

² *Snow v. Gould*, 74 Me. 540, and cases there cited; *infra*, § 503.

³ *Ross v. Gibbs*, L. R. 8 Eq. 522; *Foster v. Hall*, 12 Pick. 89; *Beltzhoover v. Blackstock*, 3 Watts, 20. See *Andrews v. Simms*, 33 Ark. 771.

That the privilege extends to any representative of the attorney, see

Jackson v. French, 3 Wend. 337; *Sibley v. Waffle*, 16 N. Y. 180; *Whart. on Ev.* § 582. But it does not extend to a mere student at law in the attorney's office, nor to the attorney's clerk, although the client supposed he was an attorney. *Barnes v. Harris*, 7 Cush. 576. Nor does it cover the case of one not a lawyer, although the party supposed him to be a lawyer. *Sample v. Frost*, 10 Iowa, 266.

⁴ *Sir John Stuart*, in *Ross v. Gibbs*, L. R. 8 Ex. 522; *S. P.*, *Wilson v. R. R.*, L. R. 14 Eq. 477; *Minet v. Morgan*, L. R. 8 Ch. 361; *Sargeant v. Hampden*, 38 Me. 581; *Foster v. Hall*, 12 Pick. 89; *March v. Ludlam*, 3 Sandf. Ch. 35; *Beltzhoover v. Blackstock*, 3 Watts, 20. See, however, *Wilson v. Rastall*, 4 T. R. 753.

Communications by a married woman to her husband's attorney, as to her separate interests, are privileged. *Scranton v. Stewart*, 52 Ind. 68.

⁵ *Vogel v. Gruaz*, Sup. Ct. U. S. 1884. See *Worthington v. Scribner*, 109 Mass. 487.

afterwards became his client.¹ An injunction of secrecy is not necessary to protect the communications.²

§ 498. A client may surrender his privilege by consent that his counsel should be examined,³ which consent cannot be implied by the client merely calling the lawyer as a witness, without examining him as to such communications.⁴ If he do not so consent, dissolution of their connection, no matter how it may occur, works no change in regard to the inviolability of their intercourse.⁵ Even death does not have this effect.⁶

§ 499. Communications which the lawyer is precluded from disclosing the client cannot be compelled to disclose.⁷ Where, however, a party offers himself as a witness, it has been said that he may be asked as to his communications to his counsel,⁸ though the better opinion is to the contrary.⁹

§ 500. The protection insured by the relationship of lawyer and client may be lost when not claimed by the party privileged;¹⁰ though it is held not to be extinguished by compromise of the suit.¹¹ While the privi-

¹ *Cutts v. Pickering*, 1 Ventr. 197. N. Y. Sup. Ct. 360; S. C., 15 Abb. Pr. See *R. v. Avery*, 8 C. & P. 596; *R. v. N. S. 337*; *Bigler v. Regher*, 43 Ind. Tuff, 1 Den. C. C. 334, and discussion 112; *Duttenhofer v. State*, 34 Oh. St. in Roscoe's Cr. Ev. 8th ed. 153. 91.

² *Wheeler v. Hill*, 16 Me. 329.

³ *Infra*, § 500; *Merle v. Moore*, Ry. 193. ⁴ *Woburn v. Henshaw*, 101 Mass. 193.

⁵ *Vaillant v. Dodamead*, 2 Atk. 524; *Duttenhofer v. State*, 34 Oh. St. 91; *Bigler v. Regher*, 43 Ind. 112; *Barker v. Kinsey*, 1 C., M. & R. 38. *v. Kuhn*, 38 Iowa, 395; *Bobo v. Bryson*, 21 Ark. 387; *State v. White*, 19 Kan. 445. See *supra*, § 479.

⁶ *Wilson v. Rastall*, 4 T. R. 759; ⁷ *Hare on Discovery* (2d ed.), 167; *Cholmondeley v. Clinton*, 19 Ves. 268; *Walsh v. Trevanion*, 15 Sim. 577; *Charlton v. Coombes*, 4 Giff. 372; *Cal- Hunter v. Capron*, 5 Beav. 93; *Dart- ley v. Richards*, 19 Beav. 401; *Russell v. Jackson*, 9 Hare, 387; *Chant v. mouth v. Holdsworth*, 10 Sim. 476; *Brown*, 7 Hare, 79. *Thomas v. Rawlings*, 27 Beav. 140.

⁸ *Foster v. Hall*, 12 Pick. 89; *Moore v. See, however, People v. Atkinson*, 40 *Bray*, 10 Barr, 520. Cal. 284, where it was said that the

⁹ *Thompson v. Falk*, 1 Drew. 21; *Vent v. Pacey*, 4 Russ. 193; *Combe v. court would interpose of its own mo- London*, 1 Russ. 631; *Holmes v. Bad- tion; and see supra*, §§ 281-83.

¹⁰ *Smith*, 28 Vt. 701; *Carnes v. Platt*, 36 ¹¹ *Hughes v. Garnons*, 6 Beav. 352.

lege may be waived by the client, the evidence of the waiver must be distinct and unequivocal.¹

§ 501. When two or more persons address a lawyer as their common agent, so far as concerns a stranger their communications to the lawyer would be privileged. It is otherwise, however, as to themselves; and as they stand on the same footing as to the lawyer, either can compel him to testify against the other as to their negotiations.²

Communications, to be privileged, must be made to party's exclusive adviser.

§ 502. Privilege in this relation does not extend to information a lawyer has received from others than his client, though his client may have given the same information.³ It has also been held that privilege does not protect statements made by client to counsel for the purpose of obtaining information as to matters of fact, not connected with litigation;⁴ or statements made to the counsel in the presence of third parties, such parties not being concerned in a confidential consultation;⁵ or statements made to counsel in order to induce him to believe that the cause is one he can undertake without breach of duty to another client.⁶

Lawyer not privileged as to information received by him extraprofessionally.

§ 503. Information belonging to ordinary, as distinguished from professional intercourse, is not within professional privilege. The

¹ *Hamilton v. People*, 29 Mich. 183. See cases cited *supra*, § 498; *Montgomery v. Pickering*, 116 Mass. 231.

² See cases cited Whart. on Ev. § 587.

³ Whart. on Ev. § 588. See *People v. Atkinson*, 40 Cal. 284.

⁴ *Bramwell v. Lucas*, 2 B. & C. 743; *Desborough v. Rawlins*, 3 Myl. & C. 515; *Sawyer v. Birchmore*, 3 Myl. & K. 572; *Allen v. Harrison*, 30 Vt. 219. *Infra*, § 503.

In *R. v. Farley*, 1 Den. C. C. 197, when the wife of a prisoner took a forged will to an attorney at the prisoner's request, and asked if he could advance her husband some money upon the mortgage of property mentioned in

the will; it was held that this was not a privileged communication. So where a forged will was put into an attorney's hands not in professional confidence, but that by finding it among the title deeds of the deceased, which the prisoner sent with the will, he might be disposed to act upon it; it was held by all the judges that the communication was not privileged. *R. v. Jones*, 1 Den. C. C. R. 166. *Roscoe's Cr. Ev.* 8th ed. 153.

⁵ *Goddard v. Gardner*, 28 Conn. 172. See *Hoy v. Morris*, 13 Gray, 519; *Perkins v. Guy*, 55 Miss. 153.

⁶ *Heaton v. Findlay*, 12 Penn. St. 304.

topic must be within the peculiar scope of a lawyer's profession.¹

Information not in the scope of professional duty not privileged.

A lawyer, for instance, may be required to identify his client;² to prove his client's handwriting;³ and to divulge statements made to him by his client when such statements are simply casual observations, having nothing to do with any legal question as to which the lawyer is consulted,⁴ or are collateral to such question.⁵ It is now said, however, that he will not be compelled to disclose his client's address,⁶ unless the client be a ward of court,⁷ or in bankruptcy.⁸ But the condition of the client's mind, when he consults his lawyer, when such condition would be patent to all observers, is not privileged;⁹ nor is the question whether the lawyer was retained by the client, and in what capacity.¹⁰

§ 504. The privilege does not shield parties seeking for advice as to prospective or past infractions of law.¹¹ Communications of an intended offence of this class counsel are bound to disclose, and so as to threats made in the attorney's office to take

¹ *Carpmael v. Powis*, 1 Ph. 687; 257; though see *Studdy v. Sanders*, 2 Bramwell v. Lucas, 2 B. & C. 745; D. & R. 347.

Brown v. Foster, 1 H. & N. 736; R. v. ⁷ *Ramsbotham v. Senior*, L. R. 8 Eq. 575.

Levenson, 11 Cox C. C. 152; *Goodall v. Little*, 20 L. J. Ch. 132; 1 Sim. N. S. 135; *Wheatley v. Williams*, 1 M. & W. 533; *Desborough v. Rawlins*, 3 Myl. & Craig, 515; *Jones v. Goodrich*, 5 Mood. P. C. 16; *Smith v. Daniel*, L. R. 18 Eq. 649; *Clark v. Richards*, 3 E. D. Smith, 89; *Pierson v. Steortz*, Morris (Iowa), 136; *State v. Mewherter*, 46 Iowa, 88.

² *Studdy v. Sanders*, 2 D. & R. 347; Doe v. Andrews, 2 Cowp. 846.

³ *Hurd v. Moring*, 1 C. & P. 372; *Johnson v. Daverne*, 19 Johns. 134; *Brown v. Jewett*, 120 Mass. 215; see *Ramsbotham v. Senior*, L. R. 8 Eq. 575; *Campbell, Ex parte*, L. R. 5 Ch. Ap. 703.

⁴ *Gillard v. Bates*, 6 M. & W. 547; *Annesley v. Anglesea*, 11 How. St. Tr. 1220.

⁵ *State v. Mewherter*, 46 Iowa, 88.

⁶ *Heath v. Creelock*, L. R. 15 Eq. 257; though see *Studdy v. Sanders*, 2 D. & R. 347.

⁷ *Ramsbotham v. Senior*, L. R. 8 Eq. 575.

⁸ *Cathcart, In re*, L. R. 5 Ch. 703.

⁹ *Daniel v. Daniel*, 39 Penn. St. 191.

¹⁰ *Beckwith v. Benner*, 6 C. & P. 681; *Heaton v. Findlay*, 12 Penn. St. 304; though see *contra*, as to nature of relationship, *Chirac v. Reinicker*, 11 Wheat. 280; S. C., 2 Pet. 613.

¹¹ *R. v. Avery*, 8 C. & P. 596; *R. v. Farley*, 2 C. & K. 313; S. C., 1 Den. C. C. 197; *R. v. Brewer*, 6 C. & P. 363; *Follett v. Jefferyes*, 1 Sim. N. S. 17; *Charles v. Coombes*, 4 Giff. 372; *Shore v. Bedford*, 5 Man. & Gr. 271; *People v. Blakeley*, 4 Parker C. R. 176; *Bank v. Mersereau*, 3 Barb. Ch. 598; *People v. Sheriff*, 29 Barb. 622; *Graham v. People*, 63 Barb. 483; *People v. Mahon*, 1 Utah, 205. In *Cole's Case*, Cent. L. J. Aug. 1, 1879; S. C., 8 Weekly Notes, 114, Judge Butler said in the U.S. Dist. Ct. in Philadelphia: "But suppose a client had devised, with the assistance

the life of a man subsequently murdered by the client.¹ The protection of privilege has also been withheld from communications to a lawyer for the purpose of raising money on forged securities.² It is scarcely necessary to add that when the lawyer connives at the illegal purpose he so far loses his professional character as to preclude him personally from claiming any privilege. "Where

Privilege does not extend to communications in view of breaking the law.

of counsel, a scheme to obstruct the administration of justice, would the communications be privileged? The authorities say not."

In *R. v. Downer* (Cr. Ca. Res.), 14 Cox C. C. 639; 43 L. T. N. S. 445, "the prisoner was charged at quarter sessions with obtaining money and goods from a railway company by means of false pretence, the substance of the case charged being that she had represented that she had delivered to the railway company a valuable parcel, when in truth it was not so. On the part of the prosecution certain letters were shown to the prisoner's solicitors, and they were asked if those letters were written by her direction. The question was objected to on the ground of privilege, and the objection upheld, but the counsel for the prosecution was allowed to ask whether the witnesses had an interview with the prisoner on a certain day, and whether in consequence of that interview those letters were written, and the answers being in the affirmative, a certain letter was admitted." The Court of Appeal "set aside the conviction upon the ground that it had not been proved that the letter had been written under the actual direction of the prisoner, which it would have been had the first question not been overruled. The court was unanimous in holding that question to be admissible: the Lord Chief Justice upon the ground that 'the solicitor's innocence of any complicity being assumed, its being writ-

ten by him at the client's direction makes it the act of the client;' Mr. Justice Stephen and Mr. Justice Denman upon the broad ground that there is no privilege in crime."

¹ *State v. Mewherter*, 46 Iowa, 88.

² *R. v. Farley*, *ut supra*.

"There is no confidence as to the disclosure of iniquity. You cannot make me the confidant of a crime or a fraud, and be entitled to close up my lips upon any secret which you have the audacity to disclose to me relating to any fraudulent intention on your part; such a confidence cannot exist." Lord Hatherley, in the case of *Gartside v. Outram*, 26 L. J. Ch. 113, 114, citing *Annesley v. Earl of Anglesea*, 17 How. St. Tr. 1139; *Mornington v. Mornington*, 2 John. & H. 697, 703; *Gore v. Bowser*, 5 D. G. & Sm. 30; *Goodman v. Holroyd*, 15 C. B. (N. S.) 839; *Blight v. Goodliffe*, 18 C. B. (N. S.) 757; *Chartered Bank of India v. Rich*, 32 L. J. Q. B. 300, 306; *R. v. Jones*, 1 Den. C. C. 166; *R. v. Farley*, 1 Den. C. C. 197. On such an issue the court will look at the circumstances of each case. *Bassford v. Blakesley*, 6 Beav. 131. See, also, *Doe d. Shellard v. Harris*, 5 C. & P. 594; *Levy v. Pope*, M. & M. 410. But *quaere*, when a paper criminating the client comes into his lawyer's hands for other purposes than advice as to crime. *R. v. Tynley*, 18 L. J. 36, M. C.; *R. v. Brown*, 9 Cox, C. C. 281, and other cases cited in London Law Times, May 3, 1884, p. 8.

Where there is fraud, there is no

a solicitor is party to a fraud, no privilege attaches to the communications with him on the subject, because the contriving of a fraud is no part of his duty as a solicitor."¹ A lawyer, however, cannot be asked, and certainly cannot be compelled to answer, whether his advice to his client did not involve an illegal purpose.² The protection is said to extend to consultations as to all acts not indictable.³

§ 505. "The communication," says Mr. Hare, in his work on Discovery,⁴ "between a party, or his legal adviser, and witnesses are also privileged. There is, in those cases, the same necessity for protection; otherwise, as Lord Langdale remarked, it would be impossible for a party to write a letter for the purpose of obtaining information on the subject of a suit, without incurring the liability of having the materials of his defence disclosed to the adverse party."⁵ Communications between the parties, with regard to the preparation of evidence, are in like manner privileged.⁶

§ 506. Telegraphic agents and operators (if there be no statute to the contrary) are compelled to produce in court the originals of telegrams, or, if such originals be lost, to give secondary evidence of their contents.⁷ A statute merely prescribing that telegrams shall not be disclosed

privilege. *Reynell v. Sprye*, 10 Beav. 51; *Follett v. Jefferyes*, 1 Sim. N. S. 1. The topic is fully discussed in Hare on Disc. (2d ed.) 163. See, also, *People v. Blakely*, 4 Park. C. R. 176.

¹ *Turner, V. C.*, in *Russell v. Jackson*, 9 Hare, 392; *Brown v. Foster*, 1 H. & S. 236, cited *supra*, § 496.

² *Doe v. Harris*, 5 C. & P. 594.

³ *Bank v. Mersereau*, 3 Barb. Ch. 528. See *Gartside v. Outram*, 26 L. J. Ch. 115; *Maxham v. Place*, 46 Vt. 434.

⁴ Hare on Disc. 2d ed. 1876, 151.

⁵ *Preston v. Carr*, 1 Y. & J. 175; *Ross v. Gibbs*, L. R. 8 Eq. 922; *Curling v. Perring*, 2 Myl. & K. 380; *Storey v. Lennox*, 1 Myl. & C. 525; *Llewellyn v. Baddeley*, 1 Hare, 527; *Lafone v. Falkland Islands Co.*, 4 Kay

& J. 34; *Gandee v. Stansfield*, 4 De G. & J. 1; *Daw v. Eley*, 2 Hem. & M. 725; *Phillips v. Routh*, L. R. 7 C. P. 289; *Wilson v. R. R.*, L. R. 14 Eq. 477; *Hamilton v. Nott*, L. R. 16 Eq. 112.

⁶ *Kennedy v. Lyell*, 48 L. T. N. S. 455. See *Wheeler v. Le Marchant*, 44 L. T. N. S. 632. Hare on Disc. 152, citing *Allan v. Royden*, 43 L. J. (C. P.) 206; though see *Rayner v. Ritson*, 6 B. & S. 888; *Colman v. Truman*, 3 Hurl. & N. 871.

⁷ *Ince's Case*, 24 L. T. (N. S.) 421; *State v. Litchfield*, 58 Me. 267; *Com. v. Jeffries*, 7 Allen, 548; *Henisler v. Freedman*, 2 Parsons Sel. Cas. 274; *Nat. Bk. v. Nat. Bk.*, 7 W. Va. 544; *Brown, Ex parte*, Ct. App. Mo. 1879; *Cent. L. J. May 9, 1879*. And see

does not apply to cases where they are called for by process of law.¹ Not only is such production required by the rule which permits a party to compel the production in court of all papers essential to enable him to make out a litigated case, but unless this right be maintained in this special instance, parties not looked upon

Whart. on Ev. § 617. See *contra*, Cooley, J., Const. Lim. 306-7; Am. Law Reg. Feb. 1879, cited Whart. on Ev. (2d ed.) § 595.

"The main question presented for our determination is, whether a telegraphic operator is bound to testify to the contents of a telegraphic message. The case finds the message material to the issue. A verbal message, communicated to the prisoner, would be admissible, and the party communicating it would be compelled to state it. So a written message, or its contents, after due notice to produce the original, and a failure of its production by the party notified, would be received in evidence. The mode of transmission to the person delivering the message, whether by telegraph or otherwise, has nothing to do with the matter. The important inquiry relates to its materiality.

"Nor can telegraphic communications be deemed any more confidential than any other communications. Telegraphic communications are not to be protected to aid the robber or assassin in the consummation of their felonies, or to facilitate their escape after the crime has been committed. No communication should be excluded, no individual should be exempt from inquiry, when the communication, or the answer to the inquiry, would be of importance in the conviction of crime or the acquittal of innocence, except when such exclusion is required by some grave principle of public policy. The honest man asks for no confidential communications, for the withhold-

ing the same cannot benefit him. The criminal has no right to demand exclusion of evidence because it would establish his guilt.

"The telegraphic companies cannot rightfully claim that the messages of rogues and criminals, which they may innocently or ignorantly transmit, should be withheld, whenever the cause of justice renders their production necessary. They cannot wish their servants should, however innocently, coöperate in the commission of crime, and decline to coöperate in its detection and punishment, and thus become its accomplices. The interests of the public demand that resort should be had to all available testimony, which may lead to the detection and punishment of crime, and to the protection of innocence. The telegraph operator, as such, can claim no exemption from interrogation. Like other witnesses, he is bound to answer all inquiries material to the issue." Appleton, C. J., *State v. Litchfield*, 58 Me. 269. See, also, *U. S. v. Babcock*, 3 Dillon, 566, where the court granted a writ requiring a telegraph company to bring into court all the copies of telegrams received at certain offices by and from persons named. In this case, however, materiality was assumed, and no question of privilege was raised.

To the same effect is the action of the House Judiciary Committee in *Barnes's Case*, 20 Alb. L. J. 110.

¹ *Brown, Ex parte*, 72 Mo. 83. The statutes are analyzed and commented on by Mr. Hitchcock, in the *Southern Law Review* for 1879.

with favor by the officials of telegraphic corporations might be exposed to ruin by the disclosure of telegrams prejudicing them and the suppression of telegrams operating to their advantage. It may be said, we have no right to presume such perfidy. We have not; yet, as a matter of fact, it has been found impossible, in times of high political or monetary excitement, to seal apertures through so many of which there is a leakage; and a wire may be tapped where it might be difficult to tap an operator. This abuse cannot be absolutely prevented; but it may be corrected by giving each party equal rights, and by saying to such corporations, "You cannot plead your immunity so as to injure those whom you are unable or unwilling to protect."

But while we must hold that a telegraph corporation is bound to produce whatever papers may be needed to subserve the case of a litigant, the subpoena, to justify an attachment, should designate the specific paper required. A call for a general correspondence, so that an inquirer may pick out what he wants, and get possession in this way of the private affairs of others, should not be sustained.¹

¹ *Supra*, § 345. A wider operation of the writ was allowed in Barnes's Case by a committee of the House of Representatives, in 1877 (Cong. Rec. vol. v. pt. i. p. 604), and in Brown, *Ex parte*, *supra*. The distinction in the text is vindicated with much strength by Mr. Hitchcock, in the excellent article already noticed. South. Law Rev. Oct. 1879; published, also, in pamphlet form, St. Louis, 1879. The conclusions stated by Mr. Hitchcock are as follows:—

"I. Telegraphic communications, however confidential, do not, *as such*, constitute a class of privileged communications. Remaining in the custody of the telegraph company, they are subject to compulsory production for use in evidence, under process lawfully issued whenever those conditions are fulfilled, in respect of the case in hand, which must exist in any case to render lawful the exercise of such a power.

"II. The right of a court to compel by *subpoena duces tecum* the production in evidence by third parties of private writings, described with certainty, and first shown to be at least *prima facie* relevant and competent, does not include any right to order search for, or compulsory production of, papers not thus brought within the lawful power of the court; and the compulsory search for and enforced production by third parties of such papers, in the absence of such certainty and proof, is an "unreasonable" and unlawful search and seizure, within the meaning of the Constitution.

"III. The exceptional features of the telegraph service, including the virtual necessity for its use by the public, and the unavoidable accumulation of private messages in telegraph offices, give rise to exceptional danger of abusing even the lawful power of the courts, and devolve upon them the

§ 507. Whether a priest is privileged as to the confidences of the confessional has been elsewhere discussed.¹ The difficulties attending the question are undoubtedly great. To establish privilege in such cases we must concede privilege to all religious confidences. But to this the objec-

Priests not privileged as to confessional at common law.

duty of exceptional precautions in its exercise. And in view of the apparent tendency of the decisions, this judicial duty should be defined and enforced without delay by appropriate legislation.

"IV. The telegraph service of the country, as an indispensable agency of commercial intercourse among the States, has been held by the Supreme Court to be clearly within the grant of congressional powers. Congress should exercise that power in this regard, not necessarily by assuming the service of the telegraph, — a completely distinct question, not involved in the present discussion, — but by such uniform regulations as will protect those who use it, not only against unauthorized disclosures by telegraph employes, but also from interference by state legislation, or by any court, with the lawful right of free communication; and from 'unreasonable searches or seizures' of such communications under color of civil or criminal process.

V. Such regulations should prescribe, as precedent to the exercise by any court of the power in question, conditions which shall effectively distinguish the lawful right to compel the production of relevant and competent evidence from the inquisitorial and oppressive power of searching among, or compelling the production of, private papers of third parties, to find out what evidence they may contain. Among these should be included:—

"a. An affidavit of the party applying for such writ, at least upon infor-

mation and belief, of the existence, the sufficiently certain description, and the alleged or supposed contents of the dispatches called for, showing their relevancy in the cause.

"b. Reasonable notice of such application, so far as practicable, to any third person, sender, or receiver of such telegram, and reasonable opportunity to show cause against the same.

"c. In addition to the criminal penalty for false swearing in any such affidavit, a right of action for exemplary damages against any person wilfully or maliciously procuring, by means of such process, the unnecessary disclosure of any private message.

"VI. Effectual provision should also be made against the like abuse of power by any legislative body or committee thereof. The constitutional right of such bodies to take and compel testimony touching facts, the knowledge of which is requisite to the fulfilment of their constitutional duties, is not denied, and was convincingly affirmed by the Supreme Court of Massachusetts in *Burnham v. Morrissey*, 14 Gray, 239; but it was also there held that such bodies are not the final judges of their own powers and privileges in cases involving the rights and liberty of the citizen, their action in that regard being subject to the review of the courts. The legislative recognition of the principles already discussed would doubtless go far, in future, to prevent the necessity for judicial interference in such cases."

¹ Whart. on Ev. § 507.

tions are serious. (1) What are *religious* confidences? Are not all confidences sanctioned by duty more or less religious?¹ (2) Can we, consistently with the Constitution of the United States, confer upon the confidences of members of religious communions distinctive privileges? Would statutes conferring such privileges be constitutional? (3) Even supposing that it is proper and constitutional to confer such privileges on members of religious communions, can we either logically or constitutionally give a protection to one communion which we refuse to another, and if we admit all communions to this privilege will not this be admitting everybody?²

§ 508. By the common law of England, as accepted in the United States, the duty of testifying as to all communications received from others has been imposed not merely on ministers of religion generally, but on priests of the Roman Catholic Church, as to communications received in the confessional.³ At the same time,

¹ See Mr. Livingston's argument, *Livingston's Works*, i. 467.

² In *Feital v. R. R.*, 109 Mass. 398, it was held by the Supreme Court of Massachusetts that a person going on Sunday to a clairvoyant exhibition, where there was to be rope dancing, and an admission charged, was attending "religious service" so as to be within the exception of the statutes prohibiting travelling on Sunday unless for purposes of religious worship, or of necessity, or charity.

³ *Wilson v. Rastall*, 4 T. R. 753; *R. v. Sparkes*, 1 Peake, 77; *Butler v. Moore*, M'Nally's Ev. 253; *Anon.*, 2 Skin. 404; *Du Barree v. Livette*, Peake's Cas. 77; *R. v. Hay*, 2 F. & F. 4; *Wheeler v. Le Marchant*, 44 L. T. N. S. 632, per Jessel, M. R.; *Com. v. Drake*, 15 Mass. 161; *Simon v. Gratz*, 2 Penn. R. 417; *State v. Bostick*, 4 Harr. (Del.) 564.

Sir J. F. Stephen (Ev. Art. 117, note 45), while saying that the question has never been solemnly decided, maintains that the law is that privilege in

such cases cannot be maintained. (See remarks in *London Law Times* for July 9, 1881.)

I have been referred by a learned friend to the following cases as conflicting with the conclusion of the text: *People v. Phillips*, Court of Gen. Sess. N. Y. 1813; *Phillips' Trial*, as approved by Chancellor Dessassaure, in *Fernandez v. Henderson*, 1 Carolina L. J. 213; *Swish's Case*, 2 City Hall Rec. 77; *Com. v. Cronin*, 1 Quart. L. Jour. 128. And see argument in Whart. on Ev. 2d ed. § 597.

That Protestant divines are not privileged, see *R. v. Sparks*, 1 Peake, 77, per Bulla, J.; *Com. v. Drake*, 15 Mass. 161.

In England no such privilege is conceded as a right. The English ecclesiastical law invites the penitent to confess his sins, "for the unburdening of his conscience, and to receive spiritual consolation and ease of mind;" but the minister, to whom confession is made, is not excused from testifying in a court of justice, but merely enjoined, "under

prosecuting officers, as representing the State, properly shrink from calling upon priests to disclose confessions as evidence against parties on trial for crimes; and eminent judges have gone a great way in encouraging this reluctance. "I, for one," so Best, J., is reported to have said, "will never compel a clergyman to disclose communications made to him by a prisoner; but if he chooses to disclose them, I will receive them in evidence."¹ So it was declared by Alderson, B., in a case where it appeared that a chaplain in a work-house had frequent conversations in his pastoral capacity with the inmates, that it was better that the chaplain should not be called as a witness to prove confessions so received by him.² The same sentiment has led to a statute in New York, providing that "no minister of the gospel or priest of any denomination whatsoever, shall be allowed to disclose any confessions made to him in his professional character, in the course of discipline enjoined by the rule or practice of such denomination."³ Similar statutes have been enacted in other States, though how far such statutes are constitutional is, as has been noticed, a matter of doubt. Under these statutes, however, a communication, to be privileged, must be made in the course of religious discipline,⁴ and it is questionable whether it relates to the concoction of an intended crime.⁵

pain of irregularity," not to reveal what is confessed. Const. & Can. 1 J. 1 Can. cxlii.; 2 Gibs. Cod. p. 963. This has been construed to leave him liable to the prescriptions of the common law, which makes in this respect no distinction between clergyman and layman. *R. v. Gilham*, 1 Mood. C. C. 188.

¹ *Broad v. Pitt*, 3 C. & P. 519, and see doubts of Lord Kenyon, in *Du Barre v. Livette*, 1 Peake, 77.

² *R. v. Griffin*, 6 Cox C. C. 219.

³ Rev. Stat. 406, § 72.

⁴ *People v. Gates*, 13 Wend. 323; *Gillooley v. State*, 58 Ind. 182. See 2 Rogers's Rec. 79. See also Forsyth's

History of Lawyers, 254; Sampson's *Roman Catholic Question in America* (Pamphlet); Joy on Confes. 49-58; and closing remarks of Field, J., in *Totten v. U. S.*, 92 U. S. 105.

R. v. Hay, 2 F. & F. 4, above noticed, led to the following discussion in the House of Commons:—

"Mr. Bowyer wished to ask a question regarding the committal of a Roman Catholic priest at Durham.

"It appeared that the reverend gentleman had received a watch, in confession, in order that he might make a restitution of it to the owner, and had subsequently handed it to a policeman. Upon the trial of a party

⁵ *Supra*, § 504. That such communications are not privileged by Roman Catholic Canon Law, see citations in

Ewald's Stories from State Papers, 217.

§ 509. The privilege of inviolability is necessarily extended to the consultations of judges; though they may be examined, as we have seen, as to what took place before them on trial, in order to identify the case, or prove the testimony of a witness.¹ The same privilege extends to justices of the peace, with a like liability to be examined as

Judges cannot be examined as to their deliberations.

for stealing the watch, the Roman Catholic priest was asked by Mr. Justice Hill from whom he received the watch. The reverend gentleman refused to answer the question, and was thereupon committed for contempt of court. Mr. Bowyer thought the case a mistaken, and very oppressive one, and that, by the old common law, the seal of confession constituted a privileged communication. He wished to ask if the reverend gentleman had been set at liberty, and if not, whether the government would take steps that he might be immediately released.

"Sir G. C. Lewis said his information differed from that of the honorable gentleman with regard to the law of England. He believed it would be found that while any communication between a counsel, solicitor, or attorney, with a client, respecting a suit in which the latter was engaged, was a privileged communication; with regard to a clergyman of any denomination, or a physician, no such privilege existed. He, therefore, contended the learned judge had not gone beyond the law. In fact, the question was pressed by counsel, and the court had no option but to commit the witness under the circumstances. He believed, however, that the reverend gentleman only remained in custody a few minutes, and had been discharged in the course of the day.

"Mr. Ingham defended the course pursued by the learned judge, and fully agreed with the right honorable gentle-

man, the home secretary, in his interpretation of the law.

"Sir F. Kelly also corroborated the statement as made by the right honorable gentleman."

See, in reply to this, an interesting work by Mr. Baddely, on the Privilege of Religious Confession, London, 1865. And see Stephen's *Ev.* 171, and Best's *Ev.* §§ 683-4, where the inference is that the privilege, if it exists at all, belongs to all clergymen.

Ecclesiastics are by the Roman common law not required to testify as to what was communicated to them under the seal of the confessional. To this rule, however, the following exceptions have been made:—

(1) When the disclosure is required by the policy of the State;

(2) When an innocent person is charged with a crime, conviction for which he can only escape by a disclosure of facts given in the confessional;

(3) When the clergyman receiving the confession is authorized to testify by the person confessing;

(4) When disclosure is necessary in order to prevent an impending crime. See Welske, *Rechtslexicon*, xv. 259.

¹ Hare on *Disc.* (2d ed. 1876) 182; *Jackson v. Humphrey*, 1 Johns. 498; *Heyward, In re*, 1 Sandf. 701. See *Welcome v. Batchelder*, 23 Me. 85; and see *Whart. on Ev.* §§ 180, 785, 986. In *R. v. Gazard*, 8 C. & P. 595, it was doubted whether, even as to the facts of a case before him, a judge could be examined. See *supra*, §§ 227 *et seq.*

to the facts of the trial.¹ A presiding judge cannot be sworn as a witness in a case before him.² But where the decision of a judge of probate is appealed from, on the ground that he was interested in the estate which his decision settled, it has been held in Massachusetts that he is a competent witness on appeal to prove that he was not interested.³

§ 510. It was at one time supposed that a grand juror was required by his oath of secrecy to be silent as to what transpired in the grand jury room;⁴ but it is now held that such disclosure, wherever it is material to explain what was the issue before the grand jury, or what was the testimony of particular witnesses, will be required.⁵ This is the statutory rule in Massa-

Nor jurors.

¹ *Highberger v. Stiffler*, 21 Md. 338; being called as a witness. *Infra*, § 511; *Taylor v. Larkin*, 12 Mo. 103.

² *People v. Miller*, 2 Parker, C. R. 197. See *Morss v. Morss*, 11 Barb. 510; *McMillen v. Andrews*, 10 Oh. St. 112; *Ross v. Buhler*, 2 Mart. (N. S.) 313.

³ *Sigourney v. Sibley*, 21 Pick. 101.

⁴ It has been ruled in England, that if a judge be sitting with others he may then be sworn, and give evidence. *Trial of the Regicides*, Kel. 12; 5 How. St. Tr. 1181, n. S. C. But in such case, the proper course seems to be for the judge who has thus become a witness to leave the bench, and take no further judicial part in the trial.

⁵ Mr. Taylor notices in this relation that on several occasions when trials have been instituted before the high court of parliament, peers, who have been examined as witnesses, have, nevertheless, taken part in the verdict subsequently pronounced. 7 How. St. Tr. 1384, 1458, 1552; 16 How. St. Tr. 1252, 1391. He argues, however, that these cases are not inconsistent with the law as above stated, since in trials before the House of Lords, the peers must be regarded at least as much in the light of jurors as of judges; and, as will hereafter be seen, a juryman is not disqualified from acting, simply by

⁴ *Imley v. Rogers*, 2 Halst. 347; *State v. Baker*, 20 Mo. 338.

⁵ *Whart. Cr. Pl. & Pr.* § 378; *Sykes v. Dunbar*, 2 Selw. N. P. 1059; *U. S. v. Charles*, 2 Cranch C. C. 76; *State v. Wood*, 13 N. H. 484; *Com. v. Hill*, 11 Cush. 137; *Com. v. Mead*, 12 Gray, 167; *State v. Fasset*, 18 Conn. 457; *People v. Hulburt*, 4 Denio, 133; *Huldekoper v. Cotton*, 3 Watts, 56; *Gordon v. Com.*, 92 Penn. St. 216; *Thomas v. Com.*, 2 Rob. (Va.) 795; *Little v. Com.*, 25 Grat. 921; *Turk v. State*, 2 Ham. pt. ii. 240; *State v. Boyd*, 2 Hill S. C. 288. See *Tindle v. Nichols*, 20 Mo. 526; *State v. Offutt*, 4 Blackf. 355; *Burnham v. Hatfield*, 5 Blackf. 21; *Perkins v. State*, 4 Ind. 222; *Granger v. Warrington*, 3 Gilman, 299; *Burdick v. Hunt*, 43 Ind. 384; *State v. Broughton*, 7 Ired. 96; *Sands v. Robinson*, 20 Miss. 704; *Rooco v. State*, 37 Miss. 357; *People v. Young*, 31 Cal. 564; *White v. Fox*, 1 Bibb, 369; *Crocker v. State*, 1 Meigs, 127; *Beam v. Link*, 27 Mo. 261; *Clanton v. State*, 13 Tex. Ap. 139, overruling *Ruby v. State*, 9 Tex. Ap. 353. *Contra*, see *Imley v. Rogers*, 2 Halst. 247.

"But it is urged that the secrets of the grand jury must be protected—that

chusetts and New York. A grand juror's testimony, however, will not be received to impeach the finding of his fellows, or even to show what was the vote on the finding.¹ So a petit juror is not ordi-

the oath of the grand jury prohibits their utterance. The juror is sworn, the state's counsel, his fellows, and his own, to keep secret. But the oath of the grand juror does not prohibit his testifying what was done before the grand jury when the evidence is required for the purposes of public justice or the establishment of private rights. *Burnham v. Hatfield*, 5 Blackf. 21. 'It seems to us,' observes Ruffin, C. J., in *The State v. Broughton*, 7 Iredell, 96, 'that the witness (who testifies before the grand jury) has no privilege to have his testimony treated as a confidential communication, but that he ought to be considered as deposing under all the obligations of an oath in judicial proceedings, and, therefore, that the oath of the grand juror is no legal or moral impediment to his solemn examination under the direction of a court, as to evidence before him, whenever it becomes material to the administration of justice.'

"To the same effect was the decision of the Supreme Court of Indiana, in *Perkins v. State*, 4 Ind. 222. In *Com. v. Hill*, 11 Cush. 137, a member of the grand jury which found an indictment was held to be a competent witness on trial to prove that a certain person did not testify before the grand jury. In *Com. v. Mead*, 12 Gray, 167, it was held that the defendant, for the purpose of impeaching a witness for the Commonwealth, on the trial of an indictment, might prove that he testified differently before the grand jury. So, if to impeach a witness evidence is offered of statements made by him before the grand jury, he may testify in rebuttal what those statements were. *Way v.*

Butterworth, 106 Mass. 75. When a witness testifies differently in the trial before the petit jury from what he did before the grand jury, the grand jurors may be called to contradict him, whether his testimony is favorable or adverse to the prisoner. So in all cases, when necessary for the protection of the rights of parties, whether civil or criminal, grand jurors may be witnesses. Such seems the result of the most carefully considered decisions in this country.

"In *Low's Case*, 4 Maine, 440, it was held that grand jurors might be examined as witnesses in court, to the question whether twelve of the panel concurred or not in the finding of a bill of indictment. If the counsel of the grand jurors is to be kept secret at all events, the votes of the grand jurors are certainly as much a matter of secrecy as anything done or testified to before them. The action of a grand juror is more especially a matter of his own counsel than any statement of any one else before his body. The assertion, that less than twelve concurred in an indictment, involves necessarily the assertion of one who did and of who did not so concur." *Appleton, C. J., State v. Benner*, 64 Me. 284.

¹ *Whart. Cr. Pl. & Pr.* § 379; *R. v. Marsh*, 6 Ad. & El. 236; *McLellan v. Richardson*, 1 Shepl. 82; *State v. Fasset*, 16 Conn. 457; *People v. Hulburt*, 4 Denio, 133; *Huidekoper v. Cotton*, 3 Watts, 56; *State v. Beebe*, 17 Minn. 241; *State v. Balt. R. R.*, 15 W. Va. 363; *State v. McLeod*, 1 Hawks, 344; *Simms v. State*, 60 Ga. 145; *State v. Baker*, 20 Mo. 338; *State v. Oxford*, 30 Tex. 428.

narily permitted to disclose the deliberations of the jury when consulting in their private room.¹ He is, however, competent to testify as to the issues actually passed on by the jury of which he was a member, when this is material on a subsequent trial.²

§ 511. As is elsewhere incidentally noticed,³ a juror on trial, who has knowledge of any material facts, must give notice, so that he can be sworn, examined, and cross-examined. He cannot be permitted to give evidence to his fellow jurors without being so sworn.⁴

A juror possessed of knowledge material to the case must be sworn as a witness.

§ 512. A prosecuting attorney, it has been held, is privileged from disclosing the proceedings of the grand jury,⁵ though not from examination as to the testimony of witnesses, or as to other matters to which a grand juror could testify.⁶ Communications made to a prosecuting attorney relative to suspected criminals, or to the operations of a detective police, are privileged, and are not to be divulged by the attorney without the consent of the person making the communication.⁷

Prosecuting attorneys privileged as to confidential matters.

¹ Whart. Cr. Pl. & Pr. § 847.

² Whart. Cr. Pl. & Pr. § 833.

³ *Haak v. Breidenbach*, 3 S. & R. 204; *Leonard v. Leonard*, 1 W. & S. 342; *Follansbee v. Walker*, 74 Penn. St. 306. *Infra*, § 593.

⁴ *Taylor's Ev.* § 1244; *R. v. Rosser*, 7 C. & P. 648, per Parke, B.; *Manley v. Shaw*, C. & Marsh. 361, per Tindal, C. J.; *Bennet v. Hartford*, Sty. 233; *Fitz-James v. Moys*, 1 Sid. 133; *Andr.* 231, arg.; *R. v. Heath*, 18 How. St. Tr. 123; *R. v. Sutton*, 4 M. & S. 532, 541, 542; 6 How. St. Tr. 1012, n.; *Dunbar v. Parks*, 2 Tyler, 217; *State v. Powell*, 2 Halst. 244; *Howsar v. Com.*, 51 Penn. St. 332; *McKain v. Love*, 2 Hill (S. C.), 506; *Sam v. State*, 1 Swan (Tenn.), 61; *Anschicks v. State*, 6 Tex. Ap. 524.

"It is equally clear that the jurors were competent witnesses. In *Haak v. Breidenbach*, 3 S. & R. 204, and *Leonard v. Leonard*, 1 W. & S. 342, the parol evidence was given by jurors, and in the latter case, under a special objection and exception; yet the judgment was reversed for the rejection of the evidence. There is no principle of law or rule of policy which in such a case ought to exclude them. It is entirely different from where they are called to impeach a verdict on the ground of their own misbehavior or that of their fellows. *Cluggage v. Swan*, 4 Binney, 150, though even that has been since questioned. *Ritchie v. Holbrooke*, 7 S. & R. 458." *Sharswood, J., Follansbee v. Walker*, 74 Penn. St. 309.

⁵ *McLellan v. Richardson*, 13 Me. 82; *Clark v. Field*, 12 Vt. 485; but see *White v. Fox*, 1 Bibb, 369; Whart. Cr. Pl. & Pr. § 380.

⁶ *Ibid.*; *Knott v. Sargent*, 125 Mass. 95; *State v. Van Buskirk*, 59 Ind. 384.

⁷ *Oliver v. Pate*, 43 Ind. 132. See § 513.

§ 513. A crown witness, in a political prosecution, cannot be asked, so it has been held in England, as to the quarters from which his information was received; and this sanctity was extended to revenue cases.¹ Even as late as O'Connell's case,² it was held that state policy precluded an investigation into the channels through which information of breaches of the law reached the prosecuting authorities. To this extent the protection may be granted, limiting it strictly to cases of public as distinguished from private necessity.³ For the same reason the executive of a State, and his cabinet officers, are entitled, in exercise of their discretion, to determine how far they will produce papers, or answer questions as to public affairs, in a judicial inquiry.⁴ In conformity with this view, it has been held that communications in official correspondence relating to matters of state cannot be produced as evidence in an action against a person holding an office, for an injury charged to have been done by him in exercise of the power given to him as such officer; not only because such communications are confidential, but because their disclosure might betray secrets of state policy.⁵ And where a minister of state, subpoenaed

¹ *R. v. Watson*, 32 How. St. Tr. 100; *R. v. Hardy*, 24 How. St. Tr. 753; *Horne v. Bentinck*, 2 B. & B. 130, 162. *Infra*, § 515.

² *Arm. & T.* 178.

³ *R. v. Richardson*, 3 F. & F. 693; *Atty.-Gen. v. Briant*, 15 M. & W. 181; *U. S. v. Moses*, 4 Wash. C. C. 726; *State v. Soper*, 16 Me. 295. See 1 *Burr's Trial*, 186; *Washington v. Scribner*, 109 Mass. 487; *Gray v. Pentland*, 2 S. & R. 23; *Oliver v. Pate*, 43 Ind. 132. *Infra*, § 515.

⁴ *Beatstone v. Skene*, 5 H. & N. 838; *Anderson v. Hamilton*, 2 B. & B. 156; *Burr's Trial*, Westcott's ed. vol. iii. p. 37; *Hopkins & Earle's ed.* vol. ii. p. 536; *Gray v. Pentland*, 2 S. & R. 23; *Yoter v. Sanno*, 6 Watts, 164; *Hartmanft's App.*, 85 Penn. St. 433; *Cooper's Case*, Whart. St. Tr. 662; *Marbury v. Madison*, 1 Cranch, 144; *Thompson v. R. R.*, 22 N. J. Eq. 111.

As to privileges of senators of the

United States in respect to their consultations, see *Law v. Scott*, 5 H. & J. 438. In England, members of parliament are privileged from examination as to what took place in parliament. *Chubb v. Salomons*, 3 C. & K. 75. See *Sykes v. Dunbar*, 2 Selw. N. P. 1059; 4 Bl. Comm. 126; note by Mr. Christian of a case at York.

⁵ *Anderson v. Hamilton*, 2 B. & B. 156, n. "Lord Campbell, C. J., once held that a witness cannot refuse to produce a letter which he holds from a secretary of state, to whom it has been addressed in his public character, and who forbids its production." *Powell's Evidence*, 4th ed. 135. At the same time it must be remembered, that where a document is privileged from production on the grounds of public policy, secondary evidence of its contents is inadmissible. *Home v. Bentinck*, 2 B. & B. 130.

to produce public documents, objects to do so on the ground that their publication would be injurious to the public interest, the court ought not to compel their publication;¹ and the question, whether the production of such a document would be injurious to the public service, must be determined by the head of the department having the custody of the paper, and not by the judge.² This privilege, however, has been held to be personal to the head of a department, and cannot be claimed by a subordinate;³ though in a suit against an admiral in the royal navy to recover damages for a collision caused by his flag-ship, Sir R. Phillimore refused the plaintiff permission to inspect reports of the collision made by the admiral to the lords of the admiralty, the secretary to the admiralty having made an affidavit that their production would be prejudicial to the public service.⁴

§ 514. Privilege, also, attaches to the proceedings of legislatures, whether federal or state, to such an extent as to protect witnesses (whether reporters or members) from questions as to debates and votes in either house of the legislature, unless the consent of the house be first given.⁵ And it was held by Lord Ellenborough,⁶ that while a member of parliament or the speaker may be called on to give evidence of the fact of a member of parliament having taken part or spoken in a particular debate, he cannot be asked what was then delivered in the course of the debate. It has also been held that communications between a governor of a province and his attorney-general are privileged.⁷ Mere volunteer private communications to the executive are not so privileged.⁸

And so consultations and communications of legislature and executive.

¹ *Beatstone v. Skene*, 5 H. & N. 838.

See *Dickson v. Wilton*, 1 F. & F. 425, where Lord Campbell, following *Beatstone v. Skene*, 5 H. & N. 838, intimated that where a head of a department should send papers called for, the judge might examine the papers himself, and determine whether they are such as public policy excludes.

² *Ibid.*, per Pollock, C. B., 5 H. & N. 853: see Whart. Com. Am. Law, § 391.

³ *Dickinson v. Lord Wilton*, 1 F. & F. 424.

⁴ *The Bellerophon*, 23 W. R. 248; 41 L. J. Adm. 5.

⁵ *Plunkett v. Cobbett*, 5 Esp. 136; S. C., 29 How. St. Tr. 71; *Chubb v. Salomons*, 3 C. & K. 75.

⁶ *Plunkett v. Cobbett*, 5 Esp. 136.

⁷ *Wyatt v. Gore*, Holt, 299. This rule was discussed in the *Rajah v. Coorg v. East India Co.*, 29 Beav. 350.

⁸ *Blake v. Pilford*, 1 M. & Rob. 198.

§ 515. "It is perfectly right," so it is stated by Eyre, C. J.,¹ "that all opportunities should be given to discuss the truth of the evidence given against a prisoner; but there is a rule, which has universally obtained, on account of its importance to the public for the detection of crimes, that those persons who are the channel by means of which that detection is made should not be unnecessarily disclosed; if it can be made to appear that it is necessary to the investigation of the truth of the case that the name of the person should be disclosed, I should be very unwilling to stop it; but it does not appear to me, that it is within the ordinary course to do it, or that there is any necessity for it in the present case." It has therefore been held that a police officer who has arrested a prisoner will not be bound to disclose the name of the person from whom he received information leading to the arrest.² On the other hand, on an indictment for poisoning, Cockburn, C. J., when a police officer declined to answer from whom information concerning certain poison was obtained, ordered the answer to be given, such answer being material.³ The distinction is materiality. When such information is material to the issue it cannot be withheld. But when it is immaterial, the courts will not compel its disclosure.⁴ This immunity, however, extends only to official counsels. "A witness for the prosecution in a trial for riot may be compelled to state, on cross-examination, whether he is a member of a secret society organized to suppress a sect to which the defendant belongs."⁵

§ 516. A medical attendant is ordinarily without privilege, even

¹ R. v. Hardy, 24 How. St. Tr. 808.

² U. S. v. Moses, 4 Wash. C. C. 726. See, also, State v. Soper, 16 Me. 295, and cases cited to § 513.

³ R. v. Richardson, 3 F. & F. 693.

⁴ In a Massachusetts case, on the trial of an indictment for murder, to which the defence was insanity, an expert, called by the government, testified, on cross-examination, that he had given the counsel for the government a statement in writing of his opinion of the defendant's mental condition. The statement was on re-

quest handed to the defendant's counsel, who offered it in evidence, but was objected to by the attorney-general, who stated that he would only allow it to be used to frame questions for cross-examination. The court refused to allow the statement to be read to the jury, and the defendant's counsel used it to cross-examine the witness. It was held that the defendant had no ground of exception. Com. v. Pomeroy, 117 Mass. 144.

⁵ People v. Christie, 2 Parker C. R. 579.

as to communications confidentially made to him by his patient.¹ In the United States, however, statutes, in several jurisdictions, have been passed conferring this immunity,² which statutes virtually prohibit physicians from disclosing information they derive professionally from their relations to their patient.³ The privilege of the statute may be waived by the patient.⁴ But it does not apply to testamentary inquiries;⁵ nor does it operate so to preclude the examination of a physician as to the symptoms of a dying man, whom he professionally attended, and whom it was charged was poisoned;⁶ nor does it shield from examination as to *post-mortem* inquiries.⁷ The privilege, also, does not cover consultations for criminal purposes.⁸ The privilege, it is held, continues after the patient's death.⁹ Whether, by the Roman common law, a physician is privileged as to matters confidentially imparted to him by a patient, has been much discussed; though the more recent tendency is to assert the inviolability of such secrets.¹⁰

Medical attendants not ordinarily privileged.

§ 517. Excepting marriage, as is elsewhere shown, there is no domestic relationship recognized by the law as attaching inviolability to its conferences. Thus parents will be compelled to disclose confidential commu-

No privilege attached to ties of blood or friendship.

¹ *Duchess of Kingston's Case*, 20 How. St. Tr. 613; *Baker v. R. R.*, 3 C. P. 91; *Mahoney v. Ins. Co.*, L. R. 6 C. P. 252.

"The communication made to a medical man, whose advice is sought by a patient with respect to the probable origin of the disease as to which he is consulted, . . . is not protected." *Jessel, M. R.*, *Wheeler v. Le Marchant*, 44 L. T., N. S. 631.

See, as qualifying this, where a physician is employed by a railway company, in special cases, to inquire as to damages from accidents, *Cossey v. R. R.*, L. R. 5 C. P. 146; *Skinner v. R. R.*, L. R. 9 Ex. 298.

² *Whart. on Ev.* § 606; *Elwell's Malpractice*, 320; *Bliss on Life Ins.* § 381.

³ See *Edington v. Life Ins. Co.*, 5 Hun, 1; *S. C.*, 67 N. Y. 185; *Kendall*

v. Grey, 2 Hilt. (N. Y.) 300; *Dillier v. Ins. Co.*, 69 N. Y. 256; *Grattan v. Ins. Co.*, 80 N. Y. 281; *People v. Stout*, 3 Parker C. R. 670; *Campan v. North*, 39 Mich. 606; *Linz v. Ins. Co.*, 8 Mo. Ap. 363.

⁴ *Johnson v. Johnson*, 14 Wend. 637; *Fraser v. Jennison*, 42 Mich. 206.

⁵ *Allen v. Public Administrator*, 1 Bradf. (N. Y.) 221; *Staunton v. Parker*, 19 Hun, 55.

⁶ *Pierson v. People*, 79 N. Y. 424.

⁷ *Summers v. State*, 5 Tex. Ap. 365.

⁸ *Hewitt v. Prime*, 21 Wend. 79. See *Territory v. Corbett*, 3 Mont. 50.

⁹ *Pierson v. People*, 79 N. Y. 424; *Edington v. Ins. Co.*, 67 N. Y. 185; *Grattan v. Ins. Co.*, 80 N. Y. 281.

¹⁰ See a summary of the question in *Weiske's Rechtslexicon*, xv. 259, ff.

nications from their children;¹ servants, those from masters;² friends, those from friends.³

§ 518. The lips of parents are, as a rule, sealed on the question of sexual intercourse, so far as such testimony would go to assail the legitimacy of children. Whether there was such intercourse cannot be inquired of from either father or mother, either directly or by aid of circumstances from which the result could be inferred.⁴ This inviolability, however, is limited to cases where legitimacy is at issue, and does not preclude the examination, in cases of bastardy, of a married woman as to her adultery with a third person, when non-access with her husband is first proved.⁵ And it has been held competent for a widow, after her husband's death, to testify in support of her children's legitimacy.⁶ But the mother of a child, begotten before marriage, though born after, is incompetent to prove that the child was not begotten by the husband.⁷ The privilege thus established is not affected by the statutes removing disability from interest.⁸ And it does not extend to cases of sexual abuse of wife by husband.⁹

¹ Gilb. Ev. 135.

² *State v. Charity*, 2 Dev. 543; *State v. Isham*, 6 How. (Miss.) 35.

³ *Smith v. Daniell*, L. R. 18 Eq. 649.

⁴ *R. v. Luffe*, 8 East, 193; *Goodright v. Moss*, 2 Cowp. 594; *Wright v. Holgate*, 3 C. & K. 158; *R. v. Sourton*, 5 A. & E. 180; *R. v. Mansfield*, 1 Q. B. 444; *Anon. v. Anon.*, 22 Beav. 481; 23 Beav. 273; *Rideout's Trusts*, L. R. 10 Eq. 41; *Chamberlain v. People*, 23 N.

Y. 85; *Boykin v. Boykin*, 70 N. C. 262.

See *supra*, § 390.

⁵ *Cope v. Cope*, 1 M. & Rob. 272; *R. v. Reading*, Cas. temp. Hard. 79; *Com. v. Connelly*, 1 Browne (Pa.), 284; *Com. v. Shepherd*, 6 Binn. 283; *State v. Petaway*, 3 Hawks, 623.

⁶ *Moseley v. Eakin*, 15 Rich. 324.

⁷ *Dennison v. Page*, 29 Penn. St. 420.

⁸ *Whart. on Ev.* § 608.

⁹ *Melvin v. Melvin*, 58 N. H. 569.

CHAPTER X.

DOCUMENTS.

I. GENERAL RULES.

A document is an instrument in which facts are recorded, § 519.

Pencil writing is sufficient, § 520.

Admission of part involves admission of whole, § 521.

II. STATUTES: LEGISLATIVE JOURNALS: EXECUTIVE DOCUMENTS.

Public statutes prove their recitals, § 522.

Otherwise as to private statutes, § 523.

Journals of legislature proof as to recited facts, § 524.

So of executive documents, § 525.

III. NON-JUDICIAL REGISTRIES AND RECORDS.

Official registry admissible when statutory, § 526.

So of records of public corporations, § 527.

Books and registries kept by public institutions admissible, § 528.

Log-book admissible under act of Congress, § 529.

IV. RECORDS AND REGISTRIES OF BIRTH, MARRIAGE, AND DEATH.

Registries of marriage and death admissible when duly kept, § 530.

So when kept by deceased persons in course of their duties, § 531.

Registry only proves facts which it was the duty of the writer to record, § 532.

Entries must be at first hand and prompt, § 533.

Certificate at common law inadmissible, § 534.

And so of copies, § 535.

Family records admissible to prove family events, § 536.

V. BOOKS OF HISTORY AND SCIENCE: MAPS AND CHARTS.

Approved books of history and geography by deceased authors receivable, § 537.

Books of inductive science not usually admissible, § 538.

Otherwise as to books of exact science, § 539.

VI. GAZETTES AND NEWSPAPERS.

Gazette evidence of public official documents, § 540.

Newspapers admissible to impute notice, § 541.

But not generally for other purposes, § 542.

Knowledge of newspaper notice may be proved inferentially, § 543.

VII. PICTURES, PHOTOGRAPHS, AND DIAGRAMS.

Pictures and photographs in cases of identity admissible, § 544.

And so of plans and diagrams, § 545.

VIII. PROOF OF DOCUMENTS.

Document must be proved by party offering, § 546.

Documents over thirty years old prove themselves, § 547.

Ancient documents may be verified by experts, § 548.

Handwriting may be proved by writer himself, or by his admissions, § 549.

Party may be called upon to write, § 550.

Witness of signature to document, § 550 *a*.

Seeing a person write qualifies a witness to speak as to signature, § 551.

Witness familiar with another's writing may prove it, § 552.

Burden on opposite side to prove witness incompetent, § 553.

On cross-examination witness may be tested by other writings, § 554.

By English common law, comparison of hands not permitted, § 555.

Exception made as to test paper already in evidence, § 556.

In some jurisdictions comparison is admitted, § 557.

Test papers made for purpose inadmissible, § 558.

Experts admitted to test writings, § 559.

Photographers in such cases admissible as experts, § 561.

Experts may be cross-examined as to skill, § 562.

Their testimony to be closely scrutinized, § 563.

IX. INSPECTION OF DOCUMENTS BY ORDER OF COURT.

Rule may be granted to compel production of papers, § 564.

Inspection must be ordered, but not surrender, § 565.

Production of criminatory document will not be compelled, § 566.

Documents when produced for inspection may be examined by interpreters and experts, § 567.

I. GENERAL CONSIDERATIONS.

§ 519. RECENT statutes having used the term "document" to designate the objects of forgery, as well as in some measure of larceny, it becomes our duty to inquire, in the first place, what the term "document" includes.

Document is an instrument on which facts are recorded.

And the answer is, that a document, in this sense, is an instrument on which is recorded, by means of letters, figures, or marks, matter which may be evidentially used. In this sense the term document applies to writings; to words printed, lithographed, or photographed; to seals, plates, or stones on which inscriptions are cut or engraved; to photographs and pictures; to maps and plans. So far as concerns admissibility, it makes no difference what is the thing on which the words or signs offered may be recorded. They may be, as is elsewhere seen, on stone or gems,¹ or on wood (*e. g.*, as is the case with tallies),² as well as on paper or parchment.³ "Document," it will be therefore seen, is a

¹ Whart. on Ev. § 220.

² Whart. on Ev. § 519.

³ Kendall v. Field, 14 Me. 30; Rowland v. Burton, 2 Harring. 288.

term at once more comprehensive and more exact than "instrument in writing," a term at one time generally used in the same relation. An "instrument in writing," it might well be argued, does not include printed books; and it clearly does not include engravings on wood or stone. "Document," however, includes not merely books, but any other thing on which is impressed a meaning which, emanating from one party, is calculated to affect the rights of another party.

§ 520. Ink and paper, or ink and parchment, it has been said, are necessary to constitute a valid writing, when a writing, as such, is to be proved. But the mode of writing is immaterial, if the thing written be legible; and it has been frequently held that pencil writing, if identified, is sufficient to constitute a writing receivable in evidence.¹ In fact, some kinds of pencils leave marks more permanent and ineffaceable than some kinds of ink.²

Pencil
writing
sufficient.

§ 521. When one writing refers directly or indirectly to another for a fuller description, the admissibility of the first writing involves the admissibility of the second.³ Thus, the admission of a writing involves the admission of all self-dissevering endorsements thereon made by the holder or with his permission.⁴ And whenever a document is offered against a party as containing an admission prejudicing him, he is entitled to have the context put in evidence in his defence.⁵

Admission
of part in-
volves ad-
mission of
whole.

¹ *Millett v. Marston*, 62 Me. 477; *Hum*, 2 Rawle, 104; *Satterlee v. Bliss*, 36 Cal. 489; *Jordan v. Pollock*, 14 Ga. 145, and cases cited in reference to confessions, *infra*, § 688; *Whart. on Ev.* § 1103.

² Compare authorities in *Whart. Cr. Pl. & Pr.* § 278 a.

³ *Nesham v. Selby*, L. R. 13 Eq. 191; *aff. L. R.* 7 Ch. 400; *Clark v. Crego*, 47 Barb. 599; *Commissioners v. Washington Park*, 52 N. Y. 131; *Blair v.*

⁴ *Harper v. West*, 1 Cranch C. C. 192; *Clarke v. Page*, 1 H. & J. 318; *Gilpatrick v. Foster*, 12 Ill. 355; *Lloyd v. McClure*, 2 Greene (Iowa), 139; *Carey v. Phil. Co.*, 33 Cal. 694.

⁵ *Infra*, § 688. See *Barly v. State*, 9 Tex. Ap. 476.

II. STATUTES: LEGISLATIVE JOURNALS: EXECUTIVE DOCUMENTS.

§ 522. A public statute may be received to prove the facts which it recites.¹ Hence, in England it is held that a recital of a state of war, contained in a public statute, is evidence of such war;² and that a recital in a public statute of disturbances and riots is proof of such disturbances and riots.³ In this country we have a series of cases to the same effect, in which the legislation of Congress was referred to, to indicate the extent and duration of the late civil war.⁴ But such proof is only *prima facie*, and may be limited or explained by other testimony.⁵

Public statutes prove their recital.

§ 523. Recitals in private statutes are held to be evidence only so far as concern the parties, not reaching further.⁶ As against the party for whose relief the statute was passed,⁷ and as against the State,⁸ such recitals are *prima facie* proof; but they are not evidence against strangers.

Recitals in private statutes not usually evidence.

§ 524. The journals of Congress and of the State legislatures are the proper evidence of the action of those bodies,⁹ and are *prima facie* proof of the facts they recite.¹⁰ They are records to be proved by inspection,¹¹ and cannot ordinarily be varied by parol.¹²

Journals of legislature admissible.

§ 525. Official public documents issued by the executive are to be received as *prima facie* proof of facts stated in them,¹³ and such is also the case with state papers when published under the authority of Congress,¹⁴ with diplomatic

So of executive documents.

¹ See Whart. on Ev. §§ 286-292; *Whiton v. Ins. Co.*, 109 Mass. 30; *Henthorn v. Shepherd*, 1 Blackf. 157; *State v. Sartor*, 2 Strobb. 60.

² *R. v. De Berenger*, 3 M. & S. 67; Whart. on Ev. § 339.

³ *R. v. Sutton*, 4 M. & S. 532.

⁴ Whart. on Ev. §§ 286 *et seq.*

⁵ *R. v. Green*, 6 A. & K. 548.

⁶ *Shrewsbury Peerage*, 7 H. L. C. 13; *Beaufort v. Smith*, 4 Exch. 450; *Cowell v. Chambers*, 21 Beav. 619; *Mills v. Colchester*, 36 L. J. C. P. 214; *Taylor v. Parry*, 1 M. & Gr. 604; *Ballard v. Way*, 1 M. & W. 329; *Elmendorff v. Carmichael*, 3 Litt. (Ky.) 472.

⁷ *State v. Beard*, 1 Ind. 460.

⁸ *Lord v. Bigelow*, 8 Vt. 460.

⁹ Whart. on Ev. §§ 290-95; *Jones v. Randall*, 1 Cowp. 17.

¹⁰ See cases cited in Whart. on Ev. § 637.

¹¹ *Coleman v. Dobbins*, 8 Ind. 156.

¹² *Wabash R. R. v. Hughes*, 38 Ill. 176; *Covington v. Ludlow*, 1 Metc. (Ky.) 295; Whart. on Ev. § 980 a.

¹³ *Thelasson v. Cosling*, 4 Esp. 266; *R. v. Franklin*, 17 How. St. Tr. 638; *Talbot v. Seeman*, 1 Cranch, 1; *Ross v. Cutchall*, 1 Binn. 399.

¹⁴ Whart. on Ev. § 525; *Whiton v. Ins. Co.*, 109 Mass. 30.

correspondence communicated by the President to Congress,¹ with the ordinances of foreign States promulgated by Congress,² and with the proclamations of a State executive,³ the authorized reports of State officials,⁴ and the charter of a city,⁵ so far as concerns the State from which these documents proceed. But it has been held that a report of the register of the State land office cannot be received to prove that lands have been patented to a railroad company.⁶ Nor is it admissible to prove by a sergeant of police that it had been reported to him by his subordinates that the defendant had been seen in the street on a particular night.⁷

III. NON-JUDICIAL REGISTRIES AND RECORDS.

§ 526. Where a statute requires the keeping of an official record for the public use, by an officer duly appointed for the purpose, and subject not merely to private suit but to official prosecution for any errors, such record, so far as concerns entries made in it in the course of business, is admissible in the courts of such State as *prima facie* proof of the facts it contains. Nor is it necessary to verify such record by the oath of the person keeping it. That it is directed by statute to be kept for the public benefit, and that it is kept, so far as appears on its face, with regularity and accuracy, entitles it to be received in evidence, and throws the burden of impeaching it on the opposite side. To make the record itself evidence, it is only necessary that it should be produced, and that it should be proved to have come from the proper depository.⁸ But such documents, to be evidence, must be kept by public officers in pursuance of an official duty. Hence it has been held in a Maryland case, that police records,

Official
registry re-
ceivable in
evidence.

¹ *Bryan v. Forsyth*, 19 How. 334;
Radeliff v. Ins. Co., 7 Johns. 38.

² *Talbot v. Seeman*, 1 Cranch, 1.

Army registers, when authenticated by the secretary of war, have been held to be proof of the names of officers, of the dates of their commissions and of their resignations, though they cannot be received to show the pay and emoluments of officers. *Wetmore v. U. S.*, 10 Pet. 647. As to judicial notice of military law see *Whart. on Ev.* § 297.

³ *Lurton v. Gilliam*, 1 Scam. (Ill.) 577.

⁴ *Dulaney v. Dunlap*, 3 Cold. 307.

⁵ *Howell v. Ruggles*, 5 N. Y. 444.

⁶ *Gordon v. Bucknell*, 38 Iowa, 438.

⁷ *Com. v. Ricker*, 131 Mass. 581.

⁸ *Whart. on Ev.* § 526. The official docket of a justice of the peace may be identified by any competent witness, though the justice himself could be called. *State v. Chambers*, 70 Mo. 625.

kept by the detective police of a city, in order to show charges made against particular individuals, cannot be put in evidence by a party so accused, in order to show the injury done him by being charged with theft; such records not being prescribed by statute, nor in any way traceable to the party sued for the injury.¹ At the same time, entries of this class, though inadmissible as public records, may become evidence when made by a deceased person against his interest,² or, as will be seen, when in discharge of a business duty.³

§ 527. Not merely are the records of public officers, national or State, when kept in accordance with statutes, thus admissible, but admissibility has been extended to official records, duly kept by municipal or other corporations, which, as to third parties, are *prima facie* evidence of the facts duly entered by officers of such bodies, in the course of their duties.⁴ Even a public officer's entry, when in the regular discharge of his duties, in a book he is by law required to keep, is *prima facie* evidence in his own favor when the performance of the acts registered is at issue.⁵

§ 528. When a registry of current events kept in a public voluntary institution is the only evidence attainable of a fact in litigation, such registry, on the principle that the best evidence is admissible evidence,⁶ may be admitted as *prima facie* proof. In accordance with this view, a record of weather kept at such a public institution has been held admissible to prove the temperature on a day as to which witnesses could not accurately speak.⁷ Such entries however, must be subjected to the same tests, as to genuineness

¹ Garvey v. Wayson, 42 Md. 187.

² Whart. on Ev. § 226. As to admission of official reports of constables after their death, see R. v. Buckley, 13 Cox C. C. 293.

³ Whart. on Ev. § 238. *Infra*, §§ 527-530.

⁴ Whart. on Ev. § 527.

⁵ Whart. on Ev. § 527.

⁶ See Whart. on Ev. §§ 72, 170-2.

⁷ De Armond v. Neasmith, 32 Mich. 231. See The Catherine Maria, L. R.

1 Adm. & Ec. 53; and see *supra*, §§ 526-7.

"The plaintiff's counsel offered in evidence a record of the weather kept at the insane asylum for a number of years, for the purpose of showing the temperature of the weather in March, 1868. We think the record was admissible, and comes within the principle of *Sisson v. Cleveland & Toledo R. R. Co.*, 14 Mich. 497." *De Armond v. Neasmith*, 32 Mich. 231, 233.

and primariness, as will presently be noticed in respect to parish records.

§ 529. Under certain acts of Congress, log-books may be evidence of the facts they state. Their admissibility, however, is limited to the points the statutes designate; and they must be identified as duly kept. But independent of the statutory provisions, a log-book is admissible if kept by a deceased officer, when in the performance of his duties, or by an officer whose attendance is unobtainable.¹

Log-book
admissible
under act
of Con-
gress.

IV. RECORDS AND REGISTRIES OF BIRTH, MARRIAGE, AND DEATH.

§ 530. An official registry, as we have already seen, is admissible, when kept in conformity with law and when duly authenticated, to prove such facts as the law requires to be registered. It follows that whenever a baptismal, marriage, or burial registry is kept in accordance with statute, such registry, being duly authenticated, is admissible to prove the facts which are within the statutory authority.² Even though there be no enabling statute, there is much strength in the position that as the canon law, so far as concerns the law of marriage, is part of English common law,³ and as parish records are public records by the canon law, they are to be regarded by us as public records, and hence admissible in evidence, by our own common law.⁴ Yet as this position

When duly
kept, mar-
riage and
baptismal
registries
are admis-
sible to
prove
facts.

¹ Whart. on Ev. § 529.

² Gilb. Ev. (3d ed.) 77; *Wihe v. Law*, 3 Stark. 63; *May v. May*, 2 Str. 1073; *Draycott v. Talbot*, 3 Bro. P. C. 564; *Doe v. Barnes*, 1 M. & Rob. 389. See *State v. Wallace*, 9 N. H. 515; *State v. Horn*, 43 Vt. 20; *Jackson v. People*, 2 Scam. 232; *Glenn v. Glenn*, 47 Ala. 204. As to necessity of compliance with statute, see *Kopke v. People*, cited *infra*, § 533.

"Parish Registers are in the nature of records, and need not be produced, or proved by subscribing witnesses." Per Lord Mansfield, C. J., *Boit v. Barlow*, Dougl. 172. They are, there-

fore, provable under 14 & 15 Vict. c. 19. *Re Hall's Estate*, 9 Hare, App. xvi.

A burial entry is evidence to prove death. *Lewis v. Marshal*, 5 Peters, 470.

But a report by a committee of foreign government as to the age of a candidate for office cannot be received. *Sturla v. Freccia*, 40 L. T. N. S. 861.

³ See Whart. Conf. of L. §§ 169 *et seq.*

⁴ *Steyner v. Droitwich*, 1 Salk. 281; S. C., 12 Mod. 86; *Holt*, 290; *Kington v. Lesley*, 10 S. & R. 383; *Am. Life & Trust Co. v. Rosenagle*, 77 Penn. St.

is open to doubt, and is in conflict with English rulings excluding registries by dissenting religious bodies, unless supported by proof *aliunde* as to their accuracy;¹ it is proper, in order to authenticate the facts stated in such records, to call the person by whom they were made, if living, to testify to their accuracy, or if he be dead, to prove that the entries were made by him in discharge of his duties. It should at the same time be remembered, that a copy of a foreign registry will be admitted wherever such registry is kept in accordance with the law of the place of entry,² supposing that the identity, authority, and signature of the registrar be duly proved.³

§ 531. As a general rule, entries kept by a deceased person in the course of his business are admissible as *prima facie* proof of all facts relating to such business, in all cases in which the entries bear genuineness on their face, and were made at or near the time of the events they register. Independently of statutory prescriptions, the entries regularly made in his own books, or his official books, by a clergyman, or by the recording officer of a parish, or by the proper functionary of a religious society, are, after his decease, evidence of all facts which it was his duty officially to enter.⁴

§ 532. A registry of baptisms, however, has been ruled not to be proof of the alleged time of the child's birth, but only that

507; *Chouteau v. Chevalier*, 1 Mo. 343; and see argument of court in *Kennedy v. Doyle*, cited *infra*, § 531.

¹ Whart. on Ev. § 653.

² *Perth Peer.*, 2 H. L. C. 865, 873, 874, 876, 877; *Abbott v. Abbott & Godoy*, 29 L. J. Pr. & Mat. 57; 4 Swab. & Trist. 254, S. C.; *Am. Life & Trust Co. v. Rosenagle*, 77 Penn. St. 507. In the absence of such proof, a copy of a baptismal register in Guernsey has been rejected in England. *Huet v. Le Mesurier*, 1 Cox Ch. R. 275. This rejection, according to Dr. Lushington, was "because it did not appear by what authority the register was kept.

Supposing it had been proved that Guernsey was part of the diocese of Winchester, which it is, and by an ancient custom a register was required to be kept there, different considerations might have applied to the case. . . . I am of opinion that there is no ground of distinction, supposing the register had been kept by order of a competent authority, between registers kept in Guernsey and in this country." *Coode v. Coode*, 1 Curtis, 766.

³ *State v. Dooris*, 40 Conn. 145.

⁴ Whart. on Ev. § 654. See opinion of Gray, J., *Kennedy v. Doyle*, 10 Allen, 165.

he was born at the date of the baptism;¹ though it seems that it may be used, with other indicatory evidence, to show the place of birth,² to indicate age,³ and to infer illegitimacy.⁴ In Massachusetts it has been accepted, cumulatively with other evidence, to prove the date of birth.⁵ Where, however, the statute provides that *births* shall be registered, then the registry is *prima facie* proof of the birth and its date.⁶ The identity of the person referred to, however, must be proved *aliunde*.⁷ The marriage registry proves not only the fact of marriage but the time of celebration.⁸ The mode of proving marriage will be found more fully discussed in a prior chapter.⁹

Registry only proves facts that it was the writer's duty to record.

§ 533. Entries in such a registry, however, must be made at first hand in order to be admissible.¹⁰ Thus, a minister's entry of a baptism, administered by another person before his own official service began, the information of the baptism having been given him by the clerk, has been ruled inadmissible,¹¹ though an entry by the proper officer may verify an act done by his official subaltern.¹² Immediateness of entry, however, is not essential, if the entry be made by the officer himself, and there is no suspicious delay,¹³ though the registry must come from the proper custody,¹⁴ and the proper officer.¹⁵ But in a criminal issue, where the fact of marriage must be proved beyond reasonable doubt,¹⁶ the statute must be strictly complied with to

Entries must be first hand and prompt.

¹ *R. v. Clapham*, 4 C. & P. 29; *Burghart v. Angerstein*, 6 C. & P. 690; *Wihe v. Law*, 3 Stark. 63; *Morrissey v. Ferry Co.*, 47 Mo. 521; though see *Wintle, In re*, L. R. 9 Eq. 373.

² *R. v. North Petherton*, 5 B. & C. 508. See *R. v. Lubbenham*, 5 B. & Ad. 968; *Clark v. Trinity Church*, 5 W. & S. 266.

³ *R. v. Weaver*, L. R. 2 C. C. 85; *Whitcher v. McLaughlin*, 115 Mass. 168.

⁴ *Cope v. Cope*, 1 M. & Rob. 271. The registry of baptism is no proof of the child's legitimacy. *Blackburn v. Crawfords*, 3 Wall. 175.

⁵ *Whitcher v. McLaughlin*, 115 Mass. 167.

⁶ *Derby v. Salem*, 30 Vt. 722; *Stoever v. Whitman*, 6 Binn. 416. See *Car-skadden v. Poorman*, 10 Watts, 82.

⁷ *Morrissey v. Ferry Co.*, 47 Mo. 521.

⁸ *Doe v. Barnes*, 1 M. & Rob. 386; *R. v. Hawes*, 1 Den. C. C. 270.

⁹ *Supra*, §§ 170, 171.

¹⁰ See *supra*, § 251; *Whart. on Ev.* § 246.

¹¹ *Doe v. Bray*, 8 B. & C. 813; *Walker v. Wingfield*, 18 Ves. 443.

¹² *Doe v. Andrews*, 1 M. & Rob. 386.

¹³ *Derby v. Salem*, 30 Vt. 722.

¹⁴ 6 *Whart. on Ev.* §§ 194 *et seq.*

¹⁵ *Doe v. Fowler*, 19 L. J. Q. B. 151.

¹⁶ *Supra*, § 171.

make the registry by itself sufficient proof. Thus, in Michigan, in a prosecution for bigamy, the only evidence of a first marriage was that of a ceremony in Ohio before a justice, under a license issued, not by a judge of probate, as required by statute, but by one signing himself "deputy clerk," with a full knowledge on the part of the justice of his want of authority, the defendant being at the time under arrest, there being also proof of a refusal of the defendant to live with the woman as his wife at any time after such ceremony. This was ruled insufficient to sustain the verdict.¹

§ 534. At common law, as we have already seen, a certificate from a party, even when acting officially, that he has done a particular thing, is inadmissible to prove such thing. If living, he must be called to prove the fact; if dead it may be proved by his official entries.² This rule applies to certificates of marriage and of birth, in cases where such certificates are not otherwise made evidence. Thus the certificate of a clergyman given sixteen years after a marriage, that he had married the husband to one claiming to be a prior wife, cannot, by itself, be received to establish such prior marriage, there being no record of such marriage in the registry of the church.³ Under the Connecticut statute, however, a certificate of baptism, by a duly authorized minister, is admissible;⁴ and such seems to be the rule under the Maine statute.⁵ When made evidence by statute, such certificates become only *prima facie* proof of the facts they duly set forth.⁶

§ 535. Copies of administrative records, or of papers deposited in public archives, are at common law inadmissible when the original can be had. Thus, a sworn copy of a marriage contract, executed in the presence of the lieutenant governor and Spanish commandant of Upper Louisiana, with a certificate of the commandant that the original was deposited in the archives of the territory, is not admissible to prove the marriage.⁷

¹ *Kopke v. People*, 43 Mich. 41. *Supra*, §§ 169 *et seq.*, 173, *a.* As to presumption of regularity, see *infra*, § 827. See *State v. Rowe*, 61 Me. 171.

² See *supra*, § 195.

³ *Gaines v. Relf*, 2 How. 619.

⁴ *Huntly v. Comstock*, 2 Root, 99.

⁵ *Dole v. Allen*, 4 Greenl. 527.

⁶ *Derby v. Salem*, 30 Vt. 722; *Jones's Succession*, 12 La. An. 397. See *Beates v. Retallick*, 23 Penn. St. 288.

⁷ *Chouteau v. Chevalier*, 1 Mo. 343. See *State v. Dooris*, 40 Conn. 145.

Yet when the original cannot be had an exemplification is admissible, for the reason that it is the best evidence attainable.¹

Where a statute, as is the case in several States, requires the return of a certificate of marriage to be made by the officiating minister to the county clerk for record, the proper mode of proving such fact is by an exemplification of the certificate.² But an exemplification of a foreign certificate of marriage will not be received unless it be proved that the record was kept in conformity with law, and that the person officiating was authorized to officiate.³

§ 536. We have already observed that for the purpose of proving pedigree, and other matters of family interest, family Bibles and other records may be received.⁴ For the same purpose a family chart, regarded as authoritative by the family, may be put in evidence.⁵

Family records admissible to prove family events.

V. BOOKS OF HISTORY AND SCIENCE: MAPS.

§ 537. Unless, as in prosecutions for libel, for the purpose of imputing certain facts to author or publisher, a history by a living author cannot be put in evidence. As a record of facts, it is, as to third parties, hearsay, and if the author's authority for these facts is sought, he must be called as a witness, whenever he is within the process of the court.⁶ Nor can such book be received when secondary, even though the author and all others who could speak to the facts are dead. Thus Dugdale's *Monasticon Anglicanum* has been rejected as evidence to show that the Abbey de Sentibus was an inferior abbey, because the original records were producible.⁷ But where the author is out of the reach of such process, then a book of history, travels, or chronicles, when not a compilation from another

Approved books of history and geography by deceased authors receivable.

¹ *Alivon v. Furnival*, 1 C., M. & R. 277; *Boyle v. Wiseman*, 10 Exch. 647; *Quilter v. Jones*, 14 C. B. (N. S.) 747; *Coode v. Coode*, 1 Curtis, 765; *Hyam v. Edwards*, 1 Dall. 2; *American Life Ins. & Trust Co. v. Rosenagle*, 77 Penn. St. 507.

² *Niles v. Sprague*, 13 Iowa, 819.

³ *State v. Dooris*, 40 Conn. 145; Whart. on Ev. § 659.

⁴ Whart. on Ev. § 219.

⁵ *North Brookfield v. Warren*, 16 Gray, 171; Whart. on Ev. § 660.

⁶ *Houghton v. Gilbert*, 7 C. & P. 701; *Fuller v. Princeton*, 2 Dane Ab. cc. 48, 49; *Morris v. Harmer*, 7 Pet. 554; *U. S. v. Jackalow*, 1 Black, U. S. 484; *Morris v. Edwards*, 1 Ohio, 524.

As to how far a court will take judicial notice of past history, see Whart. on Ev. § 338.

⁷ *Salk*, 281.

book which is producible, is admissible for what it is worth, so far as concerns facts out of the memory of living men.¹ And, as a rule, any such approved public and general history (and of the fact of approval the court will take judicial notice²), when not secondary, as a second-hand reduction of another producible work, is admissible to prove ancient facts of a public nature either at home or abroad. It is otherwise, however, as to matters of a private nature; such as the descent of families, or even the boundaries of counties.³ College catalogues,⁴ and peerage lists, and army and navy lists,⁵ are likewise inadmissible, if offered as to matters which could be proved by living witnesses. And the Gazetteer of the United States, without further authentication, cannot be received to prove the relative distances of geographical points.⁶

But to illustrate the meaning of words and allusions, books of general literary history may be referred to.⁷ Thus in a case before the English Court of Exchequer,⁸ it was ruled that works of standard authority in literature may, provided the privilege be not abused, be referred to by counsel or a party at a trial, in order to show the course of literary composition, and explain the sense in which words are used, and matters of a like nature; but that they cannot be resorted to for the purpose of proving facts relevant to the cause.⁹

§ 538. For reasons elsewhere discussed at large,¹⁰ treatises on such of the inductive sciences as are based on data which each successive year corrects and expands, must be refused admission when offered to prove the truth of facts contained in such treatises. Books of this class, therefore, though admissible, if properly authenticated, to prove the state of science at a particular epoch, when that is in issue, are inadmissible as independent substantive evidence to prove the facts they set

Books of inductive science not usually admissible.

¹ See Whart. on Ev. § 537 for cases.

² Whart. on Ev. § 282.

³ *Steyner v. Drotwich*, Skin. 623; 1 Salk. 281; 12 Mod. 85; *Evans v. Getting*, 6 C. & P. 586; *McKinnon v. Bliss*, 21 N. Y. 206.

⁴ *State v. Daniels*, 44 N. H. 383.

⁵ *Marchmont Peer*, Min. Ev. 62, 77; *Wetmore v. U. S.*, 10 Pet. 647.

⁶ *Spalding v. Hedges*, 2 Penn. St. 240. In the Tichborne trial, maps of Australia were received to show where the defendant lived. *Steph. Ev. art.* 37.

⁷ Whart. on Ev. § 282.

⁸ *Darby v. Onseley*, 1 H. & N. 1.

⁹ See *Co. Lit.* 264 a; *Best's Ev.* 802.

¹⁰ Whart. on Ev. § 665.

forth.¹ In an argument to a court, such works may, at the discretion of the court, be read, not as establishing facts (unless such books are regarded as matters of notoriety, as are ordinary dictionaries),² but as exhibiting distinct processes of reasoning which the

¹ *Darby v. Ousely*, 1 H. & N. 12 (where this distinction was expressly taken); *Collier v. Simpson*, 5 C. & P. 73; *Terry v. Ashton*, 34 L. T. 97; *Ashworth v. Kittridge*, 12 Cush. 193; *Whiton v. Ins. Co.*, 109 Mass. 24; *Com. v. Sturtivant*, 117 Mass. 122; *Com. v. Brown*, 121 Mass. 69; *State v. O'Brien*, 7 R. I. 336; *Yoe v. People*, 49 Ill. 410; *Carter v. State*, 2 Ind. 617; *Gehrke v. State*, 13 Tex. 568. As indicating a contrary practice, see *Ordway v. Haynes*, 50 N. H. 159; *Bowman v. Woods*, 1 Greene (Iowa), 441; *Bowman v. Torr*, 3 Iowa, 571; *Broadhead v. Wiltse*, 35 Iowa, 429 (by statute); *Cory v. Silcox*, 6 Ind. 39; *Luning v. State*, 1 Chand. (Wis.) 264; *Ripon v. Bittel*, 30 Wis. 614; *Stoudenmeier v. Williamson*, 29 Ala. 558; *Merkle v. State*, 37 Ala. 139. See article in 5 Cent. L. J. 439, and a valuable note by Mr. Lawson, 22 Am. Law Reg. 105 *et seq.*

² That Webster's Dictionary is so admissible, see *Alder v. State*, 55 Ala. 16.

In Texas it is said that the extent to which counsel may read from legal authorities, or from works of general science, rests within the sound discretion of the court, and the manner of exercising such judicial discretion will not be revised on appeal except in a clear case of its abuse. *Dempey v. State*, 3 Tex. Ap. 429.

Judge Redfield (1 Redfield on Wills, p. 145) tells us that the reading before the jury of "general treatises upon scientific and professional subjects has been allowed by many courts, either as part of the testimony or of the argument of counsel. But when objected

to, they have not generally been allowed to be read, either to court or jury." For this he cites *Com. v. Wilson*, 1 Gray, 337; *Washburn v. Cuddihy*, 8 Gray, 430; *Ashworth v. Kittridge*, 12 Cush. 193; *S. P., R. v. Taylor*, 13 Cox C. C. 77. Such books have been allowed to be read in Indiana, Iowa, and Alabama; *Cory v. Silcox*, 6 Ind. 39; *Bowman v. Torr*, 3 Iowa, 571; *Luning v. State*, 1 Chandler (Wis.) 264; *Bales v. State*, 63 Ala. 30; *Merkle v. State*, 37 Ala. 139. So in cases of insanity, *State v. Hoyt*, 46 Conn. 330; *Bales v. State*, 63 Ala. 30; *Conn. Ins. Co. v. Ellis*, 89 Ill. 516. *Contra*, *Carter v. State*, 2 Carter, 617; *State v. West*, 1 Houst. C. C. 371; *Gehrke v. State*, 13 Tex. 568; *State v. O'Brien*, 7 R. I. 336; *People v. Wheeler*, 60 Cal. 581; *Boyle v. State*, S. C. Wis. 1883.

Where this rule obtains, and where counsel, in their argument to the jury, read from medical books not in evidence, or proved to be authority upon the subject, it is the duty of the court to instruct the jury that such books are not evidence, but simply theories of medical men. *Yoe v. People*, 49 Ill. 410. At the same time it must be remembered that books of science relating to the law of the issue may be read in argument to the court. Such study by the court is in fact of great value to public justice. "I believe that those judges," well said Chief Justice Hornblower, when speaking judicially on this point, "who carefully study the medical writers, and pay the most respectful attention to their scientific researches on the sub-

court from its own knowledge as thus refreshed, is able to pursue.¹ But if read to establish facts, capable of proof by witnesses, such

ject, will seldom if ever submit a case to a jury in such a way as to hazard the conviction of a wronged man." *State v. Spencer*, 1 Zab. 196. And a learned judge (Bartley, C. J.) has justly said, that even as to argument to the jury, "a pertinent quotation, or extract from a book of science or art, as well as from a classical, historical, or other publication, may, by way of illustration, be not only admissible, but sometimes highly proper. And it would seem to make no difference whether it is repeated by counsel from recollection, or read from a book. It would be an abuse of this privilege, however, to make it the pretence of getting improper matter before the jury." *Legg v. Drake*, 1 McCook, 286. See *R. v. Waddington*, 1 East, 155, where Lord Kenyon, in his opinion after announcing that he had been reading "Dr. Adam Smith's work and various other publications upon the same subject," proceeded to decide that an indictment for forestalling could be sustained at common law, this being a position especially combated by Adam Smith.

In *Marshall v. Brown*, Sup. Ct. Mich. 1883, 15 N. W. Rep. 55, the court said: "It was decided in *People v. Hall*, 48 Mich. 486, that it was not competent to read professional books to the jury as evidence. The decision had not been made when this case was tried the second time; if it had been the error now complained of would probably not have been committed. On the cross-examination of Dr. Wood, a witness for the defendant, he was asked if he was acquainted with a certain book.

He replied that he had heard of it, but had not read it. He was then asked whether it was considered good authority, and he said it was. He was then requested to read a certain paragraph during the recess of the court. When the court convened again he was recalled, and counsel reading from the book the paragraph to which his attention had been called, asked him whether there was a case reported of taking sulphate of zinc, followed by vomiting, purging, and death? As this was what the paragraph stated, the evident purpose of the question was to put the passage from the book in this indirect manner before the jury, instead of reading from it directly. The witness demurred to this method of examination, but was required to answer, and did so. The case differs from *Pinney v. Cahill*, 48 Mich. 584, where a medical book was produced to contradict a witness who professed to be testifying from it."

For a learned note to *Pinney v. Cahill*, see 22 Am. Law Reg. 105 *et seq.* That before a scientific book should be read its authority should be proved by an expert, see *State v. Hoyt*, 46 Conn. 330.

In *Stilling v. Thorp*, 54 Wis. 528, the court said: "In *Ashworth v. Kittridge*, 12 Cush. 193, it was held that 'medical books, even of received authority, are not competent evidence, if objected to by the adverse party.' The reason given, in the terse opinion of Chief Justice Shaw, is that the statements contained in such extracts are 'wanting the sanction of an oath,' and are 'made by one not present, and not

¹ See fully Whart. on Ev. §§ 282, 335; *Harvey v. State*, 40 Ind. 516.

Contra, *R. v. Taylor*, 13 Cox C. C. 77; *Com. v. Wilson*, 1 Gray, 337.

books cannot be received. Medical works, consequently, are inadmissible for the purpose of proving the facts they contain.¹ So in action for a libel, charging the plaintiff with being a rebel and traitor, "because he was a Roman Catholic," the defendant was not allowed to justify by citing books of authority among the Roman Catholics, which seemed to show that their doctrines were inimical to loyalty.² It is true that an expert, when called to state the sense of his profession on a particular topic, may cite authorities as agreeing with him, and may refresh his memory by referring to standard works in his specialty,³ and may be cross-examined as to standard works so as to probe his capacity.⁴ But such witnesses are not permitted in their testimony to read extracts from books on physical philosophy as primary proof.⁵ It is clear, however, that when an expert cites certain works as authority, they may be put in evidence to contradict him,⁶ though unless he has been examined in reference to them, they cannot be used to impeach him.⁷

§ 589. Another state of facts arises when we approach books of exact science, in which conclusions from certain and constant data

liable to cross-examination.' See *Commonwealth v. Wilson*, 1 Gray, 338. In *Commonwealth v. Sturtevant*, 117 Mass. 123, it was held that 'books on medical jurisprudence cannot be read by a witness to the jury, although the witness is an expert, and concurs in the views therein expressed.' The only difference in that case and this is that here the counsel proposed to read the extracts, instead of the witness. These cases are in harmony with our own judgment, as well as the former decisions of this court on the subject. See discussions in 24 Alb. L. J. 286, 284; *Wharton Ev.* §§ 665-6; 1 Greenl. § 440, and note." As taking a laxer view, see *People v. Draper*, 1 N. Y. Cr. Rep. 139.

¹ *Com. v. Wilson*, 1 Gray, 337; *Com. v. Sturtevant*, 117 Mass. 122; *Com. v. Brown*, 121 Mass. 69. As to reading books of remarkable trials, see *Jones v. State*, 65 Ga. 506. *Supra*, § 407.

² *Darby v. Ousely*, 1 H. & N. 1; *Powell's Evidence*, 4th ed. 105.

³ *Supra*, § 407; *Cocks v. Purday*, 2 C. & K. 270; *Collier v. Simpson*, 5 C. & P. 74; *McNaughten's Case*, 10 Cl. & F. 200; *Pierson v. Hoag*, 47 Barb. 243; *Cory v. Silcox*, 6 Ind. 39; *Harvey v. State*, 40 Ind. 516; *Bowman v. Torr*, 3 Iowa, 571; *Ripon v. Bittel*, 30 Wis. 614; *State v. Terrell*, 12 Rich. 321; *Merkle v. State*, 37 Ala. 139.

That an expert may be cross-examined as to authorities in his specialty, see *supra*, § 407.

⁴ *Connect. Ins. Co. v. Ellis*, 89 Ill. 516.

⁵ *Com. v. Wilson*, 1 Gray, 337; *Washburn v. Cuddihy*, 8 Gray, 430; *Com. v. Sturtevant*, 117 Mass. 122; *Boyle v. State*, S. C. Wis., 1883. See fully *supra*, § 407. That such books cannot go out with the jury see *State v. Gillick*, 10 Iowa, 98.

⁶ *Ripon v. Bittel*, 30 Wis. 614.

⁷ *Knoll v. State*, 55 Wis. 249.

are reached by processes too intricate to be elucidated by a witness when on examination on a stand. The books containing such processes, if duly sworn to by the persons by whom they are made, are the best evidence that can be produced in that particular line.¹ When the authors of such books cannot be reached, the next best authentication of the books is to show that they have been accepted as authoritative by those dealing in business with the particular subject. Hence the Carlisle and Northampton Tables have been admitted by the courts as showing what is the probable duration of life under particular conditions.² In order to verify the book it is proper to prove, by a witness qualified to speak to the point, that it is in use in the particular line of business to which the book relates.³ It should at the same time be remembered that while the Carlisle and other tables may be received to prove certain results of a large induction, they cannot be permitted to control a litigation as to the value of a life estate, so as to work substantial injustice.⁴ An almanac, also, has been received in order to show the period of sunset and of moonlight.⁵

Otherwise
as to books
of exact
science.

VI. GAZETTES AND NEWSPAPERS.

§ 540. In England, by the Documentary Evidence Act, the government or official gazette is "*prima facie* evidence of any proclamation, order, or regulation," of the government, or of any of its departments. At common law, a distinction is taken in this connection between grants or commissions to an individual, and the correspondence of the crown with the public as a body. The gazette is not at common law evidence of the grant of land to a subject, nor of the commissioning

Gazette
evidence of
public official
documents.

¹ See *supra*, § 203. Even as to these, however, there should be verification. Iowa, 280; David v. R. R., 41 Ga. 223.

For curious illustrations of blunders in books of this class see Jevons's *Philosophy of Science*, i. 244. *Supra*, § 8 *et seq.*

² Mills v. Catlin, 22 Vt. 106; Schell v. Plumb, 55 N. Y. 598; Bank v. Hogenobler, 3 Penn. L. J. 37; S. C., 4 Penn. L. J. 392; Balt. and O. R. R. v. State, 33 Md. 542; Williams's Case, 3 Bland Ch. 221; Donaldson v. R. R., 18

Rowley v. R. R., L. R. 8 Exch. 226.

⁴ Whart. on Ev. § 667.

⁵ State v. Morris, 47 Conn. 179; Winshower v. State, 55 Md. 11. See Sutton v. Darke, 5 H. & N. 649; Sprowl v. Lawrence, 33 Ala. 671; People v. Chee Kee, 61 Cal. 404. As to judicial notice of almanacs, see Wh. on Ev. § 282; Reed v. Wilson, 41 N. J. L. 29.

of an officer of the army; but it is admissible to prove proclamations, and addresses received by the crown, and other matters of exclusively public importance, and as to which there is no private record kept. The same distinction has been recognized in the United States.¹

§ 541. When it is important to ascertain whether certain information was current in a community at a particular time, so as to impute knowledge to a particular person, then it may be admissible to put in evidence the newspapers circulating at the time in such community for the purpose of showing that the fact in question was one of common local notoriety.² And the same course is taken when the object is to prove notice of dissolution of a partnership, or of market prices, when the newspaper containing the facts alleged is shown to have been likely to be read by, or its contents familiar to, the party charged.³

News-
papers ad-
missible to
impute
knowledge
of facts to
party.

§ 542. Unless to charge a particular party with matter alleged to have been inserted by him in a newspaper; or to prove notoriety in the sense already stated; or to prove, by old newspapers, ancient facts not otherwise susceptible of proof; newspapers cannot be received in evidence.⁴ And when the object is to charge a particular advertisement on a particular person as its author, it is necessary to produce the original manuscript. It is only when the latter is non-producible that the printed copy can be received.⁵ So far as concerns ordinary events, a newspaper cannot be recognized as evidence.⁶ Thus the identity or history of a person cannot, as to matters of recent occurrence, which can be otherwise established, be proved by a newspaper notice.⁷

But not
generally
for other
purposes.

§ 543. It has been held not enough, in order to bring home to a party knowledge of a newspaper notice, to show that the newspaper was circulated in the neighborhood of the party's residence.⁸ But it will be enough, to enable the newspaper to go to the jury, to prove that it was

Knowledge
of news-
paper no-
tice may be
proved in-
ferentially.

¹ Whart. on Ev. § 671.

² Whart. on Ev. § 672.

³ Ibid. §§ 673-4.

⁴ See Whart. on Ev. § 674 a.

⁵ Swiegart v. Lowmarter, 14 S. & R. 200.

⁶ See Ring v. Huntington, 1 Mill (S. C.), 162.

⁷ Fosgate v. Herkimer Man. Co., 9 Barb. 287.

⁸ Norwich Nav. Co. v. Theobald, M. & M. 153; Kellogg v. French, 15 Gray, 354.

taken by the party on whom it is sought to prove notice,¹ or that he attended habitually a reading room where it was on file, or was shown in some way to have been familiar with the paper.²

VII. PICTURES AND PHOTOGRAPHS: PLANS AND DIAGRAMS.

§ 544. Of persons who are dead, or cannot for other reasons be produced in court,³ duly authenticated pictures,⁴ and photographs⁵ are admissible in questions of pedigree and identity; though they are open to parol explanation.

Pictures
and photo-
graphs are
admissible.

¹ *Godfrey v. Macaulay*, Pea. Ad. Cas. 155, n.; *Jenkins v. Blizard*, 1 Stark. 419; *Hart v. Alexander*, 2 M. & W. 484; *Leeson v. Holt*, 1 Stark. 186.

² *Whart. on Ev.* § 675.

³ As to inspection, see *supra*, § 311.

⁴ *Camoy's Peerage Case*, 6 Cl. & F. 801.

⁵ 3 *Whart. & St. Med. Jur.* §§ 123, 670; *Ruloff v. People*, 45 N. Y. 215; S. C., 5 *Lansing*, 261; *Udderzook's Case*, 76 Penn. St. 340; S. C., *Whart. on Hom. Appendix*; *Shaible v. Ins. Co.*, 9 *Phila.* 136; *aff. 1 Weekly Notes*, 369; *Beavers v. State*, 58 Ind. 530; *Luke v. Calhoun Co.*, 52 Ala. 115.

See *Beers v. Jackman*, 103 Mass. 192, ruling that evidence of similarity was inadmissible in bastardy suits.

As to the secondary character of photographs, see *supra*, § 175. And see 3 *Whart. & St. Med. Jur.* § 670.

The admission of photographs, as a means of identification, is thus discussed by a learned judge of the Supreme Court of Pennsylvania:—

"All the bills of exceptions, except one, relate to this question of identity, the most material being those relating to the use of a photograph of Goss. This photograph, taken in Baltimore, on the same plate with a gentleman named Langley, was clearly proved by him, and also by the artist who took it. Many objections were made to the use of this photograph, the chief

being to the admission of it to identify Wilson as Goss; the prisoner's counsel regarding this use of it as certainly incompetent. That a portrait or a miniature painted from life, and proved to resemble the person, may be used to identify him, cannot be doubted, though, like all other evidences of identity, it is open to disproof or doubt, and must be determined by the jury. There seems to be no reason why a photograph, proved to be taken from life, and to resemble the person photographed, should not fill the same measure of evidence. It is true, the photographs we see are not the original likenesses; their lines are not traced by the hand of the artist, nor can the artist be called to testify that he faithfully limned the portrait. They are but paper copies taken from the original plate, called the negative, made sensitive by chemicals, and printed by the sunlight through the camera. It is the result of art, guided by certain principles of science.

"In the case before us, such a photograph of the man Goss was presented to a witness who had never seen him, so far as he knew, but had seen a man known as Wilson. The purpose was to show that Goss and Wilson were one and the same person. It is evident that the competency of the evidence in such a case depends on the reliability of the photograph as a work of art, and this,

Photographs of places may also be admitted;¹ though the impression they give may require to be corrected *aliunde* by measurement.² In all cases the genuineness and fairness of the photograph should be proved as a prerequisite to admission;³ and the negative, if possible, should be produced.⁴ Photographs of handwriting are

in the case before us, in which no proof was made, by experts, of this reliability, must depend upon the judicial cognizance we may take of photographs, as an established means of producing a correct likeness. The Daguerrean process was first given to the world in 1839. It was soon followed by photography, of which we have had nearly a generation's experience. It has become a customary and a common mode of taking and preserving views, as well as the likenesses of persons, and has obtained universal assent to the correctness of its delineations. We know that its principles are derived from science; that the images on the plate, made by the rays of light through the camera, are dependent on the same general laws which produce the images of outward forms upon the retina through the lenses of the eye. The process has become one in general use, so common that we cannot refuse to take judicial cognizance of it as a proper means of producing correct likenesses." Agnew, C. J., *Udderzook v. Com.*, 76 Penn. St. 352, 353.

¹ *Blair v. Pelham*, 118 Mass. 420; *Cozzens v. Higgins*, 1 Ab. (N. Y.) App. 451; *Church v. Milwaukee*, 31 Wis. 512, per Cole, J.

² *Tichborne Trial*, Cockburn, C. J., Charge, li. 640. See article in 20 Alb. L. J. 4.

³ *Marcy v. Barnes*, 16 Gray, 161; *Hollenbeck v. Rowley*, 8 Allen, 473; *Com. v. Coe*, 115 Mass. 481; *Walker v. Curtis*, 116 Mass. 98; *Blair v. Pelham*, 118 Mass. 420; *Ruloff v. People*, 45 N. Y. 215; 3 Whart. & St. Med. Jur. (4th

ed.) § 835; *Cowley v. People*, 83 N. Y. 464 (S. C., 21 Hun, 415). In this case the court said: "We do not fail to notice, and we may notice judicially, that all civilized communities rely upon photographic pictures for taking and presenting resemblances of persons and animals, of scenery and all natural objects, of buildings and other artificial objects. It is of frequent occurrence that fugitives from justice are arrested on the identification given by them. 'The Rogues Gallery' is the practical judgment of the executive officers of the law on their efficiency and accuracy. They are signs of the things taken. A portrait or a miniature taken by a skilled artist and proven to be an accurate likeness would be received on a question of the identity or the appearance of a person not producible in court. Photographic pictures do not differ in kind of proof from the pictures of a painter. They are the product of natural laws and a scientific process. It is true, that in the hands of a bungler, who is not apt in the use of the process, the result may not be satisfactory. Somewhat depends for exact likeness upon the nice adjustment of machinery, upon atmospheric conditions, upon the position of the subject, the intensity of the light, the length of the sitting. It is the skill of the operator that takes care of these, as it is the skill of the artist that makes correct drawing of features and nice mingling of tints for the portrait." See discussion in 3 Whart. & St. Med. Jur. (4th ed.) §§ 670 *et seq.*

⁴ "Even photographs," says Dr. Tidy,

in like manner admissible;¹ though in cases involving delicate questions of identity of hands, a photograph should not be relied on without investigating the refractive power of the lens, the angle at which the original was inclined to the sensitive plane, the accuracy of the focusing, and the skill of the operator.² Photographs may also be received of records which cannot be brought into court.³ Engravings of scientific results may, it seems, be admitted to illustrate an argument.⁴ But as to all forms of pictorial or photographic representation, whether the representation is genuine and reasonably correct must be determined by the court before it can be received; and the ruling of the court below in this respect is not, it is said in Massachusetts, open to exception in error.⁵

Med. Jur. 1883, Pt. I. 143, "help us but little in this respect, complexion, general appearance, depth of tint, and so forth, depending still more on such details as the after touching-up of the negative, the time of its exposure, and the ease with which it prints, than they do on the face and complexion of the sitter. Further, the recognition of a well-known friend with whom we have had daily intercourse, by a carte-de-visite, taken many years previously, is often far from easy. And this suggests the remark that in all cases where photographs are required in a court of law, the negatives themselves should if possible be called for and produced. The tricks that a skilful photographer and toucher-up can play with a negative, render prints comparatively valueless as evidence." Of the effect of the imagination in identifying likeness in photographs, see 3 Whart. & St. Med. Jur. § 943 (4th ed.).

¹ *Marcy v. Barnes*, 16 Gray, 161. *Infra*, § 561. See *Robinson v. Mandell*, cited *supra*, § 10.

² *Taylor Will Case*, 10 Abb. N. Y. Pr. N. S. 300; *Tome v. R. R.*, 39 Md. 36. See *Daly v. Maguire*, 6 Blatch. 137; *Foster's Will Case*, 34 Mich. 21;

Eborn v. Zimpelman, 47 Tex. 503; *Robinson v. Mandell*, Pamph. R. 683 (Boston, 1868), gives some curious testimony as to inaccuracy of photographs of writings.

³ See *Stephens, In re*, L. R. 9 C. P. 187; *Daly v. Maguire*, 6 Blatch. 137; *Leathers v. Wrecking Co.*, 2 Wood, 682. *Supra*, § 175; *Luco v. U. S.*, 23 How. 515; *Reddin v. Gates*, 52 Iowa, 210.

⁴ *Ordway v. Haynes*, 50 N. H. 159.

⁵ "A plan or picture, whether made by hand of man, or by photography, is admissible in evidence, if verified by proof that it is a true representation of the subject, to assist the jury in understanding the case. *Marcy v. Barnes*, 16 Gray, 161; *Hollenbeck v. Rowley*, 8 Allen, 473; *Cozzens v. Higgins*, 1 Abbott (N. Y.), 451; *Ruloff v. People*, 45 N. Y. 213; *Udderzook v. Com.*, 76 Penn. St. 340; *Church v. Milwaukee*, 31 Wis. 512. Whether it is sufficiently verified is a preliminary question of fact, to be decided by the judge presiding at the trial, and not open to exception. *Com. v. Coe*, 115 Mass. 481, 505." *Walker v. Curtis*, 116 Mass. 98. In illustration of the use of photography, in connection with the produc-

§ 545. We have already had occasion to observe,¹ that parol evidence may be received of buildings, monuments, and other ob-

tion of evidence, the following cases, for which I am indebted to an eminent scientist, will be of value.

"In the case of the Rumford Chemical Works v. Hecker, 11 Blatchf. 552, the question was raised as to the relative porosity of bread made with yeast in the usual manner, and that prepared with the baking powder of the complainants. Evidence was introduced by defendants as follows: President Henry Morton, of the Stevens Inst. of Technology, Hoboken, N. J., who organized the photographic observations of the eclipse of 7th August, 1869, under the Nautical Almanac Office, and otherwise an expert in photography, was produced, and deposed to having prepared sections of both varieties of bread of exactly equal thickness, and to having made microscope or highly enlarged photographs of the same, under identical conditions. The original negatives of these, and also positive prints from the same, were received and filed as exhibits.

"In the case of H. D. Cone v. Porter & Bambridge, a question being raised as to the identity in character in embossed lines on writing paper claimed to infringe a patent for such lines when made of an 'ogee' form, the same expert named above was produced, and deposed to having prepared slips of each variety of paper under consideration, attaching the same side by side in the four positions, which would give every possible variety to the arrangement of light and shade in the experiment, and then making photographs of the entire sheet, or card, with a very oblique illumination.

"By this means the variations of surface in the embossed lines was strongly marked by light and shade, and the identity or difference of the various samples clearly shown.

"In the case of Funcke v. New York Mutual Life Insurance Co., in 1876, in the Superior Court of New York City, a question arose as to the alteration of a check from \$100 to \$1500. The alteration had been confessed by a notorious forger, who had been employed to make it, but who was under sentence for another offence. Photographs were exhibited, showing decided traces of the original writing, especially of the word 'One,' under the newly written 'Fifteen.' It was objected that these traces of the original writing, which were not visible on the check itself, were also invisible on certain of the photographs. It has been suggested to us by President Morton, that this was probably due to a too long exposure of the negatives not showing the traces. The ink, which had been obliterated by the use of dilute sulphuric acid and hypochloride of soda (Labarraque's solution), had left only a very faint trace of oxide of iron, which, by reason of its yellow color, would have a special absorbing power for the actinic or photographic rays, but yet even in this regard the difference between this remnant of the ink and the white paper was very slight, and if the exposure was at all too long, even the yellow traces reflected light enough to render the negative film opaque. It was therefore necessary that *just time enough* should be given to allow the white paper to produce its effect, when the slightly yellow

¹ *Supra*, § 168.

jects which cannot be brought into court. For this purpose, authenticated plans or diagrams of the *locus in quo* are admissible.¹ But such a plan ought not to contain any references to matters before the court, when such matters were not existing when the survey was made.²

And so of
plans and
diagrams.

VIII. PROOF OF DOCUMENTS.

§ 546. The burden of proving the due execution of a document lies on the party seeking to put it in evidence.³ When offered for a collateral purpose, a *prima facie* proof of execution is sufficient.⁴ Execution may be proved by the admission of the party, unless such proof is required by law to be by subscribing witnesses.⁵ Whether an admission can prove the contents of a paper is elsewhere discussed.⁶

§ 547. It is noticed elsewhere that the handwriting of attesting witnesses, after the lapse of thirty years, need not be proved.⁷

parts would be distinguishable by their inferior action."

The following is from the Albany Law Journal of June 10, 1876:—

"A novel application of the art of photography was made in a case on trial before Mr. Justice Dykman, in the Supreme Court Circuit, New York, on Friday, June 2, 1876. The question at issue was, whether the certification of a check, purporting to have been made by the teller of the bank on which it was drawn, was genuine, or a forgery. The teller swore that it was not his certificate, and several experts pronounced the signature a forgery; while other experts, called by the holder of the check, were equally positive that the signature was genuine. Thereupon the court-room was darkened, and 'Prof. Combs,' with the aid of a calcium light magic lantern, threw an image, from a photographic negative, of the check in question, upon the wall, to show that the writing was free and flowing, and not the labored and retouched signature, which is the usual accompaniment of forgeries, and which

some of the experts insisted appeared in this case. This exhibit seems to have had the desired effect, as the jury found that the signature was genuine." See *infra*, § 561. And see proceedings in Sharon Divorce Case, San Francisco, May, 1884.

¹ Jones v. Tarleton, 9 M. & W. 84; R. v. Fursey, 6 C. & P. 84; State v. Knight, 43 Me. 11; Wood v. Willard, 36 Vt. 81; Blair v. Pelham, 118 Mass. 420; Stuart v. Binasse, 10 Bosw. (N. Y.) 436; Vilas v. Reynolds, 6 Wis. 214; Moon v. State, 68 Ga. 687; Shook v. Pate, 50 Ala. 91; Gavignan v. State, 55 Miss. 533; State v. Lawlor, 28 Minn. 216. See several instances given in Bemis's Webster Trial.

² R. v. Mitchell, 6 Cox C. C. 82.

³ *Supra*, §§ 319 *et seq.*; Whart. on Ev. § 680.

⁴ Means v. Means, 7 Rich. 533.

⁵ Wright v. Wood, 23 Penn. St. 120; Powell v. Adams, 9 Mo. 758. *Infra*, § 687. See Whart. on Ev. § 1095.

⁶ *Infra*, § 684.

⁷ See *supra*, § 190.

The same rule is applied to ancient documents unattested by witnesses, and which are taken from proper depositories.¹

Documents over thirty years old prove themselves.

§ 548. Where, for the purposes of verification, it is important to go back beyond thirty years, a person who is familiar (from having had occasion to examine old deeds and other papers indisputably traceable to the party whose signature is contested) with the handwriting in question may be permitted to testify as to the genuineness of a document.²

Such documents may be verified by experts.

§ 549. Though the testimony of the alleged writer is of much value in determining the genuineness of a writing imputed to him,³ it is not necessarily, even supposing him to be free from bias, the strongest producible.⁴ I may remember having written or signed a particular document, and this recollection, taken in connection with my recognition of my own signature, forms strong evidence. But it by no means follows that I am the person most able to distinguish my own writing from a skilful forgery. Those who are experts in respect to handwriting are able to observe delicate shades which may be imperceptible to me, and to apply tests of which I may be ignorant. So a rude penman may be unable to frame his signature in such a way as to present to him any positive differentia. At the same time, the belief of persons accustomed to use their pens with ordinary frequency, as to the genuineness of their signature, is entitled to great consideration;⁵ and it is one of the benefits of the late statutes making parties witnesses, that the testimony of parties to their own signature can now be obtained by the ordinary common

Handwriting may be proved by the writer himself, or his admission.

¹ Whart. on Ev. § 547.

² Fitzwalter Peerage Case, 10 Cl. & F. 193; Jackson v. Brooks, 8 Wend. 426; Sweigart v. Richards, 8 Penn. St. 436; Cantey v. Platt, 2 McCord, 260; Smith v. Rankin, 20 Ill. 14. See *infra*, § 847.

³ See Com. v. Taylor, 5 Cush. 605; State v. Hooper, 2 Bailey, 214. See, generally, *supra*, §§ 160, 360.

For a discussion of the presumption of continuance of individuality in handwriting, see 1 Criminal Law Mag. 38 *et seq.* *Infra*, § 845.

⁴ In the trial of Carswell at Glasgow, in May, 1791, for the forgery of bank notes, one of the banker's clerks, whose name was on the forged note, swore distinctly that it was his handwriting, while he spoke hesitatingly with regard to his genuine subscription. Wills on Cir. Ev. 112. For extrinsic proof, see *infra*, §§ 844 *et seq.*

⁵ Bank Cases, R. & R. 378; R. v. Newland, 2 East P. C. 1001-2; 1 Leach, 311.

law processes.¹ Much less weight, however, belongs to the casual, extra-judicial admission of a person that a certain writing is his. To make such admission receivable, it must appear that the writing was shown to him; and even then he may show that his admission was founded on mistake. But, in any view, such admission is *prima facie* evidence,² and on indictments for libel is admissible to prove complicity of the defendant in a libellous publication.³

§ 550. In England, by statute, a person whose handwriting is in dispute may be called upon by the judge to write in his presence, and such writing may be compared with the writing in litigation.⁴ In this country similar statutes have been adopted. No doubt occasional advantages may flow from the application of this test.⁵ To such evidence, however, it may be objected that a person who is called upon to write, in a court-house, a piece for judicial inspection, may have strong motives to modify his usual style of writing, and in any view, such writing would be likely to be more formal and regular than a current business hand, and to perplex rather than convince experts.⁶ Nor should it be forgotten that nervousness, at such a moment, may subdue in the writing its usual characteristics. At the same time, on cross-examination of a witness who has denied his signature, such a practice is proper and efficient, though it could not be compelled when the witness sets up his privilege in respect to self-crimination.⁷ Neither should a party be permitted to manufacture evidence for himself by writing his name as a basis for a

Party may
be called
upon to
write.

¹ See *infra*, § 550.

² Whart. on Ev. § 725. *Infra*, §§ 630, 684. See *Hammond v. Varian*, 54 N. Y. 400.

³ See Whart. Crim. Law, 8th ed. § 1623.

⁴ See *Devine v. Wilson*, 10 Moore P. C. 502; *Cobbett v. Kilminster*, 4 F. & F. 490.

⁵ See *Chandler v. Le Barron*, 45 Me. 534.

⁶ As refusing to permit a party to write a paper in court as a basis for comparison, see *Com. v. Allen*, 128 Mass. 46; *Williams v. State*, 61 Ala. 33.

⁷ *Gilbert v. Simpson*, 6 Daly, 30;

First Nat. Bank v. Robert, 41 Mich.

700. "There are cases to the effect that, where a witness has denied his signature to a document, he may be called upon, in cross-examination, to write his name in open court, in order that the jury may compare such writing with the controverted signature; but this is merely as a part of the cross-examination, and for the purpose of contradicting the witness. *Doe v. Wilson*, 10 Moore P. C. 502, 530; *Chandler v. Le Barron*, 45 Me. 534; *Taylor on Evidence*, § 1669." *Ames, J., King v. Donahue*, 110 Mass. 155.

comparison of hands by a jury.¹ And hence, in Massachusetts, in 1869, where the trial court refused to admit a paper written by the defendant for the purpose of comparing it with other writing imputed to him, it was held to be within the province of the trial court "to refuse to permit such a signature to be written when the circumstances are such that it does not appear to him to furnish a fair standard of comparison."²

Evidence of handwriting by another is in no sense secondary to evidence of such handwriting by the writer himself.³

§ 550 *a*. That a witness saw the party charged write the particular document is sometimes called direct proof. But it is not direct proof. It depends, for credibility, on two conditions. In the first place, the witness must have been capable of accurately and honestly observing, and of accurately and honestly narrating.⁴ In the second place, the identity of the party charged and that of the document must be shown beyond reasonable doubt. Of course, when the witness formally attests a document, doubts as to the identity of the document are much reduced. But in this, as in all other cases of what is called "direct" testimony, so far as such testimony depends upon the statement of a single witness as to what he saw, the risk of perjury as well as of mistake must be kept in mind.

§ 551. It does not follow that because I have seen a person write I am able subsequently to identify his writing on documents which I have never previously seen. I may see a person write several times without becoming by any means as familiar with his handwriting as I would be by maintaining with him a protracted correspondence. I may watch him but listlessly, or at a distance, as one clerk may do another in a counting-room, without mastering the peculiarities of his penmanship. Still, with all these qualifications, the "presumption *ex visu scriptio*nis," as Mr. Bentham calls it,⁵ not only lends

Witness to signature.

Seeing a person write qualifies a witness to speak as to his writing.

¹ King v. Donahue, 110 Mass. 155. Hurley, 2 M. & Rob. 473; R. v. Ben-See Hammond's Case, 2 Greenl. 33; son, 2 Camp. 508; Smith v. Prescott, Keith v. Lothrop, 10 Cush. 453; Hynes 17 Me. 277; Ainsworth v. Greenlee, 1 v. McDermott, 82 N. Y. 41; *infra*, § 559; Hawks, 190; McCaskle v. Amarine, 12 Roe v. Roe, 40 N. Y. Sup. Ct. 1. Ala. 17. *Supra*, §§ 160, 360.

² Com. v. Allen, 128 Mass. 46.

⁴ See *supra*, §§ 369-375.

³ R. v. Hazy, 2 C. & P. 458; R. v.

⁵ Jud. Ev. iii. 598.

to such testimony much weight, but makes it technically primary.¹ It has, however, been said that such knowledge of handwriting, in cases where forgery is charged, must be before the commencement of the suit; for it is argued that after a suit involving forgery has been instituted, a party is under too great a temptation to make evidence for himself to justify dependence on his samples of his penmanship. But this reasoning, as giving an absolute rule as to time, cannot now prevail in those States in which by statute interest is for the jury and not for the court, and parties are admitted to testify on their own behalf. Nor, on principle, can it be admitted as an inflexible test that evidence which a party has the opportunity of moulding in his own interests is to be ruled out. If all such evidence is to be excluded, comparatively little evidence could be let in. At the same time, as has been well observed,² the knowledge must not have been communicated with a view to proof by a witness prejudiced by his employment for such purpose.³ Thus where, on an indictment for sending a threatening letter, the witness called to prove that the letter was in the handwriting of the accused was a policeman, who, after the letter had been received and suspicions aroused, was sent by his inspector to the accused to pay him some money and procure a receipt, in order thus to obtain a knowledge of his handwriting by seeing him write; his evidence was rejected by Maule, J., on the ground, that "Knowledge obtained

¹ *R. v. Tooke*, 25 How. St. Tr. 71; 144; *Carrier v. Hampton*, 11 Ired. L. R. v. Hensey, 2 Ld. Ken. 366; 1 Burr. 311; *Fogg v. Dennis*, 3 Humph. 47; 642; *U. S. v. Prout*, 4 Cranch C. C. and *Strong v. Brewer*, 17 Ala. 710, 301; *Hartung v. People*, 4 Park. C. R. "marks" were identified by persons 319; *Com. v. Smith*, 6 S. & R. 568; who had seen the party make such State v. Hess, 5 Ohio, 7; State v. Stal- marks as a signature; though it has maker, 2 Brev. 1; State v. Anderson, been ruled that without the witness 2 Bailey, 565; *Haynie v. State*, 2 Tex. having seen the party make his mark on other occasions, the evidence cannot Ap. 168. For other cases, see Whart. be received. *Shinkle v. Cook*, 17 Penn. on. Ev. § 707. *Infra*, § 846. That St. 159.

² Best's Ev. § 236.

³ See the judgments of Patteson and Coleridge, JJ., in *Doe d. Mudd v. Suckermore*, 5 Ad. & El. 703; *S. P., Keith v. Lothrop*, 10 Cush. 453; and *infra*, § 558. See, also, *Doe v. Newton*, 5 Ad. & El. 514.

In *Jackson v. Van Deusen*, 5 Johns.

for such a specific purpose and under such a bias is not such as to make a man admissible as a *quasi expert* witness.”¹

§ 552. Not only, therefore, must we conclude that knowledge of handwriting obtained exclusively by correspondence is not secondary to knowledge obtained by seeing the party write, but we must hold that knowledge obtained of handwriting by long correspondence, or by continuous business association with a party (*e. g.*, as in the case of bank teller with depositor), is entitled, when the witness is experienced and reliable, to peculiar credit; and eminently is this the case when the witness has, in prior transactions, staked much on the knowledge which he is called on to attest, though he may never have seen the party write.² It is sufficient to admit such evidence that there is an acknowledgment, express or implied, by the party writing, of the writings from which the opinion of the witness is drawn.³ If, for instance, W. writes to P. by post, to P.’s usual address, and an answer, purporting to come from P., is received by W. by post, this, if the correspondence continues, raises a presumption that P.’s letter is genuine, and thus enables W. to take it as the basis of his opinion as to P.’s handwriting.⁴ To notice another illustration: persons familiar with the signature of the officers of the bank to bank notes, such notes being proved to be treated by the bank as good, may be permitted to prove such signatures, although they were not personally acquainted with the writers.⁵

¹ *R. v. Crouch*, 4 Cox C. C. 163; but see *contra*, *Reid v. State*, 20 Ga. 681.

² See *supra*, § 548, as to such acquaintance with ancient writings.

³ *R. v. Slaney*, 5 C. & P. 213; *Doe v. Suckermore*, 5 A. & E. 731; S. C., 2 N. & P. 46; *U. S. v. Keen*, 1 McLean, 429; *U. S. v. 3109 Cases of Champagne*, 1 Ben. 241; *Hammond’s Case*, 2 Greenl. 33; *State v. Hopkins*, 50 Vt. 316; *Com. v. Peck*, 1 Met. 428; *Com. v. Carey*, 2 Pick. 47; *U. S. v. Simpson*, 3 Penn. 437; *Com. v. Smith*, 6 S. & R. 558; *State v. Spence*, 2 Harring. 348; *State v. Candler*, 3 Hawks, 390; *May v. State*, 14 Ohio, 461; *Johnston v. State*, 35 Ala. 370. *Infra*, § 845.

⁴ *Carey v. Pitt*, Pea. Add. Cas. 130; *Gould v. Jones*, 1 W. Bl. 384; and other cases cited Whart. on Ev. § 708.

⁵ *State v. Carr*, 5 N. H. 367; *Amherst Bank v. Root*, 2 Met. 522; *State v. Stalmaker*, 2 Brev. 1; *State v. Candler*, 3 Hawks, 393; *Allen v. State*, 3 Humph. 367. See *Amherst Bank v. Root*, 2 Met. 522; *Wilson v. Betts*, 4 Denio, 201; *Bank of the Com. v. Mudgett*, 44 N. Y. 514; *Johnson v. Davenport*, 19 Johns. 134; *Donaghoe v. People*, 6 Parker C. R. 120; *Hess v. State*, 5 Ohio, 5; *Sill v. Reese*, 47 Cal. 294.

On the other hand, the testimony of a person, not an expert, familiar with the writing of a person charged with forgery, that the defendant did not commit a particular forgery, has been held inadmissible,¹ though this ruling may be gravely questioned.²

It is a prerequisite to the admission of such proof that the writings from which the witness has drawn his knowledge should be genuine.³ It will not be enough that the witness obtains his knowledge from letters whose genuineness is in dispute.⁴ It may be added that this kind of testimony is not excluded, as has been already noticed, by the fact that the writer of the instrument is himself in court, and could be called.⁵

§ 558. A witness called to testify as to handwriting, and who establishes a *prima facie* case of acquaintance with the handwriting of the person whose signature is in dispute, will be admitted by the court to testify,⁶ though before his admission he may be cross-examined as to his opportunities, so that his qualifications may be tested by the court.⁷ It is not necessary that the witness should swear to an actual *belief* in the genuineness of a writing. It is enough if he states his *opinion* as to such genuineness.⁸ Lord Kenyon went so far as to hold that it was admissible for a witness to testify merely that the contested writing was like the handwriting of the party to

Burden on
opposite
party to
show wit-
ness is in-
competent.

¹ *Burress v. Com.*, 27 Grat. 934. *Infra*, § 562.

² *Infra*, § 559.

³ *Doe v. Suokermore*, 5 A. & E. 731, by Patterson, J.; *Cochran v. Butterfield*, 18 N. H. 115; *McKeone v. Barnes*, 108 Mass. 344; *Com. v. Coe*, 115 Mass. 481; *Cunningham v. Bank*, 21 Wend. 557; *Boyle v. Colman*, 13 Barb. 42; *Magie v. Osborn*, 1 Robt. (N. Y.) 689.

⁴ *Nat. Un. Bk. v. Marsh*, 46 Vt. 443; *Goldsmith v. Bane*, 3 Halst. 87; *McKonkey v. Gaylord*, 1 Jones L. (N. C.) 94. See *R. v. Benson*, 2 Camp. 508. That the admissions of one convicted of an infamous crime cannot be received to prove the identity of letters said to have been written by him, see *Long v. State*, 10 Tex. Ap. 186.

⁵ *Supra*, §§ 160, 360, 551; *Smith v.*

Prescott, 17 Me. 277; *Ainsworth v. Greenlee*, 1 Hawks, 190; *Pomeroy v. Golly*, Ga. Dec. pt. i. 26; *McCaskie v. Amarine*, 12 Ala. 17.

⁶ *De la Motte's Case*, 21 How. St. Tr. 810; *Goodhue v. Bartlett*, 5 McLean, 185; *Moody v. Rowell*, 17 Pick. 490; *Whittier v. Gould*, 8 Watts, 485; *Barwick v. Wood*, 3 Jones (N. C.) 306; *Henderson v. Bank*, 11 Ala. 855.

⁷ See *Rogers v. Ritter*, 13 Wall. 317; *Slaymaker v. Wilson*, 1 Penn. R. 216.

⁸ *Watson v. Brewster*, 1 Penn. St. 381; *Shitler v. Bremer*, 23 Penn. St. 413; *Clark v. Freeman*, 25 Penn. St. 133; *Fash v. Blake*, 38 Ill. 363; *Hopper v. Ashley*, 15 Ala. 463; and see *Utica Ins. Co. v. Badger*, 3 Wend. 102. See *supra*, § 462.

whom it is charged;¹ and though this has been doubted by Lord Eldon,² yet it is hard to say why the value of such testimony is not as much for the jury as for the court.³

§ 554. A witness may, on cross-examination, be tested by putting to him other writings, not admitted in evidence in the case, and asking him whether such writings are in the same hand with that in litigation.⁴ The tendency, also, is to hold that the test writings, if declared by the witness to be genuine, may be shown by the cross-examining party to be not genuine, and may be given to the jury for comparison.⁵ But a witness, when called to testify as to his own writing, should have the whole paper before him in order to enable him to make up his judgment. Hence, on examination of a party as to whether a certain writing is his, he cannot be compelled to answer whether the signature is his unless he is permitted to examine the paper to which it is appended.⁶

On cross-examination witness may be tested by other writings.

§ 555. In England, by the common law courts, a comparison of hands, as a mode of determining the genuineness of a writing, has been held inadmissible,⁷ though this has been modified by statute so far as to admit comparison with "any writing proved to the satisfaction of the judge to be genuine."⁸ In the United States we have a series of authorities which, following the English common law reasoning, exclude this mode of proof.⁹

By English common law comparison of hands is not permitted.

¹ *Garrels v. Alexander*, 4 Esp. 37, approved by Lord Wynford. See 2 Ph. Ev. 359, n. 2. As to cross-examination, see Whart. on Ev. §§ 531 *et seq.*

² *Eagleton v. Kingston*, 8 Ves. 476. See, also, *Cruise v. Clanoy*, 8 Irish. Eq. 552; *Taylor v. Sutherland*, 24 Penn. St. 333; *Taylor's Ev.* § 1666.

³ See Benth. Jud. Ev. iii. 599.

⁴ See *State v. Hopkins*, 50 Vt. 316.

⁵ See *Griffitts v. Ivory*, 11 A. & E. 322; 3 P. & D. 179; *Young v. Honner*, 2 M. & Rob. 537. *Infra*, § 562.

⁶ *North Am. Ins. Co. v. Throop*, 22 Mich. 146.

⁷ *Garrels v. Alexander*, 4 Esp. 37; *Mudd v. Suckermore*, 5 Ad. & E. 703;

Bromage v. Rice, 7 C. & P. 548; *Hughes v. Rogers*, 8 M. & W. 123. See remarks of Sir S. Romilly in the *Duke of York's Case*, 1 Brown's St. Tr. 267.

⁸ See *Birch v. Ridgway*, 1 F. & F. 271.

⁹ *Jackson v. Phillips*, 9 Cow. 94; *Titford v. Knott*, 2 Johns. Cas. 210; *People v. Hewitt*, 2 Parker, C. R. 20 (now altered by statute); *West v. State*, 22 N. J. L. 212; *Bank of Penn. v. Haldeman*, 1 Penn. 161; *Slaymaker v. Wilson*, 1 Penn. 216; *Penn. R. R. v. Hickman*, 28 Penn. St. 318; *Niller v. Johnson*, 27 Md. 6; *Williams v. Drexel*, 14 Md. 573; *Herrick v. Swomley*, 56 Md. 439; *Rowt v. Kile*, 1 Leigh, 216; 483

§ 556. By the courts excluding comparison in hands a single exception is made; when a writing proved to be that of the party

(but see modification of rule, *infra*, *Burress's Case*, 27 Grat. 946; *Clay v. Anderson*, 10 W. Va. 50; *Hawkins v. Grimes*, 1 Duv. 335; *Richardson v. Johnson*, 3 Brev. 51; *State v. Allen*, 1 Hawks, 6; *Pope v. Askew*, 1 Ired. 16 (but see *Yates v. Yates*, 76 N. C. 143); *Jumperts v. People*, 21 Ill. 375; *Kernin v. Hill*, 37 Ill. 209 (but see other cases, *infra*, § 557); *Howard v. Patrick*, 46 Mich. 121 (see *infra*, § 557); *State v. Fritz*, 23 La. An. 55. (By statute in Louisiana comparison is now permitted.) See, to same effect, *U. S. v. Craig*, 4 Wash. C. C. 729; *Shank v. Butsch*, 28 Ind. 19; *Woodard v. Spiller*, 1 Dana, 179; *Hawkins v. Grimes*, 13 B. Mon. 238; *Clark v. Rhodes*, 2 Helsk. 206; *Wright v. Hessay*, 3 Baxt. 42; *State v. Givens*, 5 Ala. 747; *Bishop v. State*, 30 Ala. 34 (but see *infra*, § 557, for modified view); *Hanley v. Gandy*, 28 Tex. 211 (changed now by statute); *Pierce v. Northey*, 14 Wis. 9; *State v. Miller*, 47 Wis. 520 (changed now by statute); *Miller v. Jones*, 32 Ark. 338.

In Indiana the English rule was at first adopted; *Clark v. Wyatt*, 15 Ind. 27; then enlarged; *Burdick v. Hunt*, 43 Ind. 381; and then apparently revived in its original force; *Jones v. State*, 60 Ind. 241.

But now, by the case of *Shorb v. Kinsee*, 80 Ind. 500, if the opposite party admit the genuineness of a signature on a paper not in the case, expert may use it as a basis of comparison. In *Jones v. State*, 60 Ind. 241, comparison with standards introduced for the purpose seems to have been encouraged. As to the confusion of the rulings in this State on this topic, see *Am. Law Rev. Jan. 1883*, p. 36; *Lawson on Exp. Ev. p. 381*.

In Texas the rule originally adopted,

which followed that of the English common law (see *Ballard v. Perry*, 28 Tex. 347), has been modified by statute so as to permit comparison of hands. *Pasch. Dig. Art. 3182*; *Phillips v. State*, 6 Tex. Ap. 384; *Hatch v. State*, ib. 384; *Heacock v. State*, 13 Tex. Ap. 139.

For a criticism on the common law rule, see 10 Cent. L. J. pp. 121, 141; and discussion in *Lawson on Exp. Ev. p. 323*; and in *Lawson, Am. Law Rev. Aug. 1882, Jan. 1883*.

The rule of the English common law courts in this respect was opposed to that of the ecclesiastical courts, which admitted comparison of hands. 1 Will. on Ex. 309; 1 Ought. tit. 225, §§ 1-4; *Doe v. Snuckermore*, 5 A. & E. 708-10, per Coleridge J.; *Beaumont v. Perkins*, 1 Phillim. 78; *Supt. v. Atkinson*, 1 Add. 215, 216; *Mackin v. Grinslow*, 2 Cas. temp. Lee, 335; 2 Add. 91, n. a. S. C.

The Act of Parliament of 28 & 29 Vict. c. 18, enacts, in section eight, "that comparison of a disputed writing with any writing proved to the satisfaction of the judge to be genuine, shall be permitted to be made by the witness; and such writings, and the evidence of witnesses respecting the same, may be submitted to the court and jury as evidence of the genuineness, or otherwise, of the writing in dispute." Section 1 of the same act provides, that the above enactment—in common with certain other clauses relating to evidence—"shall apply to all courts of judicature, as well criminal as others, and to all persons having, by law or by consent of parties, authority to hear, receive, and examine evidence, whether in England or in Ireland." This rule has been adopted

whose signature is in litigation, is already in evidence, having been put in for other purposes, then it is admissible to resort to this writing in order to determine the genuineness of the litigated instrument.¹

Exception
as to test
paper al-
ready in
court.

by the committee for privileges in the House of Lords. *Shrewsbury Peer.*, 7 H. L. C. 1, 15.

Under this statute it has been held, first, that any writings, the genuineness of which is proved to the satisfaction, not of the jury but of the judge (see *Egan v. Cowan*, 30 L. T. (N. S.), 223, in *Ir. Ex.*), may be used for the purposes of comparison, although they may not be admissible in evidence for any other purpose in the cause; *Birch v. Ridgway*, 1 F. & F. 270; *Creswell v. Jackson*, 2 F. & F. 24; and next, that the comparison may be made either by witnesses, or without the intervention of any witnesses at all, by the jury themselves; *Cobbett v. Kilminster*, 4 F. & F. 490, per Martin, B.; or, in the event of there being no jury, by the court.

In the earlier Virginia cases, as has been seen, the English rule was adhered to. In 1884, however (*Harriot v. Sherwood*, 17 Rep. 319) a more comprehensive view was taken by the Court of Appeals. "This," said the court, "is a case of an alleged forgery. The testimony of experts has been generally admitted in cases of erasures and of feigned hands, without comparison of handwritings, and why not by comparison of handwriting, when the writing compared is admitted to be genuine, or proved to be genuine to the satisfaction of the court? If the witness Edwards could compare the writings because he had once seen the party write his name, although an unskilled witness, and did not remember it without looking at and comparing it, is there any sound reason for holding

that one skilled and more competent and not less acquainted with the disputed handwriting, if neither knew it, is inadmissible? We think not, and we are of opinion, both upon reason and the weight of authority, that such testimony is admissible, and that the court below erred in thus admitting the inferior evidence and rejecting the best evidence on the trial of the issue herein."

¹ *Solita v. Yarrow*, 1 M. & Rob. 133; *Waddington v. Cousins*, 7 C. & P. 595; *Perry v. Newton*, 1 Nev. & P. 1; 5 Ad. & E. 514; *Myers v. Toscan*, 3 N. H. 47; *State v. Carr*, 5 N. H. 367; *Van Wyck v. McIntosh*, 14 N. Y. 439; *Randolph v. Loughlin*, 48 N. Y. 458; *Goodyear v. Vosburgh*, 63 Barb. 154; *Williams v. Drexel*, 14 Md. 566; *Duncan v. Beard*, 2 N. & McC. 401; *Yates v. Yates*, 76 N. C. 143; *Henderson v. Hackney*, 16 Ga. 521; *North Bank v. Buford*, 1 Duv. 335; *Brobston v. Cahill*, 64 Ill. 358; *Van Sickle v. People*, 29 Mich. 61; *People v. Cline*, 44 Mich. 291; *State v. Miller*, 47 Wis. 520; *State v. Tompkins*, 71 Mo. 613.

In *Moore v. U. S.*, 91 U. S. 270, the question is thus discussed by Bradley, J. :—

"The general rule of the common law, disallowing a comparison of handwriting as proof of signature, has exceptions equally as well settled as the rule itself. One of these exceptions is, that if a paper admitted to be in the handwriting of the party, or to have been subscribed by him, is in evidence for some other purpose in the cause, the signature or paper in question may be compared with it by the jury. It

§ 557. In other States it is the practice to admit as a basis of comparison any papers, whether in themselves relevant to the issue

is not distinctly stated, in this case, that the writing used as a basis of comparison was admitted to be in the claimant's hand; but it was conceded by counsel that it was, in fact, the power of attorney given by him to his attorney in fact, by virtue of which he appeared and presented the claim to the court. This certainly amounted to a declaration, on his part, that it was in his hand, and to pretend the contrary would operate as a fraud on the court. We think it brings the case within the rule, and that the Court of Claims had the right to make the comparison it did." See *Medway v. U. S.*, 6 Ct. of Cl. 420; *U. S. v. Chamberlain*, 12 Blatch. 390.

As denying this exception, see *Tome v. R. R.*, 39 Md. 90; *Outlaw v. Hurdle*, 1 Jones (N. C.), 150; *Otey v. Hoyt*, 3 Jones (N. C.), 407.

See, also, remarks of Davis, J., in *Rogers v. Ritter*, 12 Wall. 322.

In *U. S. v. Jones*, 13 Rep. 165 (1882), it was said by Benedict, J.:—

"Another point made is, that error was committed at the trial by the refusal to permit the jury to inspect a copy of the letter proved to have been mailed, which copy the accused made in the presence of the jury. In this there was no error. It is not allowable upon an issue as to handwriting to put in evidence papers otherwise irrelevant, merely for the purpose of enabling the jury to institute a comparison of the writing. The statute of the State of New York permitting a comparison of writings for the purpose of determining handwriting has no effect upon criminal proceedings in the courts of the United States. In those courts the extent of the rule is to permit the jury to compare writings lawfully in

evidence for some other purpose; it has never been permitted to introduce writings for the mere purpose of enabling the jury to institute a comparison of writings. To permit the practice here sought to be established, would be to permit the defendant to make evidence for himself.

"The last point made is, that error was committed in refusing to permit an expert in handwriting to say whether the original letter put in evidence by the government and the copy of it made by the accused, in the presence of the jury, were in the same handwriting. Here was no error. It was not shown that the expert knew the defendant's handwriting, and whether the two letters were in the same handwriting was immaterial, except upon the assumption that because the copy of the letter was made by the defendant it was in his usual handwriting, an assumption by no means justified by the circumstances under which the copy was made."

In 1856, in *Van Wyck v. McIntosh*, 14 N. Y. 439, it was declared that the New York courts adopted the English rule. Some years afterwards it was held that collateral papers, which were not competent evidence for any other purpose, could not be received in evidence to enable the jury to compare the signatures to them with the signature contested. "That such evidence is incompetent is well settled. *Van Wyck v. McIntosh*, 14 N. Y. 439; *Dubois v. Baker*, 30 N. Y. 355." *Earl, C., Randolph v. Loughlin*, 48 N. Y. 458. See, also, to same effect *Baker v. Squier*, 1 Hun, 448; *S. C.*, 3 S. C. 465; *Bank of Com. v. Mudgett*, 44 N. Y. 514; *S. C.*, 45 Barb. 663; *Ellis v. People*, 21 How. Pr. 365. In criminal cases comparison

or not, if they can be shown to the satisfaction of the court to be the writings of the party whose writing is disputed.¹ In some jurisdictions comparison generally is permitted. In Pennsylvania, however, it is said that at common law the proof from comparison of hands must be viewed as supplementary, and cannot be relied on exclusively,² and that the comparison is to be made by the jury, not by experts.³ To the admission of a test paper it is essential

of hands is therefore inadmissible. *People v. Spooner*, 1 Denio, 343; *Pontius v. People*, 82 N. Y. 349.

It was held in 1880, by the New York Court of Appeals, that signatures could not be introduced for the purposes of comparison, though signatures already in evidence could be used for this purpose. *Merritt v. Campbell*, 79 N. Y. 625; *Rapallo, J.*, citing *Miles v. Loomis*, 75 N. Y. 288; *S. P., Hynes v. McDermott*, 82 N. Y. 41. See *infra*, § 569.

To the same effect is a learned opinion of Walker, J., in *Brobston v. Cahill*, 64 Ill. 358. See *Vinton v. Peck*, 14 Mich. 287.

¹ *Hammond's Case*, 2 Greenl. 33; *Page v. Homans*, 14 Me. 487; *Woodman v. Dana*, 52 Me. 9; *Myers v. Toscan*, 3 N. H. 47; *State v. Hastings*, 53 N. H. 452; *Adams v. Field*, 21 Vt. 256; *State v. Ward*, 39 Vt. 225; *State v. Hopkins*, 50 Vt. 316; *Homer v. Wallis*, 11 Mass. 309; *McKeone v. Barnes*, 108 Mass. 344; *Com. v. Coe*, 115 Mass. 481; *Demeritt v. Randall*, 116 Mass. 331; *Moody v. Rowell*, 17 Pick. 490; *Richardson v. Newcomb*, 21 Pick. 315; *Com. v. Eastman*, 1 Cush. 189; *Keith v. Lothrop*, 10 Cush. 453; *Martin v. Maguire*, 7 Gray, 177; *Com. v. Williams*, 105 Mass. 62; *Com. v. Whitman*, 121 Mass. 361; *Lyon v. Lyman*, 9 Conn. 55; *State v. Nettleton*, 1 Root, 308; *Tyler v. Todd*, 36 Conn. 218; *McCorkle v. Binns*, 5 Binn. 340; *Bank of Lancaster v. Whitehill*, 10 S. & R. 110; *Baker v. Haines*, 6 Whart. 284;

Travis v. Brown, 43 Penn. St. 9; *Haycock v. Greup*, 57 Penn. St. 438; *Bragg v. Coldwell*, 19 Oh. St. 407; *Calkins v. State*, 14 Oh. St. 222; *Koons v. State*, 36 Oh. St. 198; *Robertson v. Miller*, 1 McMull. (S. C.) 120; *Whitney v. Bunnell*, 8 La. An. 429; *State v. Fritz*, 23 La. An. 55; *Garvin v. State*, 52 Miss. 209; *Macomber v. Scott*, 10 Kan. 340; *State v. Tompkins*, 71 Mo. 613; *State v. Owen*, 73 Mo. 440, *infra*.

As to Iowa statute, to same effect, see *Baker v. Mygatt*, 14 Iowa, 131; *Singer v. McFarland*, 53 Iowa, 540.

² *Haycock v. Greup*, 57 Penn. St. 438.

³ *Travis v. Brown*, 43 Penn. St. 9; *Clayton v. Siebert*, 3 Brews. 176. See *State v. Scott*, 45 Mo. 302; *Husband v. Schindler*, 46 Ind. 38.

As to Pennsylvania statute admitting such testimony in criminal cases, see *Brightly's Purd. i.* 631.

In Pennsylvania, to prove the writing of a person deceased at least forty years previously, witnesses are allowed to speak from a comparison with signatures and writings in family records, admitted by the family to be in the same handwriting; from letters in possession of the family, purporting to be signed by the party; and from official documents acted upon as genuine. *Sweigart v. Richards*, 8 Penn. St. 436.

It has been held in the same State that a witness, although he cannot base his testimony exclusively on comparison of hands, can refresh his memory by inspecting genuine writings

that it should be either conceded by the writer to be genuine, or proved to be so to the entire satisfaction of the court.¹

McNair v. Com., 26 Penn. St. 388; (see, to same effect, *Redford v. Peggy*, 6 Rand. (Va.) 316; and that he may base his judgment on comparison of hands when he saw the signature attached to the test paper, or when the party admitted such signature to be his; *Power v. Frick*, 2 Grant (Penn.) Cas. 306. See, as giving a still more liberal rule, *Travis v. Brown*, 43 Penn. St. 9, where it was held, (1) that genuineness of a paper in suit may be sustained by comparison by the jury between such paper and others proved to come from the alleged writer; but (2) that evidence of experts or other witnesses could not be received for purpose of comparison. *S. P., Aumick v. Mitchell*, 82 Penn. St. 211.

In Michigan the courts, as a rule, restrict comparison to cases in evidence for other purposes; and the jury may compare such papers after hearing the evidence of experts. *Van Sickle v. People*, 29 Mich. 61; *Foster's Will*, 34 Mich. 21; *People v. Gale*, 50 Mich. 537.

In Illinois substantially the same position is taken. *Pate v. People*, 8 Ill. 644; *Brobston v. Cahill*, 64 Ill. 356.

In Wisconsin comparison is now permitted by statute, though previously the English rule had been followed. *State v. Miller*, 47 Wis. 520; see *Hazleton v. Bank*, 32 Wis. 47.

In Missouri the tendency is to restrict comparison to papers in evidence for other purposes, or papers admitted by the party to be written by himself. *State v. Scott*, 45 Mo. 302; *State v. Clinton*, 67 Mo. 380; *State v. Tompkins*, 71 Mo. 613.

In Alabama, on the trial of an indictment for murder, the question before the jury was the identity of the prisoner with the murderer. The State offered in evidence the registers of three several hotels, each in a different city, accompanied by parol proof that the three names were written by the prisoner, and that he was known by those names respectively in the three cities; and they were admitted without objection. It was held, that in considering the question whether the three names were written by the same person, the jury might compare the handwritings in the several registers. *Crist v. State*, 21 Ala. 137.

And it was subsequently held, that though it is not allowable for witnesses or juries to compare disputed writings with writings not in evidence for other purposes, such comparisons could be instituted in respect to all papers before the jury for other purposes. *Mayo v. State*, 30 Ala. 32; *Kirksey v. Kirksey*, 41 Ala. 747; *Bestor v. Roberts*, 58 Ala. 331.

In the court of inquiry held at West Point, in April, 1880, to investigate the cause of an alleged outrage on a cadet, the court permitted experts to be examined for the purpose of comparing the examination papers of certain cadets with an anonymous letter alleged to have been received by the complainant. See *infra*, § 849.

In South Carolina, other papers, proved or admitted to have been written by the party whose handwriting is in contest, are receivable "in aid of doubtful proof;" but the "testimony is not entitled to any very high respect

¹ *McKeone v. Barnes*, 108 Mass. 347; *State*, 9 Tex. Ap. 1; *Heacock v. State*, Com. v. Coe, 115 Mass. 503; *Heard v.* 13 Tex. Ap. 97.

The mere finding of a diary on a party, with an admission by him that it belonged to him, is not a sufficient authentication of the writing to justify its use as a standard.¹ Press copies cannot be introduced as a basis of comparison, even where the original would be admissible;² nor can photographic copies.³

§ 558. A test paper, to be admitted for the purpose of forming a basis for comparison, should be free from any suspicion of concoction in order to affect the litigated issue.⁴ Test papers must be free from suspicion.

§ 559. An expert, apart from the vexed question of comparison of hands, is admissible to determine whether a contested writing is feigned or natural;⁵ though an absence of evidence on behalf of

or consideration." *Bennett v. Matthews*, 5 S. C. 478; citing *Boman v. Plunkett*, 2 McC. 518; *Bird v. Miller*, 1 McM. 125.

In Georgia comparison is now permitted by statute. *Boggus v. State*, 34 Ga. 278.

¹ *Van Sickle v. People*, 29 Mich. 61.

² *Com. v. Eastman*, 1 Cush. 189. See *Com. v. Jeffries*, 7 Allen, 561. See *supra*, § 177.

³ *Supra*, § 544.

"The testimony of the photographer comes within the same principle as that of Paine. It was offered to establish the forgery of the certificates in controversy, by comparing them with copies (obtained by photographic processes, either magnified or of the natural size) of certain signatures assumed or admitted to be genuine, and pointing out the differences between the supposed genuine and disputed signatures. As a general rule, in proportion as the media of evidence are multiplied, the chances of error or mistake are increased. Photographers do not always produce exact fac-similes of the objects delineated; and however indebted we may be to that beautiful science for much that is useful as well as ornamental, it is at best a mimetic

art, which furnishes only secondary impressions of the original, that vary according to the lights or shadows which prevail whilst being taken." *Bowie, J.*, *Tome v. Parkersburg R. R. Co.*, 39 Md. 90, 91-93. *Bartol, C. J.*, and *Alvey, J.*, dissenting.

⁴ *Supra*, §§ 551, 552. This point is well shown in the argument of Ames, *J.*, in *King v. Donahue*, 110 Mass. 155.

Mr. Chabot's exposition of the handwriting of Junius will illustrate the value of this evidence. See, also, the fac-similes of Junius's writing in the fourth volume of the *Chatham Correspondence*, and an ingenious article in the *London Times* of May 22, 1871.

Nowhere, however, has the value of this kind of evidence been better shown than in Chief Justice Cockburn's masterly charge in the *Tichborne trial*, *R. v. Castro*, Charge, ii. 770 *et seq.*, to which the reader is particularly referred.

Errors of spelling may be used to prove identity of authorship. *R. v. Castro*, Charge of Cockburn, C. J.; *U. S. v. Chamberlain*, 12 Blatch. 390; *Com. v. Coe*, 115 Mass. 481.

⁵ *Sweetzer v. Lowell*, 33 Me. 448; *Withee v. Row*, 45 Me. 571; *Moody v. Rowell*, 17 Pick. 490; *Com. v. Webster*,

the party charged that the signature is simulated, an expert will not be received to prove it was not simulated.¹ So experts are permitted to testify as to the period to which a writing may be assigned;² as to the nature of the ink or other material used;³ whether a certain writing shows comparative ease and facility;⁴ whether certain figures in a cheque have been changed;⁵ what is the difference between the substance of an

Experts
admissible
to test
writings.

5 Cush. 295; *Demeritt v. Randall*, 116 Mass. 331; *Lyon v. Lyman*, 9 Conn. 55; *Lansing v. Russell*, 3 Barb. Ch. 325; *Goodyear v. Vosburgh*, 63 Barb. 154; *Vanwyck v. McIntosh*, 14 N. Y. 439; *Dubois v. Baker*, 30 N. Y. 355; *Hynes v. McDermott*, 82 N. Y. 41; *People v. Hewitt*, 2 Parker C. R. 20; *Reese v. Reese*, 90 Penn. St. 89; *Hubble v. Vanhorne*, 7 S. & R. 185; *Calkins v. State*, 14 Oh. St. 222; *Jones v. Finch*, 37 Miss. 461. An interesting and curious article on this topic, by Mr. R. W. Piper, will be found in the *Am. Law Reg.* for May, 1879.

¹ *Kowing v. Manly*, 49 N. Y. 193; S. C., 57 Barb. 179, qualifying *People v. Hewitt*, 2 Parker C. R. 20. See, also, to same effect, *Merchant's Will*, 1 Tucker (N. Y.), 151; *People v. Spooner*, 1 Denio, 343; *Burress' Case*, 27 Grat. 934; *Sayres v. State*, 30 Ala. 18. As rejecting the testimony of experts to prove forgery see *Bank v. Jacobs*, 1 Penn. R. 161; *Lodge v. Phipper*, 11 S. & R. 333. See, also, a review of *Robinson v. Mandell*, in 4 *Amer. Law J.* 625. The same case is noticed *supra*, § 9.

"We think that the evidence offered to prove that the order produced by the defendants was not in a simulated handwriting was properly rejected. The plaintiff had not introduced any evidence to show that it was in a simulated handwriting, but had testified to the fact that it was not written by him. It was incumbent upon the defendants to prove that the order was in the handwriting of the

plaintiff; and we do not think that, as the evidence stood, the opinion of an expert, that the signature was not in a simulated hand, was competent for the purpose of establishing that it was the plaintiff's. In the cases cited, 3 B. Ch. 325, and 17 Pick. 490, for the purpose of proving that a mark or signature was not genuine, evidence of experts was admitted to show that the writing was simulated. The only case cited in which evidence was admitted to show that the writing was not simulated is that of *The People v. Hewitt*, 2 Park. Cr. R. 20, where, on a trial of an indictment for forgery, the prisoner was allowed to prove, by an expert, that the signature was not in a simulated hand. Whatever effect might be given to such evidence, in a criminal trial, for counterfeiting or forgery, as to which we express no opinion, we do not think it competent for the purpose of proving the genuineness of a signature against a party sought to be charged thereby." *Rapallo, J., Kowing v. Manly*, 49 N. Y. 203.

Other points of expert testimony in connection with forgery are discussed in a future section. *Infra*, § 847.

² *Doe v. Suckermore*, 5 A. & R. 703; *R. v. Williams*, 8 C. & P. 434; *Tracy Peerage*, 10 Cl. & F. 154; *Davis v. Mason*, 4 Pick. 156. See *People v. Spooner*, 1 Denio, 343.

³ *Dubois v. Baker*, 30 N. Y. 355.

⁴ *Demeritt v. Randall*, 116 Mass. 331.

⁵ *Nelson v. Johnson*, 18 Ind. 329; *Pate v. People*, 3 Gilm. (8 Ill.) 644.

instrument and a forged addition;¹ whether certain words were written before a paper was folded;² what is the meaning of certain illegible marks or signs;³ whether the whole of an instrument was written by the same hand, with the same pen and ink, and at the same time;⁴ whether a certain bank note is counterfeit,⁵ and for this purpose business men, long familiar with the notes, can be called;⁶ whether certain words were written over others;⁷ and as to the date and meaning of certain words upon an erasure.⁸ It has, however, been held inadmissible to ask an expert as to a remote contingency, as to which no special professional experience is needed to speak;⁹ nor can an expert be examined as to how far a person may improve his handwriting in a given time.¹⁰

§ 560. When comparison of hands is permitted, an expert can be called to make such comparison.¹¹ It has, however, been said that

¹ *Hawkins v. Grimes*, 13 B. Mon. 257; though see *Daniel v. Toney*, 2 Metc. (Ky.) 523.

² *Bacon v. Williams*, 13 Gray, 525.

³ *Stone v. Hubbard*, 7 Cush. 595; *Collender v. Dinsmore*, 55 N. Y. 200.

⁴ *Quinsigamond Bk. v. Hobbs*, 11 Gray, 250; *Fulton v. Hood*, 34 Penn. St. 365. See *Jewett v. Draper*, 6 Allen, 434.

"The fourth assignment of error is, that the court erred in admitting the testimony of so-called experts in regard to receipts which were in evidence. It was alleged, and direct evidence was given by the plaintiff below to prove, that the receipts had been altered, and then experts were offered to show that these alterations were not made at the same time with the body of the receipt. It was ruled in *Fulton v. Hood*, 10 Casey, 365, that the testimony of experts is receivable, in corroboration of positive evidence, to prove that, in their opinion, the whole of an instrument was written by the same hand, with the same pen and ink, and at the same time. This case is indeed the converse of that, but the principle is undoubtedly the same, whether the evidence is of experts to attack or sup-

port the instrument." *Sharswood, J., Ballantine v. White*, 77 Penn. St. 25.

⁵ *Jones v. Finch*, 37 Miss. 461.

⁶ *State v. Cheek*, 13 Ired. 114.

⁷ *Dubois v. Baker*, 30 N. Y. 355.

⁸ *Ibid.*; and *S. C.*, 40 Barb. 556; *Vinton v. Peck*, 14 Mich. 287; though see *Swan v. O'Fallon*, 7 Mo. 231.

⁹ *Thayer v. Chesley*, 55 Me. 393.

¹⁰ *McKeone v. Barnes*, 108 Mass. 344.

¹¹ *Benth. Jud. Ev.* iii. 599; *U. S. v. Keen*, 1 McLean, 429; *U. S. v. Chamberlain*, 12 Blatch. 390; *Hammond's Case*, 2 Greenl. 33; *Woodman v. Dana*, 52 Me. 9; *Furber v. Hilliard*, 2 N. H. 480; *Carr v. State*, 5 N. H. 371; *State v. Shinborn*, 46 N. H. 497; *State v. Ravelin*, 1 Chipm. 295; *State v. Ward*, 39 Vt. 225; *Moody v. Rowell*, 17 Pick. 490; *Com. v. Riley*, Thach. C. C. 67; *Amherst Bank v. Root*, 2 Met. 522; *Com. v. Williams*, 105 Mass. 62; *Lyon v. Lyman*, 9 Conn. 55; *People v. Caryl*, 12 Wend. 547; *Phoenix Bk. v. Philip*, 13 Wend. 81; *Finch v. Gridley*, 25 Wend. 469; *Roe v. Roe*, 40 N. Y. Sup. Ct. 1; *People v. Hewitt*, 2 Parker C. B. 20; *Jackson v. Murray*, Anthon, 105; *West v. State*, 22 N. J. L. 212; *Com. v. Smith*, 6 S. & R. 568; *Hubley v. Van-*

an expert cannot, as to an ancient writing, be admitted to give his conclusion from a comparison of hands,¹ though if no other proof is attainable such testimony should be received for what it is worth.²

§ 561. Photographers, who have been accustomed to scrutinize handwriting in reference to forgeries, and have been in the habit of using photographic copies for this purpose, may be examined as experts in questions of forgery, even though their opinion is founded partly on photographic copies, which they have themselves made, and which have been put in evidence.³ To enable, however, such photographic copies to be put in evidence, their accuracy and fairness must be proved.⁴

§ 562. An expert is open to cross-examination as to his qualifications,⁵ and he may be probed by test papers that may be presented to him.⁶ Unless it is shown that he is entitled to testify as an expert he should not be received as such.⁷

Photographers may be received as experts.

horne, 7 S. & R. 185; Lodge v. Phipper, 11 S. & R. 333; Powers v. Frick, 2 Grant (Penn.) Cas. 306; Sweigart v. Richards, 8 Penn. St. 436; Burkholder v. Plank, 69 Penn. St. 235; Ballantine v. White, 77 Penn. St. 20; Koons v. State, 36 Ohio St. 195; State v. Owen, 73 Mo. 440. *Contra*, Titford v. Knott, 2 Johns. Cas. 211; Bank of Penn. v. Haldeman, 1 Penn. 161; Niller v. Johnson, 27 Md. 6; Huston v. Schindler, 46 Ind. 38; State v. Harris, 5 Ired. 287; Com. v. Tutt, 2 Bailey, 44; Bird v. Miller, 1 McMull. 125; Bennett v. Matthewes, 5 S. C. 478; Johnson v. State, 35 Ala. 370; Moye v. Herndon, 30 Miss. 110; Jones v. Finch, 37 Miss. 461; Hanley v. Gandy, 28 Tex. 211. In New York it is now held that an expert may be examined as to the genuineness of a signature, basing his opinion on signatures already in evidence. Miles v. Loomis, 75 N.Y. 288. See Merritt v. Campbell, cited *supra*, § 560.

"It may be considered as well set-

led in this State (Pennsylvania), by Fulton v. Hood, 10 Casey, 365, and Travis v. Brown, 7 Wright, 9, that after direct evidence has been given on the subject of handwriting, the evidence of experts is admissible in corroboration." Sharswood, J., Burkholder v. Plank, 69 Penn. St. 235; S. P., Ballentine v. White, 77 Penn. St. 20.

¹ Fitzwalter Peerage Case, 10 Cl. & F. 193. *Supra*, § 548.

² *Supra*, § 548.

³ Marcy v. Barnes, 16 Gray, 161. See, however, Taylor Will Case, 10 Abb. (N. Y.) Pr. N. S. 301; Tyler v. Todd, 36 Conn. 218. See *supra*, § 544; Robinson v. Mandell, cited *supra*, § 9. *Infra*, § 847.

⁴ Ibid. In Tome v. R. R., 39 Md. 36, a State where comparison of hands is not allowed, it was ruled that such copies could not be put in evidence. See *supra*, § 544.

⁵ See *supra*, §§ 407-420.

⁶ *Supra*, §§ 510, 554; Demeritt v.

⁷ State v. Tompkins, 71 Mo. 613; Haun v. State, 9 Tex. Ap. 383; Heacock v. State, 13 Tex. Ap. 97.

§ 563. Expert testimony should in all cases be closely scrutinized,¹ and there is peculiar reason why this scrutiny should be applied to questions of identity of handwritings. If the expert can produce in court the writings, and explain the grounds of his conclusions, the difficulties are much reduced; but it must be remembered that there are few branches of law on which interests so momentous (*e. g.*, devolution of large estates, convictions of forgery) depend upon tests so exquisitely delicate as those applied to handwriting. It is well known that in cases of peculiar difficulty, when the difference, if there be any, between two handwritings is only noticeable by perceptions the most sensitive, experts, no matter how conscientious, often take unconsciously such a bias from the party employing them as to give to their judgment the almost infinitely slight impulse that turns the scale; nor is it strange that in an instrument so delicate, aberrations from its true course should be produced by attractions or repulsions otherwise unappreciable. If an expert could be hermetically sealed in from such extraneous influences, his judgment might be depended on at least for impartiality. This, however, is impracticable. A jury is bound, therefore, to accept the opinion of an expert as to handwriting, even when uncontradicted, as an argument rather than a proof;² and to make allowance for all the disturbing influences by which the judgment of the expert may be moved.³

Testimony
of experts
to be
closely
scrutinized.

IX. INSPECTION OF DOCUMENTS BY ORDER OF COURT.

§ 564. Although inspection will not be compelled in cases in which the party holding the document claims that its production would criminate him,⁴ yet in criminal as well as in civil issues, in cases not affected by this limitation, a party is entitled, in view of litigation, to a rule for

Rule
granted to
compel
production
of papers.

Randall, 116 Mass. 331. That an expert must have for this purpose special aptitude, see *Burress v. Com.*, 27 Grat. 934; *Goldstein v. Black*, 50 Cal. 462.

¹ *Supra*, § 420. It was held in *Koons v. State*, 36 Ohio St. 195, that to render the testimony of an expert as to handwriting admissible all the facts upon which he bases his opinion should be before the court and jury.

² Whart. on Ev. § 722, citing *Tracy Peerage*, 10 Cl. & F. 191; *Gurney v. Langlands*, 5 B. & A. 330; *R. v. Crouch*, 4 Cox C. C. 163; *Cowan v. Beall*, 1 MacArthur, 270; *Borland v. Walrath*, 33 Iowa, 130.

³ See, as to divergence of experts as to handwriting, *Robinson v. Mandell*, cited *supra*, § 9.

⁴ *Infra*, § 566.

inspection of such documents, in the hands of the opposite party, as are essential to the maintenance of contested rights. A defendant will on this principle be entitled to inspect certain letters material to the issue in the hands of the prosecution,¹ and his solicitor may be required to produce papers belonging to him which are likewise material to the issue.² To grant the order it is not necessary that the document be in the hands of the party against whom the order is asked. It is enough if the document is in the hands of his agent, or in some way subject to his authority.³ It is hard, however, to conceive of a case in which an order, in a criminal issue, would be granted on a defendant to produce a document, since it is hard to conceive of a document called for by the prosecution, which, if relevant, would not be more or less criminatory.⁴

§ 565. Although when a document which appears to have been forged or stolen is produced in court, the court may order it to be impounded,⁵ the court will not, under a mere order for inspection, compel the impounding of papers, or their deposit with an officer of the court or any third party. The owner of the document is allowed to keep it in possession. The order simply permits its inspection, while in the hands of the owner or his attorney, by the opposing party or by witnesses.⁶

§ 566. We have just stated that the court will not compel the production of documents by a holder who alleges that their production will criminate him. This limitation has been frequently applied.⁷ The risk, however, to which the custodian is exposed, must be that of a real and not that of a nominally penal prosecution.⁸ Neither a *quo warranto*,⁹ nor a *mandamus*,¹⁰ is a criminal proceeding in the above

¹ *R. v. Colnood*, 3 F. & F. 103; *R. v. Hartie*, 6 C. & P. 105.

² *R. v. Brown*, 9 Cox C. C. 281.

³ See *Whart. on Ev.* § 742.

⁴ *Supra*, §§ 432, 463; *infra*, § 661.

⁵ *Infra*, § 566.

⁶ *Thomas v. Dunn*, 6 M. & Gr. 274; *Rogers v. Turner*, 21 L. J. Exch. 9; *Whart. on Ev.* § 752.

⁷ *R. v. Purnell*, 1 W. Bl. 37; 1 Wils. 239, S. C.; *R. v. Heydon*, 1 W. Bl. 361; *R. v. Buckingham Js.*, 8 B. & C. 375; *R. v. Cornelius*, 2 Str. 1210; 1

Wils. 142, S. C.; *Montague v. Dudman*, 2 Ves. Sen. 397; *Glynn v. Houston*, 1 Keen, 329; *Byass v. Sullivan*, 21 How. (N. Y.) Pr. 50; *Wigr. Disc.* § 130; *Taylor's Ev.* § 1351. See *Bradshaw v. Murphy*, 7 C. & P. 612.

Supra, §§ 120, 463-5.

⁸ *R. v. Cadogan*, 5 B. & A. 902; 1 D. & R. 550.

⁹ *R. v. Shelley*, 3 T. R. 141; *R. v. Purnell*, 1 W. Bl. 45.

¹⁰ *R. v. Ambergate*, 17 Q. B. 957.

sense. At the same time, inspection may be ordered when the applicant has reason to believe that the document in question was forged; and the court, when required by public justice, will impound the document for the purposes of a criminal prosecution.¹

§ 567. In proper cases, in order to determine as to the meaning or genuineness of a writing, the court will authorize an inspection by experts or others having peculiar opportunities of identifying or distinguishing the document.² And the same right has been extended to cases where a defendant desires to obtain an inspection of the remains of a deceased person in the custody of the police.³

Documents may be examined by interpreters and experts.

¹ *Thomas v. Dunn*, 6 M. & Gr. 274; ² *Swansea Vale R. R. v. Budd*, L. R. Woolmer *v. Devereux*, 2 M. & Gr. 758; 2 Eq. 274; *Boyd v. Petrie*, L. R. 3 Ch. S. C., 3 Scott N. R. 224; *Richey v. Ap.* 818, qualifying S. C., L. R. 5 Eq. Ellis, Alc. & Nap. 111; *Rogers v.* 290. See *Att.-Gen. v. Whitwood Local Board*, 40 L. J. Ch. 590. *Turner*, 21 L. J. Ex. 9; *Boyd v. Petrie*, L. R. 3 Ch. Ap. 818, overruling S. C., ³ *R. v. Spry*, 3 Cox C. C. 221. See L. R. 5 Eq. 290. *supra*, § 312.

CHAPTER XI.

JUDGMENTS AND JUDICIAL RECORDS.

I. BINDING EFFECT OF JUDGMENTS.

Judgment on same subject matter binds, § 570.

Parties must be the same, § 570 a. Jurisdiction a prerequisite of admissibility of former proceedings, § 571.

Preliminary proceedings no bar, § 572.

Nor is a *nolle prosequi*, or dismissal, or *ignoramus*, § 573.

Verdict of acquittal without judgment a bar, otherwise with conviction, § 574.

Criminal prosecutions not barred by civil suits, § 575.

Military courts may make final rulings, § 576.

Judgment on *nolo contendere* estops, § 577.

Offences must be identical, § 578.

When evidence in second case is enough to have secured judgment in first, then first judgment estops, § 579.

When the same act has two indictable aspects, conviction of the one bars the other, § 580.

Illustrations in liquor cases, § 581.

Prior acquittal on ground of misnomer inadmissible, § 582.

And so of prior acquittal from variance, § 583.

Prior prosecution of minor offence inclosed in major is admissible in a subsequent trial of major, § 584.

Otherwise when there could be no conviction on first trial of major offence, § 585.

In prosecution for minor offence, it is admissible to put in evidence

former prosecution of case containing major and minor, § 586.

When two persons are simultaneously killed by one blow, a prosecution for killing one is not barred by a prosecution for killing the other, § 587.

On a trial for stealing the goods of A., a former prosecution for stealing the goods of B. is not a bar, § 588.

"Simultaneous" does not mean coincidence in a point of time, § 589.

In battery, prosecution for prior simultaneous battery of another is a bar, § 590.

Judgment on successive offences not exhaustive, § 591.

Autrefois acquit must be specially pleaded, § 592.

Parol evidence admissible to identify or distinguish, § 593.

II. WHEN JUDGMENT MAY BE IMPEACHED.

Judgment may be collaterally impeached for want of jurisdiction, § 594.

So for fraud, § 595.

Foreign judgments impeachable for want of jurisdiction or fraud, § 596.

And so of convictions when *res inter alios acta*, § 596 a.

III. ADMINISTRATION, PROBATE, AND INQUISITION.

Letters of administration not conclusive proof of death or other recitals, § 597.

Probate of will not conclusive as to strangers, but otherwise as to parties, § 598.

Inquisition of lunacy only *prima facie* proof, § 599.

IV. JUDGMENTS IN REM.

Effect of judgments *in rem* in criminal cases, § 600.

V. JUDGMENTS VIEWED EVIDENTIALLY.

Proof of prior convictions when aggravated sentence is sought, § 601.

Conviction of principal evidence against accessory, § 602.

Judgments to establish other facts, § 602 a.

To prove judgment as such, record must be complete, § 603.

Minutes of court admissible to prove action of court, § 604.

Docket entries not admissible when full record can be had, § 605.

Rule relaxed as to ancient records, § 606.

For evidential purposes portions of record may be admitted, § 607.

But such portions must be complete, § 608.

Verdict inadmissible without record, § 609.

Parts of ancient records may be received, § 610.

Officer's returns admissible, § 611.

Return of *nulla bona* admissible to prove insolvency, § 612.

VI. RECORDS AS ADMISSIONS.

Record may be received when involving admission of party against whom it is offered, § 613.

A party may be bound by his admissions of record, § 614.

Pleadings may be received as admissions, § 615.

A demurrer may be an admission, § 616.

Certificate of clerk admissible to prove facts within his range, § 617.

I. BINDING EFFECT OF JUDGMENTS.

§ 570. JUDGMENTS are admissible in criminal prosecutions under the same conditions as in civil suits. Hence we may hold that a judgment in a criminal trial may be received in evidence for the following purposes:—

Judgment
on same
subject
binds.

(1) *As an admission, as which it may be offered by a stranger against the party making such admission.*¹ It is true, that strictly we are not entitled to speak of the *judgment* of a court as the *admission* of a party. But when a party asks the judgment of a court, and to obtain such judgment makes a particular statement, and the judgment is based on such statement, then the court may be viewed as the agent of the party making the statement, and the judgment of the court may be imputed to the party as an admission. Hence, a judgment against a party on the plea of guilty may be put in evidence against such party in subsequent proceedings to which it may be relevant.² And a plea of guilty precludes the party offering it from afterwards, in a judicial proceeding, contesting his guilt.³

¹ *Infra*, § 613.

² See Whart. Cr. Pl. & Pr. § 416.

³ *R. v. Fontaine Moreau*, 11 Q. B. 1035; *Bradley v. Bradley*, 2 Fairf. 367; *Cal. 432*.
Green v. Bedall, 48 N. H. 546.

(2) *As to public rights, in respect to which a judgment is conclusive against all the world.*¹

(3) *As to the defendant himself, between whom and the sovereign by whom he is prosecuted a final judgment on a particular charge is conclusive.*² This last topic we will now proceed to develop.

§ 570 a. Where a particular section or aspect of an offence is prosecuted in a State having jurisdiction, this does not bar another prosecution of another section or aspect of the same offence in another State having jurisdiction;³ nor, as will presently be seen, does a civil suit, in the name of the party injured, bar a subsequent prosecution by the sovereign.⁴ Nor is the fact that an issue was determined in another trial between the defendant and a private suitor, or between the sovereign and another defendant, conclusive as to persons not parties to such issue. Thus, when parties are indicted for procuring a fraudulent divorce, the prosecution may go behind the record and inquire into the merits;⁵ and on an indictment for conspiring to falsely accuse an innocent man of crime, the prosecution can go behind the record of conviction, and show that the conviction was the result of fraud.⁶ It is true that in a case decided in 1880, in Massachusetts, it was held that an indictment for obtaining money by false pretences will not lie for receiving money upon a judgment obtained upon a false representation, and false evidence of an injury.⁷ "To hold that the statute," said Colt, J., "which punishes criminally the obtaining of property by false pretences, extends to the case of a payment made by a judgment debtor in satisfaction of a judgment, when the evidence only shows that the false pretences were used to obtain a judgment, as one step towards obtaining the money, would practically make all civil actions for the recovery of damages liable

¹ See Whart. on Ev. §§ 758-794.

² On the relation of criminal to civil suits in this connection see *Duchess of Kingston's Case*, 2 How. St. Tr. 538; *State v. Lang*, 63 Me. 220; *Com. v. Evans*, 101 Mass. 25; *R. v. Hartington*, 4 E. & B. 780; *Flitters v. Allfrey*, L. R. 10 C. P. 29; *Miltimore v. Miltimore*, 40 Penn. St. 151; *Hopper v. Hopper*, 19 Ill. 219.

³ See Whart. Cr. Pl. & Pr. §§ 441-2.

⁴ *Infra*, § 575.

⁵ See Whart. Crim. Law, 8th ed. § 1362.

⁶ *Com. v. McLean*, 2 Parsons, 367.

⁷ *Com. v. Harkins*, 128 Mass. 79; 10 Rep. 513; *Gray, C. J., Soule, J., and Ames, J., diss.*

in such cases to revision in the criminal court, and subject the judgment creditor or prosecution generally for collecting a valid judgment, whether the same was paid in money or satisfied by a levy on property." But it is as much an indictable offence to cheat by fraudulently obtaining a judgment, as it is to cheat by fraudulently obtaining a bond. It is true, it may be well argued, that a party to such a judgment must apply to the court entering it to have it opened, and until this is done he cannot resort to criminal proceedings against his adversary. But the Commonwealth of Massachusetts, in the case before us, was not a party to the judgment alleged to have been fraudulent, and could not have been heard on a motion to open it. Judgments, as we will see,¹ can be impeached collaterally for fraud, and the Commonwealth was therefore entitled to set up fraud as against the judgment alleged to have been fraudulently obtained in the case here criticized.

§ 571. To enable the proceedings in a prior prosecution to bar a subsequent prosecution, it is necessary that in the prior prosecution the court should have had jurisdiction of the offence, and the proceedings should be regular.² When two courts have concurrent jurisdiction of an entire and undivisible crime, the court first assuming such jurisdiction over a particular person or thing acquires exclusive control, and its judgments are a bar to subsequent proceedings in the ancillary tribunal.³

Jurisdiction a prerequisite to admissibility of former proceedings.

¹ *Infra*, § 595.

State, 14 Tex. 387; *Dunn v. State*, 2 Pike, 229.

² *Infra*, § 594; Archbold's C. P. 92; 1 Leach, 135; 2 Hawk. c. 35; R. v. Bowman, 6 C. & P. 337; *Stevens v. Fassett*, 27 Me. 266; *Marston v. Jenness*, 11 N. H. 156; *State v. Hodgkins*, 42 N. H. 475; *Com. v. Alderman*, 4 Mass. 477; *Com. v. Cunningham*, 13 Mass. 245; *Com. v. Peters*, 12 Met. 387; *Com. v. Bosworth*, 113 Mass. 200; *State v. Brown*, 16 Conn. 54; *State v. Cooper*, 1 Green, 361; *Com. v. Myers*, 1 Va. Cas. 188; *Bailey's Case*, 1 Va. Cas. 258; *Wortham v. Com.*, 5 Rand. (Va.) 699; *State v. Odell*, 4 Blackf. 156; *O'Brian v. State*, 12 Ind. 369; *State v. Payne*, 4 Mo. 376; *Norton v.*

³ *Whart. Conf. of L.* § 933; *U. S. v. Pirates*, 5 Wheat. 184; *Robinson, Ex parte*, 6 McLean, 355; *Com. v. Goddard*, 13 Mass. 455; *State v. Davis*, 1 South. 311; *Trittip v. State*, 10 Ind. 343; *Mize v. State*, 49 Ga. 375; *State v. Simons*, 3 Mo. 415; *Burdett v. State*, 9 Tex. 43; though see *State v. Tisdale*, 2 Dev. & Bat. 159; *Com. v. Bright*, 78 Ky. 238.

That a plurality of governments may prosecute an offence having a plurality of aspects see *Whart. Cr. Pl. & Pr.* § 443. The authorities are collected in *Whart. Crim. Law*, 8th ed. §§ 264 *et seq.*

§ 572. A discharge of a defendant on proceedings preliminary to a trial is usually no bar.¹ Thus he is not protected from a subsequent prosecution by an *ignoramus* from a grand jury,² nor by a discharge on *habeas corpus*.³

Nolle prosequi no bar. § 573. Nor is a *nolle prosequi* ordinarily a bar;⁴ nor, in Massachusetts, is a dismissal by the trial court;⁵ though it is otherwise where a *nolle prosequi* is entered when the jury is empanelled, and the case is committed to them finally, and then withdrawn without consent of the defendant, and without order of court or statutory power; or when, even if the court approve the entry, the defendant was at the time in jeopardy, under the Constitution.⁶ But when the *nolle prosequi* is with permission of the court, it may be no bar, even though the case is opened to the jury.⁷ After verdict a *nolle prosequi* may operate as a pardon.⁸

¹ See *Wolverton v. Com.*, 75 Va. 909.

² Whart. Cr. Pl. & Pr. § 446; 2 Hale, 243-6; 2 Hawk. c. 35, s. 6; *R. v. Newton*, 2 M. & R. 503; *Com. v. Miller*, 2 Ashm. 61. See *Christmas v. State*, 53 Ga. 81.

³ Whart. Cr. Pl. & Pr. §§ 545, 1011. See, however, under South Carolina statute, *State v. Fley*, 2 Brev. 338.

⁴ Whart. Cr. Pl. & Pr. § 447; *U. S. v. Stowell*, 2 Curtis C. C. 170; *Com. v. Wheeler*, 2 Mass. 172; *Com. v. Tuck*, 20 Pick. 356; *Bacon v. Towne*, 4 Cush. 234; *State v. Main*, 31 Conn. 572; *Wortham v. Com.*, 5 Rand. (Va.) 699; *State v. McNeill*, 3 Hawks, 183; *State v. McKee*, 1 Bail. 651; *State v. Haskins*, 3 Hill (S. C.), 95; *State v. Blackwell*, 9 Ala. 79; *Aaron v. State*, 39 Ala. 75; *Winston, Ex parte*, 52 Ala. 419; *Clark v. State*, 23 Miss. 261; *Donaldson v. State*, 44 Mo. 149. See *R. v. Roper*, 1 *Craw. & Dix.* 93; *Com. v. Drew*, 3 Cush. 279; *People v. Vanhorne*, 8 Barb. 160; *Gardner v. People*, 6 Parker C. R. 155; *State v. Tisdale*, 2 Dev. & Bat. 159; *State v. Thornton*, 13 Ired. 256; *State v. Colvin*, 11 Humph. 599; *State v. Patterson*, 73 Mo. 695. For other cases see Whart. Cr. Pl. & Pr. § 449.

⁵ *Com. v. Gould*, 12 Gray, 171; *Com. v. Bressant*, 126 Mass. 246.

⁶ *U. S. v. Shoemaker*, 2 McLean, 114; *State v. Smith*, 49 N. H. 155; *State v. Roe*, 12 Vt. 941; *Com. v. Tuck*, 20 Pick. 356; *Com. v. Kimball*, 7 Gray, 328; *People v. Barrett*, 2 Caines, 304; *People v. Vanhorne*, 8 Barb. 158; *McFadden v. State*, 23 Penn. St. 12; *Mounts v. State*, 14 Ohio, 295; *Baker v. State*, 12 Oh. St. 214; *Reynolds v. State*, 3 Kelly, 53; *Weinzorpfm v. State*, 7 Blackf. 186; *Harker v. State*, 8 Blackf. 540; *Wright v. State*, 5 Ind. 290; *State v. McKee*, 1 Bailey, 651; *Jones v. State*, 55 Ga. 625; *State v. Kreps*, 8 Ala. 951; *Cobia v. State*, 16 Ala. 781; *Grogan v. State*, 44 Ala. 9; *Barnett v. State*, 54 Ala. 579; *Ward v. State*, 1 Humph. 253; *State v. Connor*, 5 Cold. 311. See *R. v. Oulaghan*, *Jebb*, 270. As to special Massachusetts statute see *Rev. Stat. c. 136, § 27*; c. 198, § 1; *Sup. Rev. Stat.* 387.

⁷ *U. S. v. Morris*, 1 Curtis C. C. 23; *State v. Morgan*, 33 Md. 44.

⁸ *State v. Whittier*, 38 Me. 574; *Roe v. State*, 12 Vt. 93; *Com. v. Briggs*, 7 Pick. 177; *Com. v. Tuck*, 20 Pick. 356; *Com. v. Jenks*, 1 Gray, 490; *People v.*

§ 574. It is not necessary that a judgment should have been entered on a verdict of acquittal to make such acquittal an estoppel.¹ An outstanding verdict of guilty may estop, even without a judgment,² and so where there is a plea of guilty without judgment;³ though it is otherwise where the indictment is conceded to be bad by the prosecution,⁴ and where the indictment on which the proceedings are had is stolen,⁵ and where the defendant asks for a new trial. But "jeopardy" may constitute a bar.⁶

Verdict of acquittal without judgment a bar. Otherwise with conviction.

§ 575. Proceedings in a criminal prosecution will not be barred by the fact that a prior civil suit has been instituted for the same cause of action, as in such cases the parties are not the same;⁷ though a court will take into consideration the civil procedure in adjusting sentence on the criminal.⁸

Prior civil proceedings no bar.

§ 576. It is not necessary that a judgment, to be a bar, should be that of a court of common law jurisdiction. The judgment of a military court, or a court-martial, if competent and constitutional, may likewise establish *res judicata*.⁹ But ordinarily an offence against a State is

Rulings of military courts final.

Van Brunt, 8 Barb. 158; State v. Fleming, 7 Humph. 152. See generally, as to *nolle prosequi*, Whart. Cr. Pl. & Pr. §§ 383, 447.

¹ West v. State, 2 Zabr. 212. See *infra*, § 609. For other cases see Whart. Cr. Pl. & Pr. § 435. And compare *supra*, § 570.

² Whart. Cr. Pl. & Pr. § 435; U. S. v. Herbert, 5 Cranch C. C. 87; U. S. v. Keen, 1 McLean, 429; State v. Elden, 41 Me. 165; Ratzky v. People, 29 N. Y. 124; Shepherd v. People, 11 E. P. Smith, 407; West v. State, 2 Zabr. 212; Preston v. State, 25 Miss. 383; State v. Spear, 6 Mo. 644; Lewis v. State, 1 Tex. Ap. 323.

³ People v. Goldstein, 32 Cal. 432. See State v. Lang, 63 Mo. 220. *Infra*, § 577.

⁴ Penn. v. Huffman, Addis. 140.

⁵ State v. Mounts, 14 Ohio, 295.

⁶ See Com. v. Cook, 6 S. & R. 577; Com. v. Clue, 3 Rawle, 498; McCreary v. Com., 29 Penn. St. 323; Com. v. Fells, 9 Leigh, 613; Spier's Case, 1 Dev. 491; and see cases in Whart. Cr. Pl. & Pr. § 436.

⁷ See cases cited in Whart. Cr. Pl. & Pr. § 453.

⁸ See R. v. Rhodes, 2 Strange, 703; State v. Frost, 1 Brev. 385; Buckner v. Beck, Dudley (S. C.), 168; State v. Blennerhasset, 1 Walker, 7.

Whether the injured party is bound to prosecute criminally before having resort to civil proceedings is elsewhere considered. Whart. Cr. Pl. & Pr. § 453.

⁹ Whart. Cr. Pl. & Pr. § 439; Dynes v. Hoover, 20 How. 65; Wooley v. U. S., 20 Law Rep. 631; U. S. v. Reiter, 4 Am. Law Reg. N. S. 534.

not barred by the action of a federal court-martial,¹ nor is a court-martial barred by a state prosecution for the same offence in its state aspects.² Where, however, a court-martial has, by law, exclusive jurisdiction to try an offence, then its judgment is a bar to the proceedings of other tribunals.³

§ 577. A judgment found on a plea of *nolo contendere* is a conclusive bar to a subsequent criminal prosecution,⁴ though in civil suits *nolo contendere* is held not to involve an admission of guilt.⁵

Judgment
on *nolo*
contendere
estops.

§ 578. Illustrations of the rule that the offences must be identical, in order to enable an acquittal or conviction on a former trial to be received in evidence to bar proceedings on a second trial, belong more properly to the accompanying Treatise on Pleading.⁶ It may, however, be here mentioned that an acquittal on ground of misnomer of third parties or of things is no bar to a second indictment for the same offence accurately describing the third parties or things,⁷ nor is an acquittal

Offences
must be
identical.

¹ *State v. Rankin*, 4 Cold. 145.

² See 3 Op. Atty.-Gen. 750; 6 *ibid.* 413. See *supra*, § 571; *U. S. v. Cashiel*, 1 Hughes, 552.

³ *Coleman v. State*, 97 U. S. 509. For other cases see Whart. Cr. Pl. & Pr. § 439.

In *Coleman v. State*, 97 U. S. 509, the defendant, while in the military service of the United States during the civil war, was convicted in Tennessee by a court-martial, and sentenced to suffer death. The sentence, for some cause unknown, was not carried into effect. After restoration of federal authority in Tennessee, he was indicted by a Tennessee court for the same murder. To the indictment he pleaded his conviction before the court-martial. The plea being overruled, he was tried, convicted, and sentenced to death. It was held by the Supreme Court of the United States that the state court had no jurisdiction to try him for the offence, as he was at the time answerable only to the federal government,

and only by its laws, as enforced by its armies, could he be punished. It was further ruled that unless suspended or superseded by the commander of the forces of the United States which occupied Tennessee, the laws of that State, so far as they affected its inhabitants among themselves, remained in force during the war, and over them, its tribunals, unless superseded by him, continued to exercise their ordinary jurisdiction.

⁴ *State v. Lang*, 63 Me. 220; Whart. Cr. Pl. & Pr. § 418.

⁵ *Com. v. Horton*, 9 Pick. 206; *Com. v. Tilton*, 8 Met. 232.

⁶ See Whart. Cr. Pl. & Pr. §§ 456 *et seq.*

⁷ *Ibid.* § 460; 2 Hale, 247; *R. v. Cogan*, 1 Leach, 443; *R. v. Green*, Dears. & B. 113; *R. v. Champneys*, 2 M. & R. 26; *State v. Sias*, 17 N. H. 558; *Com. v. Wade*, 17 Pick. 395; *Com. v. Sutherland*, 109 Mass. 342; *Com. v. Trimmer*, 84 Penn. St. 18; *Burres v. Com.*, 27 Grat. 934; *Durham*

on account of a wrong venue a bar to an indictment in which the right venue is laid;¹ nor is an acquittal on ground of a false allegation of time, in cases where time is essential, a bar to a subsequent indictment giving the time correctly.² It is of course otherwise when the averment of time is immaterial.³ A conviction, on the other hand, on an indictment defective for either of the above reasons, followed by an endurance of sentence, bars further proceedings.⁴

§ 579. When the evidence necessary to support the second indictment would have been sufficient to procure a legal conviction on the first, then the first procedure operates as an estoppel; but not otherwise.⁵ Hence an acquittal on a defective or inadequate indictment is no bar;⁶ but it is otherwise as to a conviction on a defective indictment followed by an endurance of the sentence.⁷ In conformity with the general principle above stated, after judgment has been arrested or reversed on a defective indictment, or after an indictment has been quashed, or after a judgment has been entered for the defendant on demurrer, a new indictment may be found correcting the defects in the prior indictment, and to the second indictment the proceedings under the first will be no bar.⁸

When evidence in second case is sufficient to secure a judgment in first, then first judgment estops.

v. People, 4 Scam. 172; *State v. Risher*, 1 Rich. 217; *Davis v. State*, 58 Ga. 173; *Martha v. State*, 26 Ala. 72; *State v. McGraw*, 1 Walker, 208; *Hite v. State*, 9 Yer. 357. *Supra*, §§ 91 *et seq.*

¹ *Vaux's Case*, 4 Co. 45 a, 46 b; *Methard v. State*, 19 Oh. St. 363. *Supra*, § 107.

² *R. v. Taylor*, 3 B. & C. 502. *Supra*, § 106.

³ *Supra*, § 103; 2 Hale, 179, 244; 2 Hawk. 35.

⁴ *Com. v. Loud*, 3 Met. 328; *Com. v. Keith*, 8 Met. 531; *Fritz v. State*, 40 Ind. 18; *Durham v. People*, 4 Scam. 172.

⁵ Whart. Cr. Pl. & Pr. §§ 456 *et seq.*; *R. v. Sheen*, 2 C. & P. 634; *R. v. Clark*, 1 Brod. & B. 473; *R. v. Emden*, 9 East, 437; *R. v. Vandercomb*, 2 Leach, 708; *Heikes v. Com.*, 26 Penn. St. 513.

⁶ Whart. Cr. Pl. & Pr. § 457; *Vaux's Case*, 4 Co. 45 a; *Com. v. Clair*, 7 Allen, 525; *People v. Barrett*, 1 Johns. 66; *Com. v. Somerville*, 1 Va. Cas. 164; *Price v. State*, 19 Ohio, 423; *Mount v. Com.*, 2 Duvall, 63; *Black v. State*, 36 Ga. 447; *Whitley v. State*, 38 Ga. 50; *Waller v. State*, 40 Ala. 325; *State v. McGraw*, Walker, 208; *Munford v. State*, 39 Miss. 558; *State v. Horne-man*, 16 Kans. 452.

⁷ *Com. v. Loud*, 3 Met. 328; *Com. v. Keith*, 8 Met. 531; *Fritz v. State*, 40 Ind. 18.

⁸ *Writhpole's Case*, Cro. Car. 147; *R. v. Drury*, 3 Cox C. C. 544; *R. v. Houston*, 3 Craw. & Dix, 310; *R. v. Wildey*, 1 M. & S. 188; *Com. v. Gould*, 12 Gray, 171; *People v. Casborus*, 13 Johns. 351; *Com. v. Zepp*, 5 Penn. L. J. 256; *Cochrane v. State*, 6 Md. 400;

But an erroneous acquittal (if not fraudulent) is conclusive, so that the defendant cannot be retried for any offence of which he could have been convicted under the indictment on which he was acquitted.¹

§ 580. Wherever an unlawful act has two aspects, under either of which it is indictable, and the evidence of either of which would sustain an indictment for the other, then an indictment for one aspect absorbs the case, and there can be no further prosecution for the act. In other words, when the evidence necessary to support the second indictment would have supported the first, the second is barred by a conviction or acquittal on the first; though not otherwise.² Thus where a riot consists of a series of tumultuous assaults, the defendant, after being convicted of the riot, cannot be put on trial for the constituent assaults;³ nor, when a riot consists in breaking up a religious meeting, can the defendant be prosecuted for the two offences successively;⁴ nor after a conviction for hold-

Where the same act has two indictable aspects, conviction of one bars the other.

Com. v. Hatton, 3 Grat. 623; *State v. Ray*, 1 Rice, 1; *State v. Phil*, 1 Stew. 31; *Turner v. State*, 40 Ala. 21; *Jeffries v. State*, 40 Ala. 381. *Infra*, § 582. For other cases see *Whart. Cr. Pl. & Pr.* § 547.

¹ 2 Inst. 318; 2 Hale, 274; *R. v. Sutton*, 5 B. & Ad. 52; *R. v. Praed*, 4 Burr. 2257; *R. v. Mann*, 4 M. & S. 337; *State v. Kittle*, 2 Tyler, 471; *State v. Brown*, 16 Conn. 54; *People v. Maher*, 4 Wend. 229; *State v. Taylor*, 1 Hawks, 264; *Black v. State*, 36 Ga. 547; *State v. Dark*, 8 Blackf. 526; *State v. Norvell*, 2 Yerg. 24; *Slaughter v. State*, 6 Humph. 410.

² Archbold's C. P. by *Jervis*, 82; 6 Leach, 448; *R. v. Embden*, 9 East, 437; *Com. v. Cunningham*, 13 Mass. 245; *Com. v. Bakeman*, 105 Mass. 53; *Com. v. Wade*, 17 Pick. 395; *Com. v. Tenney*, 97 Mass. 50; *People v. Barrett*, 1 Johns. 66; *Canter v. People*, 38 How. (N. Y.) Pr. 91; *State v. Reed*, 12 Md. 263; *Price v. State*, 19 Ohio, 423; *Gerard v. People*, 3 Scam. 363; *Durham*

v. People, 4 Scam. 42; *Guedel v. People*, 42 Ill. 226; *State v. Egglesht*, 41 Iowa, 574; *State v. Murray*, 55 Iowa, 130; *State v. Gleason*, 56 Iowa, 203; *State v. Ray*, 1 Rice, 1; *State v. Risher*, 1 Rich. 217; *State v. Revels*, Busbee, 120; *Holt v. State*, 38 Ga. 187; *Hite v. State*, 9 Yerg. 357; *State v. Keogh*, 13 La. An. 243. See, to same effect, 2 N. Y. Rev. St. 1856. Other cases will be found in *Whart. Cr. Pl. & Pr.* § 471.

³ *R. v. Champneys*, 2 M. & R. 26; *Com. v. Kinney*, 2 Va. Cas. 139; *Smith v. Com.*, 7 Grat. 593; *Price v. People*, 9 Ill. Ap. 36; *State v. Stanly*, 4 Jones (N. C.), 290; *State v. Fife*, 1 Bailey, 1; *State v. Standifer*, 5 Porter, 523. See *Com. v. Hawkins*, 11 Bush, 603; though see *Scott v. U. S.*, 1 Morris, 142; *State v. Ross*, 4 Lea, 442, where a conviction for disturbing a religious meeting by firing a pistol was held not to bar an indictment for an attempt to kill; and cases in *Whart. Cr. Pl. & Pr.* § 471.

⁴ *State v. Townsend*, 2 Harring. 543.

ing forged paper, under an indictment for holding and uttering such paper, can there be a conviction for uttering the paper.¹ But a conviction of larceny, on an indictment for larceny, does not bar a prosecution for the burglary with intent to steal to which the larceny was an incident;² nor does an acquittal of larceny bar a prosecution for obtaining the same goods by false pretences or by conspiracy,³ nor, at common law, for being an accessory to the stealing.⁴ In some instances courts have undertaken to say that when a prosecution elects to prosecute a particular phase of an offence (*e. g.*, larceny in a case of robbery,⁵ or arson in a case where the burning caused killing,⁶ or one of a series of municipal negligences occurring on the same day);⁷ this is an adequate determination and satisfaction, and the case, on the particular evidence, ought to be pushed no further. But whether public justice demands a second prosecution, in such cases, is a question for the executive, who may properly step in and prevent an undue accumulation of prosecutions. For the court the test is, whether, on the first trial, there could have

A conviction of an assault, however, does not bar a prosecution for riot to which the assault was collateral. See *Skidmore v. Bricker*, 77 Ill. 164.

¹ *State v. Benham*, 7 Conn. 414; *People v. Van Keutzen*, 5 Park. C. R. 66. See *People v. Allen*, 1 Park. C. R. 445; *State v. Eggesht*, 41 Iowa, 574. Otherwise as to stealing and receiving, and as to forging and uttering. *Foster v. State*, 39 Ala. 229; *Harrison v. State*, 36 Ala. 248. See *Hirshfield v. State*, 11 Tex. Ap. 207. As to forging a claim on one bank, and obtaining money on such claim from another bank, see *People v. Ward*, 15 Wend. 231; Whart. Cr. Pl. & Pr. §§ 465 *et seq.*

² See *Wilson v. State*, 24 Conn. 57; *State v. Warner*, 14 Ind. 572; but see *State v. Lewis*, 2 Hawks, 98; *Roberts v. State*, 14 Ga. 8. But see *State v. De Graffenreid*, 9 Baxt. 287.

³ *R. v. Henderson*, C. & M. 328; *State v. Sias*, 17 N. H. 558; *Dominick v. State*, 40 Ala. 680.

⁴ *State v. Larkin*, 49 N. H. 36; *Foster v. State*, 39 Ala. 229. See, for a fuller discussion, Whart. Cr. Pl. & Pr. § 471.

⁵ *State v. Lewis*, 2 Hawks, 98. See *Roberts v. State*, 14 Ga. 8.

⁶ *State v. Cooper*, 1 Green (N. J.), 361; *People v. Smith*, 3 Weekly Dig. 162; cited 13 Eng. Rep. 659. See an able criticism on these cases in 13 Eng. Reps. 659-60.

⁷ *State v. Fayetteville*, 2 Murph. 371. See *Fiddler v. State*, 7 Humph. 508.

In Pennsylvania, under a statute forbidding the employment of young girls in liquor saloons, it is held that the act of employment being a single offence, there is no misjoinder in not entering a separate indictment for each female so employed. So, also, in imposing a fine of \$800, the minimum punishment prescribed in the act, \$100 for each female employed, there being no misjoinder there was no error in the sentence. *Walter v. Com.*, 88 Penn. St. 137.

been a conviction of the offence prosecuted in the second.¹ If not, then the rule *ne bis idem* does not apply.²

§ 581. Prosecutions under the liquor laws afford us several illustrations to the same effect. A conviction, for instance, of the offence of keeping a tippling-house, or of being a common seller, does not bar a prosecution for individual sales;³ and a conviction for nuisance will not bar a prosecution for keeping intoxicating liquor.⁴ But a prosecution for a particular sale bars a subsequent prosecution for the same sale, though the indictments in the two cases are under distinct statutes, or sections of statutes.⁵

§ 582. It may be that the defendant was previously prosecuted for the same offence as that under trial, but, on a plea of abatement offered by him, had a verdict in his favor. If so, the record of the former trial is inadmissible, since on that trial the defendant could not have been convicted on the evidence adduced on the second trial. The former proceedings do not bar a subsequent indictment giving his right name.⁶

§ 583. Wherever a description is material, and an acquittal follows from a variance in respect to such description, such acquittal, as we have seen, is not admissible on the trial of a second indictment in which the averments are correctly made. It is otherwise when the description was not of the essence of the offence, in which case, where the defendant could have been convicted on the first trial on the evidence admissible on the second, proceedings on the second trial are concluded by acquittal or conviction on the first.⁷

¹ Wilcox v. State, 6 Lea, 571.

See *contra*, State v. Nutt, 28 Vt. 598;

² See, for a fuller discussion, Whart. Cr. Pl. & Pr. §§ 465 *et seq.*

Miller v. State, 3 Oh. St. 475.

³ Whart. Cr. Pl. & Pr. § 472; State v. Coombs, 32 Me. 527; State v. Maher, 35 Me. 225; State v. Innes, 53 Me. 536; Com. v. Cutler, 9 Allen, 486; Com. v. Kennedy, 97 Mass. 224; State v. Johnson, 3 R. I. 94; Heikes v. Com., 26 Penn. St. 513; Roberts v. State, 14 Ga. 8; Morman v. State, 24 Miss. 54.

⁴ Com. v. McCauley, 105 Mass. 69. See State v. Innes, 53 Me. 536; Com. v. Hardiman, 9 Allen, 487; State v. William, 1 Vroom, 102.

⁵ Ibid.; State v. Nutt, 28 Vt. 598; Miller v. State, 3 Oh. St. 475. Further distinctions are stated in Whart. Cr. Pl. & Pr. § 472.

⁶ *Supra*, § 94; *infra*, § 639.

⁷ *Supra*, §§ 91 *et seq.*, 578.

§ 584. Wherever a minor offence is inclosed in a major, then, if the two be contained in the same count, either an acquittal or conviction of the minor, is admissible as a bar to a subsequent indictment for the major offence.¹ On an indictment for murder, for instance, if the jury convicts of manslaughter, this is a virtual acquittal of murder, and the case cannot be retried on an indictment for murder.² A conviction, also, of murder in the second degree is a bar to a prosecution for murder in the first degree.³ On the same reasoning, a defendant convicted of an assault, on an indictment for an assault and battery, or for an assault with intent to kill, cannot afterwards be tried for the assault and battery, or the assault with intent to kill;⁴ and a defendant convicted of an assault with intent to ravish, under an indictment for rape, cannot be subsequently tried for the rape.⁵ And it has been held that a defendant convicted of a breach of the peace cannot afterwards be tried for an assault of which the breach of the peace was an ingredient.⁶

Prior prosecution of minor offence inclosed in major admissible on subsequent trial of major.

¹ *R. v. Oliver*, 8 Cox C. C. 384; *R. v. Yeadon*, 9 Cox C. C. 91; *R. v. Bird*, T. & M. 437; 2 Den. C. C. 94; 5 Cox C. C. 11; *State v. Waters*, 39 Me. 54; *State v. Dearborn*, 54 Me. 442; *Com. v. Griffin*, 21 Pick. 523; *Stewart v. State*, 5 Ohio, 242; *State v. Wiles*, 8 C. Min., 9 Rep. 472; *Swinney v. State*, 8 Sm. & M. 576; *State v. Chaffin*, 2 Swan, 492; *Miller v. State*, 58 Ga. 200; *State v. De Laney*, 28 La. An. 434; *Cameron v. State*, 8 Eng. (Ark.) 712; *State v. Taylor*, 3 Oregon, 10. See *supra*, §§ 130, 144; and see *Whart. Cr. Pl. & Pr.* § 465, for other cases.

² 2 Hale, 246; *Fost.* 329; *Livingston's Case*, 14 Grat. 592; *Brennan v. People*, 15 Ill. 511; *Barnett v. People*, 54 Ill. 325; *Jordan v. State*, 22 Ga. 545; *Hurt v. State*, 25 Miss. 378; *State v. Ross*, 29 Mo. 32; *Slaughter v. State*, 6 Humph. 410; *State v. Lessing*, 16 Minn. 80; *State v. Byrd*, 31 La. An. 419; *State v. Dennison*, id. 847; *State v. Martin*, 30 Wis. 216; *People v. Gilmore*, 4 Cal. 376. See, however, *U. S.*

v. Harding, 1 Wall. Jr. 147; *State v. Beheimer*, 20 Oh. St. 579; and see other cases in *Whart. Cr. Pl. & Pr.* § 465.

³ *Lewis v. State*, 51 Ala. 1; *Fields v. State*, 52 Ala. 348; *State v. Smith*, 53 Mo. 139; *Slaughter v. Com.*, 6 Humph. 410; *Johnson v. State*, 29 Ark. 31.

⁴ *Whart. Cr. Pl. & Pr.* § 465; *State v. Dearborn*, 54 Me. 442; *State v. Hardy*, 47 N. H. 538; *State v. Coy*, 2 Aiken, 181; *State v. Reed*, 40 Vt. 603; *State v. Johnson*, 1 Vroom, 185; *Francisco v. State*, 4 Zab. 30; *Stewart v. State*, 5 Ohio, 242; *Clark v. State*, 12 Ga. 131; *State v. Stedman*, 7 Porter, 495; *Carpenter v. State*, 23 Ala. 84; *Reynolds v. State*, 11 Tex. 120; *State v. Robey*, 8 Nev. 312; *People v. Apgar*, 35 Cal. 389.

⁵ *State v. Shepherd*, 7 Conn. 54.

⁶ *Com. v. Miller*, 5 Dana, 320; *Com. v. Hawkins*, 11 Bush, 603. See fully for other cases *Whart. Cr. Pl. & Pr.* § 465.

§ 585. If, however, there could have been no conviction, on the first trial, of the major offence, then, on a subsequent trial of the major offence, the record of the first prosecution of the minor offence is not admissible.¹ Thus, acquittal for an assault with intent to kill or ravish (the acquittal being on the ground of merger) is no bar to a subsequent indictment for the consummated offence;² and a conviction of an assault with intent to kill is no bar to a subsequent prosecution for murder, the person assaulted having immediately died.³ It should also be observed, that it has been argued that if the major offence could have been included in the first prosecution, but was omitted either negligently or wilfully, and if the facts constituting the major or more aggravated offence were put in evidence on the first trial, then there can be no second trial for such offence.⁴ But as a general rule we must fall back on the proposition already stated, that if there could have been no conviction of the major offence on the former indictment, then judgment on such indictment cannot estop a subsequent indictment for the major offence.

Otherwise when there could be no conviction on first trial of major offence.

¹ Whart. Cr. Pl. & Pr. § 465; R. v. *In re*, 9 W. R. 203; R. v. Champneys, 2 M. & R. 26; State v. Smith, 43 Vt. 324; State v. Stanly, 4 Jones (N. C.), 290; though see Smith v. Com., 7 Grat. 593. For other authorities, see Whart. Cr. Pl. & Pr. § 407. The English rulings, it should be observed, rest in part on a special recent statute providing that after a trial by justices there shall be no further proceedings "for the same cause."

² Whart. Cr. Pl. & Pr. §§ 456, 465; State v. Murray, 15 Me. 100; Com. v. Kingsbury, 5 Mass. 106; People v. Mather, 4 Wend. 265. See Com. v. Parr, 5 W. & S. 345. In R. v. Tancock, 13 Cox C. C. 217, where the defendant was indicted for murder, and pleaded a former conviction for manslaughter for the same act, on an indictment for manslaughter, Denman, J., held that as the case on trial amounted only to manslaughter, the former conviction was a bar; though he expressed a doubt whether if the second trial disclosed a case of murder, the former conviction of manslaughter would be a bar. See comments in Whart. Cr. Pl. & Pr. § 465.

³ R. v. Morris, L. R. 1 C. C. 90; R. v. Salvi, 10 Cox C. C. 481, n.; Com. v. Evans, 101 Mass. 25; Burns v. People, 1 Parker C. R. 182; Wright v. State, 5 Ind. 527. *Supra*, § 570.

⁴ R. v. Elrington, 9 Cox C. C. 86; 1 B. & S. 689; 10 W. R. 13; citing R. v. Stanton, 5 Cox C. C. 324; Thompson,

§ 586. A previous prosecution on an indictment including a minor and a major offence, bars a subsequent prosecution for the minor offence. Thus, a conviction or acquittal on an indictment for murder bars a subsequent prosecution for manslaughter; a conviction or acquittal on an indictment for burglary and larceny bars a subsequent prosecution for larceny.¹ It is otherwise when there could not have been a conviction of the minor offence under the first indictment.² Thus, an acquittal for burglary with intent to steal does not bar a prosecution for larceny;³ and an acquittal for murder on the ground that the assaults averred did not contribute to the murder does not bar a subsequent indictment for the assaults.⁴

In prosecution for minor offence, it is admissible to put in evidence former prosecution of case containing major and minor.

§ 587. Is it permissible to introduce into one indictment the killing by A. of B. and C. simultaneously; and if so, can the two killings be tried together, and a verdict found so as to include both? That this can be done is expressly ruled by several courts;⁵ but the tendency of authority is to the contrary,⁶ and with reason. It by

When two are simultaneously killed by one blow, a prosecution for killing one

¹ 4 Co. R. 45; 2 Hale, 246; Fost. 339; R. v. Barrett, 9 C. & P. 387; People v. McGowan, 17 Wend. 386; People v. Loop, 3 Parker C. R. 581; Lohman v. People, 1 Comst. 379; State v. Cooper, 1 Green, 361; Dinkey v. Com., 17 Penn. St. 126; State v. Reed, 12 Md. 263; State v. Lewis, 2 Hawks, 98; State v. Scott, 15 S. C. 434; Johnson v. State, 44 Ga. 253; State v. Smith, 15 Mo. 550; State v. Keogh, 13 La. An. 243; Wilcox v. State, 31 Tex. 586. See, for other cases, Whart. Cr. Pl. & Pr. § 466.

² Hawks. b. ii. c. 25, s. 5; 1 Leach, 12; R. v. Henderson, C. & M. 328; State v. Warner, 14 Ind. 572; State v. Jesse, 3 Dev. & B. 98; State v. Standifer, 5 Porter, 523; State v. Wightman, 26 Mo. 515. See, however, R. v. Gould, 9 C. & P. 364.

³ State v. Warner, 14 Ind. 572; Roberts v. State, 14 Ga. 8.

⁴ R. v. Bird, T. & M. 437; 2 Den. C. C. 94; 5 Cox C. C. 11. See *supra*, §§ 91-3. And so if the assaults are not averred. Moore v. State, 59 Miss. 25.

⁵ State v. Womack, 7 Cold. 508; Rucker v. State, Sup. Ct. Tex. 1880, 9 Rep. 525; and so Clem v. State, 42 Ind. 420.

⁶ See authorities in Whart. Crim. Law, 8th ed. § 468; R. v. Champneys, 2 M. & R. 26; R. v. Jennings, R. & R. 388; State v. Damon, 2 Tyler, 390; Com. v. Bakeman, 105 Mass. 53; State v. Benham, 7 Conn. 414; People v. Warren, 1 Parker C. R. 338; Vaughan v. Com., 2 Va. Cas. 273; Smith v. Com., 7 Grat. 593; State v. Fife, 1 Bailey, 1; State v. Fayetteville, 2 Murphy, 371; State v. Standifer, 5 Porter, 523; Teat v. State, 53 Miss. 439; People v. Ilbez, 49 Cal. 452.

In State v. Horneman, 16 Kans. 452, it was held that an acquittal on a

is not
barred by
a prosecu-
tion for
killing the
other.

no means follows that because two persons are killed simultaneously by the same blow, the issue as to each is the same.¹ A., for instance, shooting at B. in self-defence, may negligently kill C., in which case an acquittal on an indictment for killing B. would not bar an indictment for killing C. Or A., an officer of justice, when killing B. under legal warrant negligently kills C., in which case an acquittal for killing B. would not bar a prosecution for killing C. Or A. designing to poison B., by the same poison, at the same meal, negligently poisons C., in which case a verdict of manslaughter as to C. would not bar an indictment for the murder of B. Even if we follow the cases which rule that when a second person is killed incidentally to an assault on a first, the offence is to be viewed in respect to the second person precisely as if he were the first,² yet the question still arises, which is the person assaulted whose relations are to be imputed to the other person killed, and how, if both were killed, can a lumping sentence be imposed?³

§ 588. It is not only proper but right, where a number of articles having a common ownership are stolen simultaneously, that they should be grouped in the same indictment;⁴ from which it follows that on an indictment for stealing the goods of A. it is admissible to put in evidence, in bar, a prior prosecution for the stealing at the same time other goods of A. If the prosecution did not lump all the goods stolen in the first indictment, it was its own fault; and it cannot avail itself of its own negligence to multiply indictments against the defendant.

On a trial
for stealing
the goods
of A., a
former
prosecu-
tion for
stealing
the goods
of B. si-
multane-
ously is not
a bar.

charge of shooting with intent to kill was no bar to a prosecution, based on the same act, for wounding a horse.

¹ See this question discussed more fully in Whart. Cr. Pl. & Pr. § 458.

² See Whart. Crim. Law, 8th ed. § 120.

³ See *People v. Warren*, 1 Parker C. R. 338; *Vaughan v. Com.*, 2 Va. Cas. 273; *Smith v. Com.*, 7 Grat. 593.

⁴ *R. v. Carson*, R. & R. 303; *Fur-neaux's Case*, R. & R. 335; *State v. Snyder*, 50 N. H. 150; *State v. Cameron*, 40 Vt. 555; *Com. v. Williams*, 2

Cush. 583; *Com. v. O'Connell*, 12 Allen, 451; *Com. v. Eastman*, 2 Gray, 76; *Jackson v. State*, 14 Ind. 327; *State v. Williams*, 10 Humph. 101; *Lorton v. State*, 7 Mo. 55; *Hatch v. State*, 6 Tex. App. 384. See other cases cited Whart. Cr. Pl. & Pr. § 470. See also *State v. Egglesht*, 41 Iowa, 574, where it was held that when by one act several forged checks were uttered, these utterings formed but one offence. Compare *Walter v. Com.*, 88 Penn. St. 137, cited *supra*, § 580.

But a more difficult question arises where articles simultaneously stolen belong to different owners, in which case it is argued that because each owner is entitled to restitution, he cannot be precluded from this by a proceeding as to which he may not have had notice, and that therefore several stealings from different owners cannot be grouped in the same indictment.¹ This conclusion, however, has been rejected by several courts, and the preponderating opinion is, that when there is a taking of the articles of several owners by a single act, the prosecution may elect to indict for all the articles together.² If so, on the reasoning already given; by indicting for stealing a single article, it may preclude itself from a further prosecution of the transaction.³

§ 589. It must be remembered, in view of the terms of the present discussion, that to constitute simultaneousness it is not necessary that there should be exact coincidence in a particular point of time. It may appear, for instance, that the defendant has tapped his neighbor's gas-pipe, and has for weeks been consuming his neighbor's gas. This, however, will not justify a series of prosecutions for each day's or each hour's appropriation. The tapping with the subsequent appropriations constitute one act, and must be prosecuted as such.⁴ The same reasoning applies to the removal, piece by piece, of ore from a neighboring quarry, by an orifice made at one specific time.⁵ And it has been held that the setting on fire a block of houses constitutes a simultaneous offence, though the houses take fire and are consumed at successive periods of time.⁶

"Simultaneous" does not mean coincidence in a point of time.

¹ *R. v. Knight*, L. & C. 278; *State v. Newton*, 42 Vt. 537; *Com. v. Andrews*, 2 Mass. 409; *State v. Thurston*, 2 McMull. 382. see discussion in Whart. Cr. Pl. & Pr. § 470.

² That a prosecution may be barred by selecting a particular grade see *supra*, § 580.

³ *Com. v. Williams*, Thach. C. C. 722; *State v. Nelson*, 29 Me. 329; *State v. Merrill*, 44 N. H. 624; *Com. v. Dobbin*, 2 Parsons, 380; *State v. Hennessy*, 23 Oh. St. 339; *Lowe v. State*, 57 Ga. 171; *Ben v. State*, 22 Ala. 9; *Lorton v. State*, 7 Mo. 55; *State v. Morphin*, 37 Mo. 373; *Wilson v. State*, 45 Tex. 170. See U. S. v. Beerman, 5 Cranch, C. C. 412; and *R. v. Firth*, L. R. 1 C. C. 172; 11 Cox C. C. 234. See *R. v. Jones*, 4 C. & P. 217; Whart. Cr. Pl. & Pr. § 474.

⁴ *R. v. Bleasdale*, 2 C. & K. 765. ⁵ *Woodford v. People*, 62 N. Y. 117; *aff. S. C.*, 3 Hun, 310; 5 Thomp. & C. 539.

§ 590. In view of the comparative lightness of the offence, and the power residing in the courts to modify the sentence according to the evidence, it has been frequently held admissible for the prosecution, when there have been simultaneous batteries on several persons, to include these batteries in the same count. It follows from this that on a trial for one of these batteries it is admissible for the defendant to show, in bar of the indictment, that he has been previously prosecuted for a simultaneous battery on another person, the indictment in the first case averring the double battery.¹ But it is otherwise when the indictment in the first case charged simply a battery on a person other than the prosecutor in the second suit.²

On trial for battery, prosecution for prior simultaneous battery of another is a bar.

§ 591. A question of much moment arises when there are a series of successive offences relating to the same transaction. It will not be pretended that an acquittal or conviction for a nuisance to-day will be a bar to a prosecution for a similar nuisance on the same premises to-morrow.³ Nor would it be maintained that a judgment for the plaintiff for yesterday's nuisance would be conclusive in a suit for to-day's nuisance.⁴ Nor, if a way is obstructed, could a judgment on a suit for yesterday's obstruction bar a suit from being brought for to-day's obstruction.⁵ Nor, if a series of drams are sold at a bar, can an action for a sale yesterday prevent an action from being brought for a sale to-day.⁶ We may therefore

Judgment on successive offences not exhaustive.

¹ *R. v. Benfield*, 2 Burr. 984; *R. v. Standifer*, 5 Porter, 523. See on this topic Whart. Cr. Pl. & Pr. § 469.

² See Whart. Cr. Pl. & Pr. § 475; *People v. Townsend*, 3 Hill (N. Y.), 479; *R. v. Fairie*, 8 E. & B. 486; 8 Cox C. C. 66. For analogous civil cases, see Whart. on Ev. §§ 788-9.

³ *Richardson v. Boston*, 19 How. 263. See *Gormley v. State*, 37 Ohio St. 120.

⁴ *Evelyn v. Haynes*, cited Taylor on Ev. § 1509; *Connery v. Brooke*, 73 Penn. St. 80.

⁵ *State v. Coombs*, 32 Me. 529. *Supra*, § 581.

⁶ *People v. Warren*, 1 Parker C. R. 338; *Vaughan v. Com.*, 2 Va. Cas. 273; *Smith v. Com.*, 7 Grat. 593; *State v. McClintock*, 8 Iowa, 203; *State v.*

hold, that although, when the question at issue goes to the general liability of the defendant, a judgment may be admitted as *prima facie* determining such liability, yet a judgment on a suit for a breach of yesterday cannot be conclusive as to a suit for a breach of to-day. The same distinction may be illustrated by the rulings in civil cases as to recurring claims: *e. g.*, taxes, and debts due by instalments.¹ But where the question whether a certain thing is a nuisance or a trespass is solemnly determined between the parties by a judgment for the plaintiff, or the prosecution, as the case may be, then the defendant is estopped from denying, on a suit for a continuing offence, the fact that the thing complained of is a nuisance or a trespass.²

§ 592. In civil practice, a former judgment, when offered by either party in bar, can be put in evidence under the general issue.³ In criminal practice, a special plea of *autrefois acquit* or *convict* is usually regarded as an essential prerequisite to the introduction of the record of the prior procedure.⁴ In some States, by statute, the record can be put in evidence under the general issue.⁵

Prior procedure must be specially pleaded.

§ 593. Even when the parties are the same, and the judgment *prima facie* admissible, it is always open to a party against whom such judgment is offered, to show, by parol or otherwise, that notwithstanding this apparent identity, there is a difference in the points submitted in the two cases, either as to the offence or the offender. The issue thus raised as to identity is one of fact, which the jury must determine.⁶ So substantial as well as formal identity may be shown

Parol evidence admissible to identify or to distinguish.

¹ 1 Bigelow on Estoppel, 2d ed. 34; *v. State*, 37 Miss. 357; *Clem v. State*, 42 Ind. 420; *State v. Salge*, 2 Nev. 321.

² Whart. on Crim. Law, 8th ed. § 475; *Fowle v. R. R.*, 107 Mass. 352; *Plate v. R. R.*, 37 N. Y. 472. For a full discussion of pleading in this respect, see Whart. Cr. Pl. & Pr. §§ 477 *et seq.*

³ Whart. on Ev. § 765.

⁵ *Clem v. State*, 42 Ind. 420.

⁴ 2 Hale P. C. 241; *Hawk. b. 2, c. 35*; *R. v. Crofts*, 9 C. & P. 219; *State v. Barnes*, 32 Me. 530; *Com. v. Merrill*, 8 Allen, 545; *Com. v. Chesley*, 107 Mass. 223; *Solliday v. Com.*, 28 Penn. St. 13; *Nonemaker v. State*, 34 Ala. 211; *Foster v. State*, 39 Ala. 329; *Mountain v. State*, 40 Ala. 344; *Rocco*

⁶ *R. v. Crofts*, 9 C. & P. 219; *R. v. Parry*, 7 C. & P. 836; *Ricardo v. Garcias*, 12 Cl. & F. 368; *R. v. Bird*, 2 Den. C. C. 94; 5 Cox C. C. 20; *Aspenden v. Nixon*, 4 How. 467; *Goodrich v. City*, 5 Wall. 566; *Packet Co. v. Sickles*, 5 Wall. 580; *Post v. Smilie*, 48 Vt. 185; *Piper v. Richardson*, 9

by parol.¹ The burden of disputing a *prima facie* case of identity is on the party disputing.² But a point not at issue by the record cannot be shown by parol to have been decided by the case.³

II. WHEN JUDGMENT MAY BE IMPEACHED.

§ 594. A procedure before a court which, on the face of the record, has either no jurisdiction, or a jurisdiction which does not attach, is *coram non judice*, and may be impeached, even by the party in favor of whom the proceeding is instituted;⁴ *a fortiori* by the party against whom it is offered.⁵ An inferior court must show on the record that it had jurisdiction.⁶ The same distinction holds good with respect to superior courts with limited statutory jurisdiction,⁷ and with regard to courts of any class obviously transcending their

Judgment
may be
collaterally
impeached
for want of
jurisdiction.

Met. 155; Com. v. Dillane, 11 Gray, 67; Leonard v. Whitney, 109 Mass. 265; Com. v. Sutherland, 109 Mass. 342; Smith v. Sherwood, 4 Conn. 276; People v. McGowan, 17 Wend. 386; Porter v. State, 17 Ind. 415; State v. Maxwell, 51 Iowa, 314; Duncan v. Com., 6 Dana, 295; Newton v. White, 47 Ga. 400; Chamberlain v. Gaillard, 26 Ala. 504; Robinson v. Lane, 22 Miss. 161; State v. Andrews, 27 Mo. 267; State v. Small, 31 Mo. 197; State v. Thornton, 37 Mo. 360. *Supra*, §§ 509-11. For other cases see Whart. on Ev. § 785.

¹ Whart. on Ev. § 795.

² 2 Hale, 241; Com. v. Daley, 4 Gray, 209; State v. Small, 31 Mo. 197; State v. Thornton, 37 Mo. 360; Whart. Cr. Pl. & Pr. § 483.

³ Manny v. Harris, 2 Johns. 24; Jackson v. Wood, 3 Wend. 27.

⁴ Mercier v. Chace, 9 Allen, 242.

⁵ *Supra*, § 571; R. v. Chester, 1 W. Bl. 25; R. v. Washbrook, 4 B. & C. 732; R. v. Bowman, 6 C. & P. 337; Briscoe v. Stephens, 2 Bing. 213; 9 Moore, 413; Thompson v. Whitman, 18 Wall. 457; Hill v. Mendenhall, 21 Wall. 453; Penobscot R. R. v. Weeks,

52 Me. 456; State v. Hodgkin, 42 N. H. 475; Com. v. Alderman, 4 Mass. 477; Com. v. Goddard, 13 Mass. 457; Borden v. Fitch, 15 Johns. 121; Latham v. Edgerton, 9 Cow. 227; Gage v. Hill, 43 Barb. 44; State v. Cooper, 1 Green (N. J.), 361; Fisher v. Longnecker, 8 Barr, 410; Com. v. Myers, 1 Va. Cas. 198; Wortham v. Com., 5 Rand. 699; James v. Smith, 2 S. C. 183; Parish v. Parish, 32 Ga. 653; Richardson v. Hunter, 23 La. An. 255; State v. Payne, 4 Mo. 376; Bonsall v. Issett, 14 Iowa, 309; Mayo v. Ah Loy, 32 Cal. 477; Dorsey v. Kendall, 8 Bush, 294; North v. Moore, 8 Kans. 143.

⁶ Harris v. Willis, 15 C. B. 709; Crawford v. Howard, 30 Me. 422; Clark v. Bryan, 16 Md. 171; Adams v. Tiernan, 5 Dana, 394; Gray v. McNeal, 12 Ga. 424.

⁷ Harris v. Hardeman, 14 How. 334; Morse v. Presby, 25 N. H. 299; Carleton v. Ins. Co., 35 N. H. 162; Huntington v. Charlotte, 15 Vt. 46; Embury v. Conner, 3 Comst. 322. See, however, Hahn v. Kelly, 34 Cal. 391; Tibbs v. Allen, 27 Ill. 119; and remarks in Bigelow on Estoppel, 2d ed. 124.

powers.¹ If the record, however, avers the facts necessary to constitute jurisdiction, such averments cannot (except in cases of fraud to be hereafter noticed) be collaterally disputed by parties or privies.² Nor, where the record shows jurisdiction (unless with the exception already noticed), can parties or privies collaterally dispute the rulings of courts on questions of jurisdiction which were ruled against them at the time.³

§ 595. Whenever a party seeks to avail himself of a former judgment, fraudulently entered, the opposite party may show the fraud and thus avoid the judgment. In criminal issues this is settled law. An acquittal or conviction a defendant manages to have fraudulently entered is no bar to a second prosecution.⁴ Fraud, however, must be substantively proved, or the prior judgment will be a bar.⁵ The burden is on the party setting up the fraud to show it.⁶

Former judgment may be avoided on proof of fraud.

§ 596. A foreign judgment is impeachable for want of jurisdiction, and, hence, for want of personal service, within the jurisdiction, on the defendant, this being internationally essential to jurisdiction. Thus, where a settlement was

Impeachable for want of jurisdiction or fraud.

¹ Windsor v. McVeigh, cited 93 U. S. 264.

² McCormick v. Sullivan, 10 Wheat. 192; Morse v. Presby, 25 N. H. 299; Carleton v. Ins. Co., 35 N. H. 162; Coit v. Haven, 30 Conn. 190; Hartman v. Ogborn, 54 Penn. St. 120; Clark v. Bryan, 16 Md. 171; Simmons v. McKay, 5 Bush, 25; Callen v. Ellison, 13 Oh. St. 446; Moffit v. Moffit, 69 Ill. 641; Rice v. Brown, 77 Ill. 549; Hahn v. Kelly, 34 Cal. 391; 35 Cal. 533; McCauley v. Fulton, 44 Cal. 355; Smith v. Wood, 37 Tex. 616; though see Comstock v. Crawford, 3 Wall. 397, where it was held that the jurisdictional recitals of a statutory Probate Court were only *prima facie* evidence of the facts recited.

³ Sheldon v. Wright, 5 N. Y. 497; Fitshugh v. McPherson, 9 Gill & J. 51.

⁴ Duchess of Kingston's Case, 2 How. St. Tr. 544; R. v. Davis, 12 Mod. 9; R. v. Furzer, Say. 90; State v. Little, 1 N.

H. 257; State v. Brown, 16 Conn. 54; Com. v. Alderman, 4 Mass. 477; Com. v. Jackson, 2 Va. Cas. 501; Bulson v. People, 31 Ill. 409; State v. Green, 16 Iowa, 239; Dunlap v. Cody, 31 Iowa, 260; Hulverson v. Hutchinson, 39 Iowa, 316; State v. Davis, 4 Blackf. 345; Halloran v. State, 80 Ind. 586; State v. Simpson, 28 Minn. 66; State v. Atkinson, 9 Humph. 677; State v. Colvin, 11 Humph. 599; Ellis v. Kelly, 8 Bush, 621; State v. Jones, 7 Ga. 422; State v. Cole, 48 Mo. 70. See State v. Lowry, 1 Swan, 34.

⁵ State v. Casey, Busbee, 209; State v. Tisdale, 2 Dev. & Bat. 159; Burdett v. State, 9 Tex. 43.

⁶ Ibid. *Supra*, §§ 226, 590 a; *infra*, § 596 a. See Welsh v. Mandeville, 1 Wheat. 33. Fraud can only be shown in the obtaining of the judgment, not in the cause of action. State v. Holmes, 69 Ind. 577; see *supra*, § 570 a.

made in England on a marriage between a Turk domiciled in England and an English lady, the former promising to reside always in England, Hall, V. C., held that a Turkish court could not, by a decree of divorce pronounced without notice to the wife or other persons interested under the settlement, make void the settlement. So it has been held that a foreign judgment can be contested, even by parties and privies, for fraud in its concoction; or for its flagrant violation of justice; or for non-identity of subject matter; or for incurable defectiveness or obscurity; or for manifest errors in its processes; or, generally, for any violation of the principles of international law.¹

§ 596 a. A conviction of crime, when offered to disqualify a witness, cannot be impeached by him, by proof of his innocence, since the law is that it is the conviction that disqualifies.² The same rule obtains as to convictions when admitted under statutes which permit *convictions* of infamous crimes to be introduced in order to discredit a witness.³ It is otherwise, however, when there is no such statute. Even supposing that it is admissible at common law to put in evidence, to discredit a witness, his conviction of a specific crime, not involving perjury, the record, when admitted, is, so far as concerns the parties to the suit, *res inter alios acta*, and hence it is open to impeachment by proof of the witness's innocence.⁴ And a judgment, so far as it affects persons not parties to the record, and who could not have become parties, is *res inter alios acta*, and, if admissible at all, is open to impeachment.⁵

Convictions when *res inter alios acta* may be impeached.

III. ADMINISTRATION AND PROBATE.

§ 597. Letters of administration are not, so far as concerns third parties, adequate proof of the fact of death of the alleged dece-

¹ Whart. on Evid. § 803.

² *Supra*, § 489.

³ *Com. v. Gallagher*, 126 Mass. 54. See *Bartholomew v. People*, 104 Ill. 601.

⁴ *Sims v. Sims*, 75 N. Y. 472, citing *Maybee v. Avery*, 18 Johns. 352; *People v. Buckland*, 13 Wend. 592. See

Gibson v. McCarthy, Cas. temp. Hard. 311; *Mead v. Boston*, 3 Cush. 404. *Supra*, §§ 439, 489.

⁵ Whart. on Ev. § 803. This is the case where a judgment of acquittal is offered collaterally to prove innocence. See *Bell v. State*, 57 Md. 168; *infra*, § 602.

dent; and when offered, even as between parties or privies, they may be rebutted and invalidated by proof that the party whom they declared to be dead was really alive.¹

Letters of administration proof of title but not of recital.

§ 598. A probate of a will is the judicial action of a court having jurisdiction, admitting a will as *prima facie* genuine and valid. Technically it is a copy of the will, sealed with the seal of the Court of Probate, and attached to a certificate that the will has been proved, and that administration of the goods of the deceased has been granted to one or more of the executors named, or, in default of executors, to administrators. A probate of a will is only *prima facie* proof of the validity of the will as against parties seeking to avoid it on ground of insanity,² or on the ground of other incompetency,³ or of imperfect execution.⁴ And a person indicted for forging a will cannot set up the probate of the will as even *prima facie* a defence.⁵ With regard to recitals (*e. g.*, that of the presence of a party in court), a decree of a Court of Probate has been held to be *prima facie* evidence as to strangers,⁶ though this can only be good to prove the record action of the court. Such recitals cannot be received to estop parties not served, but who should have been served.⁷

Probate of a will not conclusive as to strangers, but otherwise as to parties.

§ 599. Inquisitions of lunacy are necessarily *ex parte*, so far as concerns the person claimed to be a lunatic; since, on the assumption by which alone they have validity, he is a lunatic, and if a lunatic, he is not capable of putting in a valid appearance. Unless upon the hypothesis that such proceedings are *in rem*,⁸ they cannot be held admissible against strangers; and at the best make out only a *prima facie* case.⁹

Inquisition of lunacy *prima facie* proof.

¹ Whart. on Ev. § 810, and cases there cited. See article in Am. Law Rev. for May, 1880.

² *Marriott v. Marriott*, 1 Str. 671.

³ *Dickinson v. Hayes*, 31 Conn. 417.

⁴ *Charles v. Huber*, 78 Penn. St. 449.

⁵ *R. v. Buttery*, R. & R. 342.

⁶ *Sawyer v. Boyle*, 21 Tex. 28. See *Lovell v. Arnold*, 2 Munf. 167.

⁷ *Supra*, § 594; *Randolph v. Bayue*, 44 Cal. 366.

⁸ See Whart. on Ev. § 817.

⁹ Whart. on Ev. § 599.

IV. JUDGMENTS IN REM.

§ 600. It is maintained by Mr. Taylor, that whether a judgment *in rem* is conclusive in a *criminal* proceeding is a question which admits of some doubt. “In the Duchess of Kingston’s case, the judges expressed a decided opinion in the negative: urging, first, that it would be contrary to public policy that the temporal courts, in the investigation of a criminal charge, should be bound by a decision, perhaps, of an ecclesiastical judge, addressed only to the conscience of the party, and founded, as it might be, on evidence inadmissible at common law; and next, that if such a decision were conclusive in favor of a prisoner, it would be equally binding against him, and consequently, his life, liberty, property, and fame might depend upon the judgment of a court which had no organs to discover whether he had committed a crime or not.¹ On the other hand, it has been contended that this opinion of the judges, when taken apart from the reasons on which it is founded, is not entitled to much weight, being merely an *obiter dictum* unnecessary for the decision of the points submitted to them;² and then, in answer to the reasons, it is said that nothing can be more inconvenient or dangerous than a conflict of decisions between different courts; and that, if judgments *in rem* are not regarded as binding upon all courts alike, the most startling anomalies may occur.”³ And there are some intimations that judgments *in rem* bind in criminal as well as in civil suits.⁴

Effect of
judgments
in rem in
criminal
cases.

V. JUDGMENTS VIEWED EVIDENTIALLY.

§ 601. There is no reason why former proceedings in criminal, as well as in civil suits, should not be admissible to prove relevant

¹ Ibid.; 20 How. St. Tr. 540–543; 2 Smith L. C. 642 S. C.

² 2 Smith L. C. 676, 677.

³ Taylor’s Ev. § 1493.

He adds: The authorities reported in the books throw little light upon the subject. *R. v. Buttery* is sometimes cited as confirming the opinion of the judges in the Duchess of Kingston’s Case, but in fact it lends little, if any, support to that opinion; for the only

point there determined was, that if a party be indicted for forging a will, the mere production of the probate is not conclusive evidence of its validity; a doctrine which is unquestionably sound law, but which, as before stated, would apply equally to a civil action, provided the object was not to dispute the title of the executor.

⁴ See *R. v. Hickling*, 7 Q. B. 880; *R. v. Graddon*, 1 Cowp. 315.

facts.¹ Whenever, in fact, a former judicial procedure is material, then the record must be produced. Of this we have a familiar illustration in cases in which an offence is punished more severely on account of a former conviction, and in which, to justify such increased penalty, it is necessary for the indictment to aver and the evidence to establish such former conviction. For this purpose the record of the former trial must be introduced; though, as is elsewhere seen,² statutes have been enacted in some jurisdictions by which the prior conviction is not to be submitted to the jury until they have found the defendant guilty of the charge primarily on trial. When such a statute is not in operation, however, it is necessary to lay the record of the prior conviction before the jury; though they should at the time be instructed not to permit the fact of such former conviction in any way to influence them in determining the question of the defendant's guilt of the immediate charge.³

Averments of record of former prosecutions admissible. Prior convictions.

§ 602. As at common law the conviction of the principal is a condition precedent to the conviction of the accessory, it is necessary, on the trial of the accessory, to put in evidence the record of the conviction of the principal. This record is, however, only *prima facie* proof of the guilt of the principal; and may be impeached by proof that such conviction was erroneous.⁴ Judgment must have been entered on the

Conviction of principal evidence against accessory.

¹ See cases cited *supra*, §§ 570-573; *Janes v. Buzzard*, 1 Hempst. 240; *Parsons v. Copeland*, 30 Me. 370; *Canon v. Abbot*, 1 Root, 251.

² Whart. Cr. Pl. & Pr. § 938, where the cases are collected.

³ Ibid. See *R. v. Shuttleworth*, 3 C. & K. 375. That any number of prior convictions may be so alleged and proved, see *R. v. Clark*, 3 C. & K. 367; 6 Cox C. C. 210.

⁴ *R. v. Turner*, Mood. C. C. 347; *R. v. Rateliff*, 1 Lew. 121; *U. S. v. Hartwell*, 3 Cliff. 221; *State v. Ricker*, 29 Me. 84; *State v. Rand*, 33 N. H. 216; *Com. v. Knapp*, 10 Pick. 477; *People v. Buckland*, 13 Wend. 592; *Anderson v. State*, 63 Ga. 675; *Keithler v. State*, 10 Sm. & M. 192.

"A learned author," said Folger, J., in *Levy v. People*, 80 N. Y. 329, "has doubted whether it is strictly in accordance with the principle respecting the admissibility of verdicts in evidence against third persons, and insists that the record of conviction of the principal is not admissible in evidence of his guilt as against another charged with being connected with him in the crime. 2 Phillips on Ev. *49. In this State the doubt thus put forth has not prevailed; for here it is said that the record is *prima facie* evidence of the principal's guilt, but is not conclusive. Per Sutherland, J., *People v. Buckland*, 13 Wend. 592. Yet, as it is not conclusive, and the prisoner may controvert it, and may show that

verdict to make the record admissible.¹ The burden of proving that the principal was not guilty is on the accessory,² but the accessory is not restricted to proof of facts shown on the former trial.³ On the other hand, it is admissible for the prosecution to put in evidence facts tending to show the principal's guilt.⁴ In most jurisdictions proof of such conviction is by statute no longer necessary in order to convict the accomplice or accessory.⁵

§ 602 a. A prior judgment may be also admissible as part of the evidence on which the case for or against the defendant may be made out.⁶ This is eminently the case in proceedings for perjury, in which the record of the trial at which the alleged perjury was committed is admissible as inducement, though not to prove the perjury.⁷ And on an indictment for escape, it is necessary, if the person escaped was a convict, to put in evidence his conviction.⁸ It has also been held that on the trial of an indictment for manslaughter, the record of a conviction of the defendant for the assault which caused death (the deceased having died after such conviction) is conclusive evidence that the assault was unjustifiable.⁹

the principal was not properly convicted, the people are entitled to rebut his proofs thereon, and make evidence of the commission of the principal crime *aliunde* the record of his conviction, so that the question made here is but one as to the order of proof which is in the discretion of the court trying the case. The admission of the testimony was not within the reprehension given in *Coleman v. People*, 55 N. Y. 81. It did not go to prove a crime upon the prisoner different from that for which he was on trial. It was not called out for one purpose colorable only, and used for another; it was not idle and frivolous. We have not been able to find that it has ever been held that the people are confined in their proof of the guilt of the principal, where he has been tried first, to the record of his conviction. We see nothing in the decisions on this topic that leads to such a result; but rather the other

way. Nor is there anything in this case that asks for such a rule.¹¹

¹ *State v. Duncan*, 6 Ired. 236.

² *Com. v. Knapp*, 10 Pick. 484; *State v. Chittum*, 2 Dev. 49; *State v. Duncan*, 6 Ired. 236.

³ *Ibid.*; *State v. Sims*, 2 Bail. S. C. 29.

⁴ *Levy v. People*, 80 N. Y. 329; 21 Alb. L. J. 313. *Infra*, § 702.

⁵ Wh. Cr. Law, 8th ed. § 237; *Hatchett v. State*, 75 Va. 925.

⁶ *Com. v. McPike*, 3 Cush. 181.

⁷ *R. v. Christian*, C. & M. 388; *R. v. Browne*, 3 C. & P. 572; *R. v. Iles*, B. N. P. 243; *R. v. Stovel*, 6 C. & P. 489; *Brown v. State*, 47 Ala. 47.

⁸ *R. v. Shaw*, R. & R. 526; *R. v. Waters*, 12 Cox C. C. 390; *Davies v. Lowndes*, 1 Bing. N. C. 607; *Com. v. Miller*, 2 Ashmead, 61; *Kyle v. State*, 10 Ala. 226.

⁹ *Com. v. Evans*, 101 Mass. 25.

In this case Wells, J., said: "The

It may be relevant, also, to prove a former offence committed by the defendant as part of a system of crime of which the offence under trial is another part.¹ If so, it is admissible to put in evidence the defendant's conviction of the former offence.² Where, also, the offence charged is that of being a common thief, a prior conviction of the defendant in the same jurisdiction of larceny is admissible as part of the case of the prosecution.³ And a record of conviction of the defendant in the same jurisdiction, being an adjudication in which the same parties were litigant, may be conclusive when showing a relevant fact.⁴

former conviction for assault and battery is not pleaded as a bar to this indictment. As the death occurred after the conviction, the offence now prosecuted was not then complete; and was not capable of judicial determination. The two offences are not identical in law. *Com. v. Roby*, 12 Pick. 496; *Com. v. Cutler*, 9 Allen, 486. See, also, *R. v. Salvi*, 10 Cox C. C. 481, n. (and see *infra*, § 585). The identity, in fact, of the assault which caused death with that which was the subject of the former conviction, is conceded. The record was therefore competent to prove the fact of such conviction. *Com. v. McPike*, 3 Cush. 181. The only question is, as to the effect of that judgment, as evidence, upon the issues of fact raised in the trial of this case for manslaughter. The court below ruled that it established conclusively that the assault was unjustifiable, and therefore disproved the position of the defendant in this case, that the knife was used in self-defence. Upon general principles, the parties being the same, the former judgment must be held to have established all the facts which were involved in the issue then tried, and essential to the judgment rendered upon it. The conviction for assault and battery therefore necessarily excludes all justification which could

have been set up under the general issue of not guilty. The facts of the assault remain the same; and whatever would sustain the ground of self-defence, now relied upon, would have been a complete defence to the former prosecution. The verdict and judgment in that case were therefore rightly held to be a conclusive answer to the attempt at justification made in this case." *Com. v. Austin*, 97 Mass. 595.

¹ *Dubose v. State*, 13 Tex. Ap. 418.

² *State v. Neagle*, 65 Me. 468.

³ *World v. State*, 50 Md. 47.

⁴ On the trial, in Massachusetts, of an indictment for an assault on a police officer with a dangerous weapon, the officer testified for the prosecution that at the time of the assault he arrested defendant for being drunk, and was taking him to the station-house; that he afterward took defendant before a police court and made a formal complaint against him for drunkenness, to which complaint, as was shown by the records of that court, the defendant pleaded guilty and was sentenced to pay a fine, which he paid and was thereupon discharged. The defendant offered evidence to show that he was not drunk at the time of the arrest as alleged in the complaint, which was excluded. It was held by the Supreme Court that the exclusion was proper. "The conviction and sentence of the

§ 603. If the object of the evidence be to prove a particular judicial result, *e. g.*, the entering of a judgment, it is not enough to have a certificate of the result. The whole record, so far as it concerns the formal stages, must be either produced or exemplified, and if exemplified, the exemplification must show on its face that the record is complete.¹

To prove
judgment
record
must be
complete.

defendant for drunkenness was a conclusive adjudication as between him and the Commonwealth that he was drunk at the time of his arrest. *Com. v. Evans*, 101 Mass. 25; *Phillips v. Fadden*, 125 ib. 198." *Com. v. Feldman*, 131 Mass. 588. See *Brunet v. State*, 12 Tex. Ap. 521.

¹ See *supra*, §§ 179, 184, 195; *R. v. Smith*, 8 B. & C. 341; *Godofrey v. Jay*, 3 C. & P. 192; *R. v. Robinson*, 1 C. & D. 329; *Porter v. Cooper*, 6 C. & P. 354; *R. v. Birch*, 3 Q. B. 431; *Jay v. East Livermore*, 56 Me. 107; *Merrill v. Foster*, 33 N. H. 379; *Hawks v. Truesdell*, 99 Mass. 557; *Davidson v. Murphy*, 13 Conn. 213; *Belden v. Meeker*, 2 Lansing, 470; *Com. v. Trout*, 76 Penn. St. 379; *Numbers v. Shelly*, 78 Penn. St. 426; *Carriek v. Armstrong*, 2 Cold. 265; *Evans v. Reed*, 2 Mich. N. P. 212; *Sternburg v. Callanan*, 14 Iowa, 251; *Smith v. Smith*, 22 Iowa, 516; *Miles v. Wingate*, 6 Ind. 458; *Miller v. Deaver*, 30 Ind. 371; *Young v. Thompson*, 14 Ill. 380; *Oliver v. Persons*, 30 Ga. 391; *Mitchell v. Mitchell*, 40 Ga. 11; *Hallet v. Kelava*, 3 St. & P. 105; *Anderson v. Cox*, 6 La. An. 9; *Loper v. State*, 4 Miss. 429; *Wash v. Foster*, 3 Mo. 205; *Mason v. Wolf*, 40 Cal. 246; *Ogden v. Walters*, 12 Kans. 282.

The English practice is thus stated by Mr. Roscoe (*Criminal Ev.* 8th ed. 824):—

"A record is not complete until delivered into court in parchment. Thus the minutes made by the clerk of the peace at sessions, in his minute book, are neither a record nor in the

nature of a record so as to be admissible in evidence as proof of the names of the justices in attendance. *R. v. Bellamy*, Ry. & Moo. 172. And where, to prove an indictment for felony found by the grand jury, the indictment itself (which was in another court), indorsed 'a true bill,' was produced by the clerk of the peace, together with the minute book of the proceedings of the sessions at which the indictment was found, the Court of King's Bench held, that in order to prove the indictment it was necessary to have the record regularly drawn up, and that it should be proved by an examined copy. *R. v. Smith*, 8 B. & C. 341; *Cooke v. Maxwell*, 2 Stark. 183. So an allegation that the grand jury at sessions found a true bill is not proved by the production of the bill itself with an indorsement upon it, but a record, regularly made up, must be produced. *Porter v. Cooper*, 6 C. & P. 354; 4 Tyr. 456; 1 C., M. & R. 388, S. C. So it has been ruled on an indictment for perjury, that in order to prove that an appeal came on to be heard at sessions, it must be shown that a record was regularly made upon parchment. *R. v. Ward*, 6 C. & P. 366; and see *R. v. The Inhabitants of Pembridge*, Carr. & M. 157."

In *R. v. Gordon*, C. & Marsh. 410, Lord Denman held that an allegation in an indictment for perjury, that judgment was "entered up" in an action, was proved by producing from the judgment office the book in which the inscription was entered. On the

The component parts of the record should be so attached that it will appear that the certificate extends to them all.¹ A certificate that a transcript is true and perfect, enumerating all the usual parts of a record, is sufficient.² But a complete extension of the record will not be exacted when all that is substantial appears,³ though if the judgment of a court is put in evidence to effect a transfer of rights, the preliminary conditions of the judgment must, in some shape, appear on the record. Even a sentence in admiralty, to sustain its admissibility for such purpose, must have attached to it the preliminary proceedings on which it is based;⁴ and a judgment of an ecclesiastical or probate court cannot prove title without producing the libel and answer, and the defensive allegations.⁵ And to sustain a plea of *autrefois convict*, the record must show an un-arrested judgment.⁶

§ 604. The journals of a court, in those jurisdictions where such journals are kept, though not technically part of the record, are to be regarded as proof, when duly verified, of the action of the court in any matter to which they relate. They are, therefore, admissible, in any view, provisionally.⁷ In such case, the object being to show

Journals
of court
admissible
to prove
action of
court.

other hand, in *R. v. Thring*, 5 C. & P. 507; and *R. v. Robinson*, 1 Crawl. & D. C. C. 329, it was held that, on an indictment for perjury in a prosecution, the record of the former trial must be made up.

¹ *Susquehanna R. R. v. Quick*, 68 Pa. St. 189; *Herndon v. Givens*, 16 Ala. 261.

² *Coffee v. Neely*, 2 Heisk. 304.

³ See *supra*, § 179; *R. v. Newman*, 2 Den. C. C. 390. "It is not now denied that the record of the Court of Common Pleas for Luzerne County, in the State of Pennsylvania, offered in evidence by the plaintiff, was duly authenticated according to the statutes of the United States and of this Commonwealth. U. S. Sts. 1790, c. 11; 1804, c. 56; Gen. Sts. c. 131, § 61. It is not extended with the formality and accuracy required in the records of our own courts, but it is sufficient in substance, and contains all the essen-

tial requisites of a judicial record. It shows the parties to the suit, the subject matter of the suit, jurisdiction over the parties, a final judgment of the court for fixed sums in damages and costs, and the date of the judgment. *Knapp v. Abell*, 10 Allen, 485. It was, therefore, rightly admitted in evidence." *Brainard v. Fowler*, 119 Mass. 262, *Morton, J.* In Kansas it has been ruled that a certificate of the entry of a foreign judgment may be received as *prima facie* proof of the judgment, without requiring the whole record to be certified. *Haynes v. Cowen*, 15 Kans. 637.

⁴ Com. Dig. Kv. C. 1; *Taylor's Ev.* § 1411.

⁵ *Leake v. M. of Westmeath*, 2 M. & Rob. 394, per *Tindal, C. J.*, overruling *Stedman v. Gooch*, 1 Esp. 6.

⁶ *State v. Sherborne*, 58 N. H. 535.

⁷ *R. v. Browne*, 3 C. & P. 572.

that some other proceeding has occurred before the same court, a minute of the former proceeding will be admitted in lieu of the record, whenever the formal record cannot be presumed to have been made up.¹ The minutes of a court, however, cannot be introduced to contradict a record.² Nor is the entry on the docket of a presiding judge, such entry not being in his handwriting, nor part of the record, admissible to prove the entering of a *nolle prosequi*.³

§ 605. What has been said of the minutes of the court applies *a fortiori* to the docket entries, regularly entered by the clerk or prothonotary,⁴ which give the details from which the record is made up, and which can be received in place of the record until it is made up.⁵ In many jurisdictions, the docket, which contains the substantial parts of the record, is regarded as its substitute until such time as a full record is required for removal to a superior court.⁶ Even after a record is extended, if it be lost, the docket entries become primary.⁷

The docket entries, when lost, can be proved by parol.⁸

¹ R. v. Tooke, 25 How. St. Tr. 446-449; recognized in R. v. Smith, 8 B. & C. 343; R. v. Robinson, 1 Craw. & Dix. 329; R. v. Reilly, Ir. Cir. R. 795, per Doherty, C. J.

So far, however, as concerns the testimony of a former witness, a judge's notes are not original evidence, but can only be used to refresh his memory. *Supra*, § 231; and see Fitzpatrick v. Fitzpatrick, 6 R. I. 64. As to justice's minutes, see Grosvenor v. Tarbox, 39 Me. 129. As to trial lists see Wilkins v. Anderson, 11 Penn. St. 399.

² Den. v. Downam, 13 N. J. L. 135; Mandeville v. Stockett, 28 Miss. 398. See Strongly v. Bradley, 13 Vt. 9.

³ Smith v. State, 62 Ala. 29.

⁴ Com. v. Bolkom, 3 Pick. 281; Townsend v. Way, 5 Allen, 426; Keller v. Killion, 9 Iowa, 329; Prentiss v. Holbrook, 2 Mich. 372; Hair v. Melvin, 2 Jones, 59; Handley v. Russell, Hard. (Ky.) 145.

⁵ Whart on Ev. § 826; State v. Neagle, 65 Me. 468; Com. v. Wey-

mouth, 2 Allen, 144; Boyd v. State, 36 Penn. St. 355; Boteler v. State, 8 Gill & J. 359; Weighorst v. State, 7 Md. 446; Maguire v. State, 47 Md. 497.

⁶ Jay v. Livermore, 56 Me. 117; Willard v. Harvey, 24 N. H. 314; Hamilton v. Com., 16 Penn. St. 129.

It has been held in Maine (*State v. Hines*, 68 Me. 202), that where the record has not been extended, docket entries showing that, in a former trial of the defendant for a violation of the same provision of the statute, a verdict of guilty has been rendered, exceptions filed, and subsequently overruled and certified by the law court to the clerk of the county, and no other proceedings pending for the reversal of the verdict, are sufficient proof of a prior conviction, though no sentence has been passed.

⁷ Whart. on Ev. § 605.

⁸ Pruden v. Alden, 23 Pick. 187; Tillotson v. Warner, 3 Gray, 574. See Whart. on Ev. § 135.

§ 606. An ancient record, taken from the proper depository, may be proved in fragments, when no fuller proof is attainable.¹ It is otherwise, however, when the fragments offered have no internal evidence of authority.²

Rule relaxed as to ancient records.

§ 607. It frequently happens, as is elsewhere incidentally noticed,³ that record proof is appealed to merely to establish evidentially (as distinguished from dispositively, or from estoppel) some circumstance relevant to the case.⁴ Thus the object of the evidence may be merely to prove the fact of a former trial, and in such case, on an indictment for perjury committed at such trial, it has been held that the production by the officer of the court of the caption, the indictment with the indorsement of the prisoner's plea, the verdict and the sentence of the court upon it, is sufficient, without the production of the record.⁵ Or again, the object is to prove that A. B. was resident at C. at the particular time. As an item of proof in such a case, it is admissible to put in evidence a justice's process, of the date in question, in favor of A. B. of C.⁶ If the object be to prove an arrest or attachment, the officer's return to this effect establishes a *prima facie* case. And, generally, when the object is to introduce certain record facts as part of the indicatory evidence of a case (*e. g.*, to show that a certain writ issued, or was returned in a particular way), then the pertinent portions of a record may be certified and put in evidence separately.⁷

For evidential purposes, portions of record may be admitted; *e. g.*, writs and their returns.

§ 608. In order, however, to admit separate portions of record to prove certain facts, they must be shown to be complete in their relation to such facts.⁸ Thus, if the object be to show that a search-warrant legally issued, it must

But such portions must be complete.

¹ See Whart. on Ev. § 136.

² Taylor's Ev. § 1423, citing Evans v. Taylor, 7 A. & E. 617; 3 N. & P. 174; Vaux Barony, Min. Ev. 67; Leighton v. Leighton, 1 Str. 308.

³ *Supra*, §§ 570, 602.

⁴ See Blower v. Hollis, 1 C. & M. 396; Leake v. Westmeath, 2 M. & Rob. 397; Attwood v. Taylor, 1 M. & Gr. 289; Benedict v. Heineberg, 43 Vt. 231; Lee v. Stiles, 21 Conn. 500; Whitmore v. Johnson, 10 Humph. 610;

Smith v. Pattison, 45 Miss. 619; Watts v. Clegg, 48 Ala. 561.

⁵ R. v. Newman, 2 Den. C. C. R. 390; S. C., 21 L. J. M. C. 75.

⁶ Cavendish v. Troy, 41 Vt. 99. See *supra*, § 570.

⁷ Whart. on Ev. § 828; World v. State, 50 Md. 49; and cases cited *supra*, § 612 a.

⁸ Buford v. Hickman, 1 Hempst. 232; Glenn v. Garrison, 17 N. J. L. 1; Kendrick v. Kendrick, 4 J. J. Marsh.

appear that it was preceded by the proper oath;¹ if the object is to prove service of process, an officer's return must be set forth.² It is also stated that writs and warrants, before their return, must be proved by actual production, though after their return, when they become matters of record, they are provable by copies.³

§ 609. When the object of proving a verdict is the refreshing the memory of a witness, or forming one of the links of the chain of circumstantial evidence in a matter collateral to the merits of the verdict, the verdict may be put in evidence as a mere evidentiary fact, not as in any way showing that it was true, but simply as proving that it was taken.⁴ For the purpose of proving reputation, a verdict, without judgment, has been held admissible, even against strangers, when the verdict goes directly to reputation. But this holds good only as to ancient verdicts, and such as have been acquiesced in by the parties; and, as a general rule, a verdict cannot be put in evidence unless judgment has been entered on it.⁵ In criminal cases, however, as we have seen, a verdict of acquittal operates as a bar without a judgment; and so, under certain conditions, does a verdict of conviction.⁶

§ 610. As has been already incidentally observed,⁷ when a record is ancient, and when its imperfect condition is to be ascribed to the usual deteriorating effects of time, it is admissible to prove such portions of it as are attainable, imperfect as they may be. It is essential, however, that

Verdict inadmissible without record.

Parts of ancient records may be received.

241; *Welch v. Walker*, 4 Porter, 120; *Vassault v. Austin*, 32 Cal. 597.

¹ *Halsted v. Brice*, 13 Mo. 171.

² *Peers v. Carter*, 4 Litt. (Ky.) 268; *Lyne v. Bank*, 5 J. J. Marsh. 545.

³ *Taylor's Ev.* § 1424, citing B. N. P. 234.

The mere fact of a paper being found among a bundle of papers in a clerk's office does not make it an office paper, and so admissible. *Bank v. Donaldson*, 6 Penn. St. 179.

⁴ *R. v. Tooke*, 25 How. St. Tr. 446; *R. v. Smith*, 8 B. & C. 343; *Whart. on Ev.* §§ 824 (note 7), 825.

⁵ See *Whart. on Ev.* § 831.

Where an indictment for perjury against A. alleged that B. was convicted on an indictment for perjury, upon the trial of which the perjury in question was alleged to have been committed, and it appeared by the record, when produced, that B. had been convicted, but the judgment against him had been reversed upon error, after the finding of the present indictment; it was held that the record produced supported the indictment.

R. v. Meek, 9 C. & P. 513.

⁶ *Supra*, § 574.

⁷ *Supra*, § 606.

such documents should have been produced from the proper office, and should on their face exhibit *prima facie* evidence of regularity. When lost, such records may be supplied by parol.¹

§ 611. An officer's return in execution of a writ may be admissible for the following purposes:—

1. *As a link in title, or in any other way as a basis of suit.*² Return of officer may be evidence.

2. *As binding the officer making it.* In such case the return is a solemn admission, conclusive against the officer and his privies. He may, however, put in evidence supplementary facts,³ not inconsistent with his return.⁴ When offered in the officer's favor, however, the return is but *prima facie* proof of its contents.⁵

3. *As binding the parties.* A party issuing a writ is also bound by it, and is ordinarily estopped from disputing its averments.⁶ So far as concerns such parties, the verity of the returns of the officers cannot, as we have seen, be disputed collaterally. The redress must be by application to the court from which the execution issues.⁷ When, however, a return is ambiguous, it may be explained by parol.⁸

4. *As proving its legal effects.* A return may be put in evidence against strangers to prove that it issued; or to prove, in the same manner as may a judgment, its legal effects.⁹ But when used to affect the interest of strangers, such returns, so far as concerns facts which it is the duty of the officer to state, are only *prima facie* evidence at the best, and as to other facts are not evidence at all.¹⁰

§ 612. A *fi. fa.* returned *nulla bona*, or returned in such a way as to indicate insolvency in the execution defendant, may be admissible as *prima facie* proof in a link in the evidence to prove such insolvency. To the execution, however, it has been held proper that the record should be attached; and even if this be dispensed with, the execution must

Return of *nulla bona* admissible to prove insolvency.

¹ Whart. on Ev. § 833. *Supra*, §§ 204, 606.

² Whart. on Ev. § 833. *Infra*, § 642.

³ *Ibid.* *Infra*, § 614.

⁴ Whart. on Ev. § 834.

⁵ Freeman on Executions, § 366.

⁶ *Ibid.*; Whart. on Ev. § 834.

⁷ Whart. on Ev. § 834. See Freeman on Executions, § 364.

⁸ Whart. on Ev. § 834; Herman on Executions, §§ 240, 244, 295.

⁹ See Whart. on Ev. §§ 822-4, 834.

¹⁰ Whart. on Ev. § 833. *Infra*, § 642.

have the seal of the court. Proceedings in insolvency are in like manner admissible to prove, in collateral proceedings, the debtor's insolvency.¹

VI. RECORDS AS ADMISSIONS.

Record may be an admission. § 613. A judgment may be also treated as evidentiary when it involves a self-dis-serving admission of the party against whom it is offered.²

Parties bind themselves by their admission of record. § 614. When an officer, or his sureties, is sued on his return, then such return is conclusive against him so far as it involves admission of the reception of goods by himself; and the same rule holds on criminal proceedings against him on his return.³ A party, also, who has obtained possession of property by decree of court solemnly prayed for by himself, cannot afterwards, in a suit against him to recover claims on such property, deny the ownership. And a party may preclude himself from offering evidence inconsistent with the attitude assumed by him in a particular suit, as where, on demurrer, he is precluded from disputing facts the demurrer admits,⁴ or where, after one plea is entered, a repugnant plea will not be received.⁵ But this does not prevent the entering of successive pleas tentatively.⁶

Pleadings may be admissions. § 615. The pleadings of a party in one suit may be used in evidence against him in another, not as estoppel, but as proof, open to rebuttal and explanation, that he admitted certain facts. But in order to bring such admission home to him, the pleading must be either signed by him, or it must appear that it was within the scope of the attorney's authority to admit such facts.⁷ Yet even if such admissions are thus brought home to the party, they are entitled to little weight.⁸ A plea of guilty in a criminal issue, however, being presumed to be solemnly entered by the defendant himself, may be put in evidence against him as a confession of the fact, in a civil issue.⁹ And a

¹ Whart. on Ev. § 834.

⁶ Ibid. § 420; Whart. on Ev. §

² Whart on Ev. § 836. *Infra*, §§ 638 837.
et seq.

⁷ *Infra*, § 697.

³ Whart. on Ev. § 837. *Supra*, § 611; *infra*, §§ 638-9.

⁸ *Infra*, §§ 638-42. See for cases Whart. on Ev. § 838.

⁴ See Whart. Cr. Pl. & Pr. § 400.

⁹ *Supra*, § 577; Anon. cited Phil.

⁵ Ibid. § 419.

Ev. 25; R. v. Fontaine Moreau, 11 Q.

plea verified by affidavit, or an answer in chancery, may be properly viewed as a solemn admission ;¹ though the party must have been capable of binding himself by the plea ; and hence a person cannot be made responsible criminally for a plea made by him when incompetent by reason of infancy.² A plea in abatement, filed by a party in a particular suit, on which there is judgment in his favor, estops him from afterwards denying the facts set up in the plea.³ But dilatory pleas, and pleas on which no judgment in favor of the party pleading is entered, are always rebuttable.⁴

§ 616. A "demurrer only admits the facts which are well pleaded ; it does not admit the accuracy of an alleged construction of an instrument when the instrument is set forth in the record, if the alleged construction is not supported by the terms of the instrument."⁵ And so the "mere averments of a legal conclusion are not admitted by a demurrer, unless the facts and circumstances set forth are sufficient to sustain the allegation."⁶ In criminal cases a demurrer to the prosecution's evidence admits all the facts that the evidence tends to prove.⁷

A demurrer may be an admission.

§ 617. Facts pertaining to a record, but not entered on the record, may be certified to by the proper clerk, and the certificate received as evidence.⁸ Thus the certificate of a clerk of a Circuit Court has been received to prove that a cause was not tried at the circuit ;⁹ and the certificate of a court of appeals may be evidence to prove reversal of a judgment.¹⁰

Certificate of clerk admissible to prove facts within his range.

B. 1033 ; *Bradley v. Bradley*, 2 Fairf. 367 ; *Green v. Bedell*, 48 N. H. 546 ; *Clark v. Irvine*, 9 Ham. 131. See Whart on Ev. § 776.

⁵ *Clifford, J., Gould v. R. R.*, 91 U. S. 536. Compare Whart. Cr. Pl. & Pr. §§ 400-3.

⁶ *Ibid.*

¹ *Infra*, § 638-41.

² *R. v. Stone*, 1 F. & F. 311. *Infra*, § 638.

⁷ *Com. v. Parr*, 5 W. & S. 345 ; *Brister v. State*, 26 Ala. 108. See *Golden v. Knowles*, 120 Mass. 336 ; Whart. Cr. Pl. & Pr. § 407.

³ Whart. Cr. Pl. & Pr. § 425. *Supra*, § 94.

⁸ See *supra*, §§ 166, 195-201.

⁴ See Whart. on Ev. § 838 ; *Com. v. Lannan*, 13 Allen, 563. The evidential effect of plea of guilty is hereafter fully considered. *Infra*, §§ 638-41.

⁹ *Wright v. Murray*, 6 Johns. 286. See *supra*, § 166.

¹⁰ *Hoy v. Couch*, 6 Miss. 188.

CHAPTER XII.

MODIFICATION OF DOCUMENTS BY PAROL.

§ 620. It is rarely that an issue can arise, in criminal procedure, involving the modification of a document by parol. It is enough, therefore, in the present volume, to state, as a general rule, that to vary the terms of a document-parol evidence cannot be received. It is important, at the same time, to keep in mind the distinction between documents which are uttered dispositively, *i. e.*, for the purpose of disposing of rights; and those uttered non-dispositively, *i. e.*, not for the purpose of disposing of rights. A non-dispositive, or, to adopt Mr. Bentham's term, a "casual" document, is more open to parol variation than is a document which is dispositive, or, as Mr. Bentham calls it, "pre-determined." A casual or non-dispositive document (*e. g.*, a letter or memorandum thrown off hurriedly in the ease and carelessness of familiar intercourse, without intending to institute a contract, and without reference to the litigation into which it is afterwards pressed) is peculiarly dependent upon extraneous circumstances; is often inexplicable unless such circumstances are put in evidence; and employs language which, so far from being made up of phrases selected for their conventional business and legal limitations, is marked by the writer's idiosyncrasies, and sometimes comprises words peculiar to the writer himself. But whether such documents are informally or formally constituted, they agree in this, that, so far as concerns the parties to the case in which they are offered, they were not prepared for the purpose of disposing of the rights of the party from whom they emanate. *Dispositive* documents, on the other hand, are deliberately prepared, and are usually couched in words which are selected for the purpose, because they have a settled legal or business meaning. Such documents are meant to bind the party uttering them in both his statements of fact and his engagements of future action; and they are usually accepted by the other contracting party (or, in case of wills, by parties interested), not in any

Documents
not to be
varied by
parol.

occult sense, requiring explanation or correction, but according to the legal and business meaning of the terms. It stands to reason, therefore, that parol evidence is not as a rule to be received to vary the terms of documents so prepared and so accepted, though it is otherwise when such documents are offered, not dispositively, between the parties, but non-contractually, as to strangers. So far as concerns the parties or privies to a dispositive document, valid in itself, its terms cannot ordinarily be varied by parol.¹

¹ See Whart. on Ev. vol. ii. c. xii. where the topic before us is discussed as follows :—

I. *General Rules.*

- Parol evidence not admissible to vary documents as between parties, § 920.
- New ingredients cannot be thus added, § 921.
- Dispositive documents may be varied by parol as to strangers, § 923.
- Whole document must be taken together, § 924.
- Written entries are of more weight than printed, § 925.
- Informal memoranda are excepted from rule, § 926.
- Parol evidence admissible to show that document was not executed, or was only conditional, § 927.
- And so to show that it was conditioned on a non-performed contingency, § 928.
- Want of due delivery, or of contingent delivery, may be proved by parol, § 930.
- Fraud or duress in execution may be shown by parol, and so of insanity, § 931.
- But complainant must have a strong case, § 932.
- So as to concurrent mistake, § 933.
- So of illegality, § 935.

- Between parties intent cannot be proved to alter written meaning, § 936.
- Otherwise as to ambiguous terms, § 937.
- Declarations of intent need not have been contemporaneous, § 938.
- Evidence admissible to bring out true meaning, § 939.
- For this purpose extrinsic circumstances may be shown, § 940.
- Acts admissible for the same purpose, § 941.
- Ambiguous descriptions of property may be explained, § 942.
- Erroneous particulars may be rejected as surplusage, § 945.
- Ambiguity as to extrinsic objects may be so explained, § 946.
- Parol evidence admissible to prove "dollar" means Confederate dollar, § 948.
- Parol evidence admissible to identify parties, § 949.
- To enable undisclosed principal to sue or be sued, he may be proved by parol, § 950.
- But person signing as principal cannot set up that he was agent, § 951.
- Suretyship on writing may be shown by parol, § 952.
- Other cases of distinction and identification, § 953.

§ 621. In criminal practice few cases arise in which the ordinary exceptions to this rule are appealed to. We may, however, gener-

Evidence of writer's use of language admissible to solve ambiguities, § 954.

Party may be examined as to intent or understanding, § 955.

Patent ambiguities cannot be explained by parol, § 956.

"Patent" is "subjective," and "latent" "objective," § 957.

Usage cannot be proved to vary dispositive writings, § 958.

Otherwise in case of ambiguities, § 961.

Usage is to be brought home to the party to whom it is imputed, § 962.

May be proved by one witness, § 964.

Usage is to be proved to the jury, and must be reasonable and not conflicting with *lex fori*, § 965.

When no proof exists of usage, meaning is for court, § 966.

Power of agent may be construed by usage, § 967.

Usage received to explain broker's memoranda, § 968.

Customary incidents may be annexed to contract, § 969.

Course of business admissible in ambiguous cases, § 971.

Opinion of expert inadmissible as to construction of document; but otherwise to decipher and interpret, § 972.

Parol evidence admissible to rebut an equity, § 973.

Opinion of witnesses as to libel admissible, § 975.

Dates not necessarily part of contract, § 976.

Dates presumed to be true, but may be varied by parol, § 977.

Exception to this, § 978.

Time may be inferred from circumstances, § 979.

II. *Special Rules as to Records, Statutes, and Charters.*

Records cannot be varied by parol, § 980.

And so of statutes and charters, § 980 a.

Otherwise as to acknowledgment of sheriff's deeds, § 981.

Record imports verity, § 982.

But on application to court, record may be corrected by parol, § 983.

For relief on ground of fraud, petition should be specific, § 984.

Fraudulent record may be collaterally impeached, § 985.

When silent or ambiguous record may be explained by parol, § 986.

Town records subject to same rules, § 987.

Former judgment may be shown to relate to a particular case, § 988.

Nature of cause of action may be proved, § 989.

So of hour of legal procedure, § 990.

So of collateral incidents of records, § 991.

III. *Special Rules as to Wills.*

Wills cannot be varied by parol. Intent must be drawn from writing, § 992.

When primary meaning is inapplicable to any ascertainable object, evidence of secondary meaning is admissible, § 996.

When terms are applicable to several objects, evidence admissible to distinguish, § 997.

ally say that parol evidence is admissible to identify a record and to explain its subject matter;¹ to show that a forged document, on its face invalid, is one on which a prosecution may *prima facie* be sustained;² to support the *innuendoes* in a libel;³ and to clear ambiguities in a written confession.⁴

But parol evidence admissible to identify and distinguish document.

In ambiguities, all the surroundings, family, and habits of the testator may be proved, § 998.

All the extrinsic facts are to be considered, § 999.

When description is only partly applicable to each of several objects, then declarations of intent are inadmissible, § 1001.

Evidence admissible to the other ambiguities, § 1002.

Erroneous surplusage may be rejected, § 1004.

Patent ambiguities cannot be resolved by parol, § 1006.

Ademption of legacy may be proved by parol, § 1007.

Parol proof of mistake of testator inadmissible, § 1008.

Fraud and undue influence may be so proved, § 1009.

Testator's declarations primarily inadmissible to prove fraud or compulsion, § 1010.

But admissible to prove mental condition, § 1011.

Parol evidence inadmissible to sustain will when attacked, § 1012.

Probate of will only *prima facie* proof, § 1013.

IV. *Special Rules as to Contracts.*

Prior conference merged in written contract, § 1014.

Parol may prove contract partly oral, § 1015.

Oral acceptance of written contract may be so proved, § 1016.

Rescission of one contract and substitution of another may be so proved, § 1017.

Exception at law as to writings under seal, § 1018.

Parol evidence admissible to reform a contract on ground of fraud, § 1019.

So as to concurrent mistake, § 1021.

But not ordinarily to contradict document, § 1022.

Reformation must be specially asked, § 1023.

Under statute of frauds parol contract cannot be substituted for written, § 1025.

Collateral extension of contract may be proved by parol, § 1026.

Parol evidence inadmissible to prove unilateral mistake of fact, § 1028.

And so of mistake of law, § 1029.

Obvious mistake of form may be proved by parol, § 1030.

Conveyance in fee may be shown to be a mortgage, § 1031.

But evidence must be plain and strong, § 1033.

¹ *Supra*, § 593.

² *R. v. Toshack*, T. & M. 207; 1 Den. C. C. 492; *R. v. Ray*, L. R. 1 C. C. 257; *Com. v. Ray*, 3 Gray, 441; *People v. Shall*, 9 Cow. 778.

³ See Whart. Crim. Law, 8th ed. §§ 1651 *et seq.*

⁴ *Infra*, § 643.

Admission of such evidence does not conflict with statute of frauds, § 1034.

Resulting trust may be proved by parol, § 1035.

So of other trust, § 1038.

Particular recitals may estop, § 1039.

Otherwise as to general recitals, § 1040.

Recitals do not bind third parties, § 1041.

Recitals of purchase-money open to dispute, § 1042.

Consideration may be proved or disproved by parol, § 1044.

Seal imports consideration, but may be impeached on proof of fraud or mistake, § 1045;

Consideration in contract cannot *prima facie* be disputed by those claiming under it, though other consideration may be proved in rebuttal of fraud, § 1046.

When fraud is alleged, stranger may disprove consideration, § 1047.

And so may *bond fide* purchasers and judgment vendees, § 1049.

V. *Special Rules as to Deeds.*

Deeds not open to variation by parol proof, § 1050.

Acknowledgment may be disputed by parol, § 1052.

Between parties, deeds may be varied on proof of ambiguity and fraud, § 1054.

Deeds may be attacked by *bond fide* purchasers, and judgment vendees, § 1055.

And so as to mortgages, § 1056.

Deed may be shown to be in trust, § 1057.

(As to recitals, see §§ 1039-1042.

VI. *Special Rules as to Negotiable Paper.*

Negotiable paper not susceptible of parol variation, § 1058.

Blank indorsement may be explained, § 1059.

Relations of parties with notice may be varied by parol, and so may consideration, § 1060.

Real parties may be brought out by parol, § 1061.

Ambiguities in such paper may be explained, § 1062.

VII. *Special Rules as to other Instruments.*

Releases cannot be contradicted by parol, § 1063.

Receipts can be so contradicted, § 1064.

Exception as to insurance receipts, § 1065.

Receipts may be estoppels as to third parties, § 1066.

Bonds may be shown to be conditioned on contingencies, § 1067.

Subscriptions cannot be modified as to third parties by parol, § 1068.

Bills of lading are open to explanation, § 1070.

It may be added that a letter whose object is, it is claimed, to extort money, but which is ambiguous on its face, may be explained by extraneous facts, as well as by other declarations of the writer. *R. v. Tucket*, 1 Mood. C. C. 134; *R. v. Cooper*, 3 Cox C. C. 547; *State v. Linthicum*, 68 Mo. 60. The prosecution, to whom the letter was sent, may be asked what appeared to him its meaning. *R. v. Tucket*, 1 Mood. C. C. 134.

CHAPTER XIII.

CONFESSIONS.

I. GENERAL CHARACTERISTICS.

Confessions not strictly evidence,
§ 623.

Must relate to existing conditions,
§ 624.

When extra-judicial do not conclude,
§ 625.

Intent necessary to give weight to,
§ 626.

Credibility a question of fact,
§ 627.

Confession of guilt deductive : admission of a fact inductive,
§ 628.

Confession to be brought home to party charged,
§ 629.

Imperfection of medium to be considered,
§ 630.

Confessions when voluntary generally admissible,
§ 631.

But without proof of *corpus delicti* inadequate,
§ 632.

Meaning of *corpus delicti*, § 633.

Credibility to be tested objectively,
§ 634.

And also subjectively,
§ 635.

And so as to terms of statement,
§ 636.

Confessions of adultery to be closely scrutinized,
§ 637.

II. JUDICIAL CONFESSIONS.

Confessions by plea conclusive,
§ 638.

So of pleas of abatement,
§ 639.

In pleading that which is not disputed is admitted,
§ 640.

Pleadings in other cases may be admissions,
§ 641.

And so of process,
§ 642.

III. WRITTEN CONFESSIONS.

Written confessions entitled to peculiar weight,
§ 643.

Letters are thus admissible,
§ 644.

So of telegrams,
§ 645.

IV. ADMISSIBILITY OF CONFESSIONS AS DETERMINED BY THREATS OR PROMISES.

Confession induced by threats is inadmissible,
§ 646.

Mere adjuration to speak the truth does not exclude,
§ 647.

Nor does a statement of the wrongfulness of concealing,
§ 648.

Nor the bare fact of the confession being made to a person in authority,
§ 649.

But confession induced by authoritative promises is inadmissible,
§ 650.

Promise must be made by person in authority,
§ 651.

Promise made by master does not exclude when offence does not concern master,
§ 652.

Condition of party confessing is to be considered,
§ 653.

Mere advice does not exclude,
§ 654.

Nor does expectation of compromise,
§ 655.

Confession of accomplice called as state's evidence cannot be used against him,
§ 656.

Collateral inducement does not exclude,
§ 657.

Issue is whether the influence applied was such as to lead to a false statement,
§ 658.

Assurances of secrecy do not exclude,
§ 659.

Nor do spiritual inducements,
§ 660.

When duress excludes, § 661.
 Answers to interrogatories admissible, § 662.
 Even when questions are leading, § 663.
 Not excluded by the fact that the statement was under oath, nor by defendant on former trial, § 664.
 Otherwise when compelled to answer under oath, § 665.
 Examination of prisoner when admissible, § 666.
 Parol evidence of written examination inadmissible, § 667.
 Answers under oath are inadmissible, § 668.
 Otherwise as to voluntary statements and evidence on former trials, § 669.
 Artifice does not exclude, § 670.
 Not necessary that the inducement should be held out directly to the defendant, § 671.
 Presence of person in authority does not necessarily exclude, § 672.
 Apparent authoritative influence should be applied, § 673.
 What expressions are to be construed as likely to produce a false confession, § 674.
 Question of voluntariness a distinct issue, § 674 a.

V. SLEEP AND DRUNKENNESS.

Confessions during sleep inadmissible, § 675.
 How far drunkenness excludes, § 676.

VI. HOW FAR ORIGINAL IMPROPER INFLUENCE VITIATES SUBSEQUENT CONFESSIONS.

When influence ceases confession becomes admissible, § 677.

VII. HOW FAR EXTRANEOUS FACTS REACHED THROUGH AN INADMISSIBLE CONFESSION MAY BE RECEIVED.

Extraneous facts reached through an inadmissible confession may be proved, § 678.

VIII. ADMISSIONS BY SILENCE OR CONDUCT.

Statements silently acquiesced in may be treated as admissions, § 679.

But not so when accused was not in a position to speak, § 680.
 And not so as to parties hearing testimony of witness, § 681.

Letters in possession of a party not admissible against him, § 682.

Admissions may be by acts, § 683.

IX. WHAT CONFESSIONS MAY PROVE.

Party's admission may prove contents of writing, § 684.

Confession not excluded because party could be examined, § 685.

May prove marriage, § 686.

But not record facts, § 687.

X. HOW CONFESSIONS ARE TO BE CONSTRUED.

Whole confession must be proved, § 688.

XI. HOW ADMISSIBILITY IS TO BE DETERMINED.

Question of admissibility is for court, § 689.

XII. SELF-SERVING DECLARATIONS.

Self-serving declarations inadmissible for defendant, § 690.

Exception as to *res gestae*, § 691.

Coincident declarations admissible to prove authority, § 692.

And so as to state of party's mind, § 693.

Weight of self-serving declarations, § 694.

XIII. AGENTS.

Admissions of agents are receivable, § 695.

Wrongful act of agent not imputable without proof of criminal design in principal, § 696.

And so of admissions of attorney and referee, § 697.

XIV. CO-CONSPIRATORS.

Declarations of, admissible against each other, § 698.

Order of testimony, § 698 a.
 Not admissible after conspiracy
 is at an end, § 699.
 Rule not affected by the parties
 being co-defendants, § 700.
 Decoy not a co-conspirator, §
 700 a.

Form of prosecution not mate-
 rial, § 701.
 Principal's acts admissible
 against accessory, § 702.
 Declaration of co-conspirators in
 each other's favor, § 703.

I. GENERAL CHARACTERISTICS.

§ 623. A CONFESSION is rather a fact to be proved by evidence than evidence to prove a fact. It is not so much proof that a particular thing took place, as it is a waiver by the party charged of his right to have certain facts alleged against him technically proved. A., for instance, is shown to have said that certain facts implicating him actually took place. Were this statement by A. offered as evidence of such facts, it would be merely hearsay, and would be inadmissible. But it is not offered to prove the facts, but to show that A. has dispensed with their proof. They are assumed by the prosecution, and admitted by the defence. A confession, therefore, which involves admission, is not, to adopt the words of the Roman law, *probatio*, but *levamen probationis*.¹

Confes-
 sions not
 strictly
 "evi-
 dence."

§ 624. A confession to have the effect of conceding, either wholly or *prima facie*, the case of the prosecution, must relate to a past or present state of facts. If I say, "I did a particular thing," this may be treated as a confession. If I say, "I will do this thing in the future," this is not a confession, unless, with other evidence, it implies a past or present act. Relevancy to past or existing conditions is, therefore, an essential requisite of the admissibility of a confession.²

A confes-
 sion must
 relate to
 existing
 conditions.

§ 625. An extra-judicial confession forms but a *prima facie* case against the party by whom it is made.³ As will hereafter be more fully seen, such confessions are not conclusive proof of that which they state;⁴ they may be neutralized by proof that they were uttered in ignorance,

Extra-
 judicial
 confessions
 do not
 conclude.

¹ See Bald. in L. 3 Cod. iv. 30, qu. 10; Mascard. i. qu. 7 nr. 11; Pacian, L. C. 11, nr. 10; Endemann, 135.

² State v. Cox, 65 Mo. 29.

³ Mascard. i. C. No. 26; Endemann, 137. See Whart. on Ev. § 1077.

⁴ That a defendant is to be permitted to impugn even a written confession of guilt, see State v. Brown, 1 Mo. Ap. 86. On the other hand, it has been held to be inadmissible for him to show that he afterwards denied having made the

or levity, or mistake;¹ and hence they are, at the best, to be regarded as only cumulative proof, which affords but a precarious support, and on which, when uncorroborated, a verdict cannot be permitted to rest. This is eminently the case where there is any suspicion from the nature of things attachable to the confession, as is the case with admissions of adultery;² or where the party against whom it is offered made it under a mistake of fact.³ Whenever such a mistake is proved, the confession, as we will hereafter see more fully, is to be disregarded.⁴ And the same rule applies to an admission of an act technically void. Thus on an indictment for setting fire to a ship, it was held that the prosecutor could not make use of an admission by the prisoner that certain persons were owners, if it appeared that the requisites of the Shipping Act had not been complied with.⁵ It has also been held that an admission of a marriage, which turned out to be void, cannot be used against a defendant charged with bigamy.⁶

§ 626. Extra-judicial confessions, as we will hereafter notice more in detail, may be adduced either as admissions of guilt, or as admissions of isolated facts from which guilt may be inferred. When offered for the former purpose, they have no weight unless they were made intentionally and in sincerity;⁷ and hence it is admissible, in order to impugn a confession, to show that it was made as a joke. We must also remember that an alleged confession may have been only a brag, understood by the parties to be such at the time,⁸ or, as will be seen in the next section, may have been uttered in order to make

confession. *Ray v. State*, 50 Ala. 194. And this is good law in those States in which he could be put in the witness-box to prove such denial under oath.

¹ *Infra*, §§ 634-6.

² *Infra*, § 637; *Lyon v. Lyon*, 62 Barb. 138; *Prince v. Prince*, 25 N. J. Eq. 310; *Evans v. Evans*, 41 Cal. 103; *Mathews v. Mathews*, 41 Tex. 331.

³ See *People v. Velarde*, 59 Cal. 457.

⁴ See cases cited *infra*, § 634; and compare *R. v. Wheeler*, 1 Leach C. C. 311; *Herne v. Rogers*, 9 B. & C. 577; *Newton v. Belcher*, 1 Q. B. 921; *Newton v. Liddiard*, 12 Q. B. 927; *Atty.-*

Gen. v. Stephens, 1 Kay & J. 748; *Hall v. Huse*, 10 Mass. 39; *State v. Welsh*, 7 Porter, 463; *State v. Brown*, 1 Mo. Ap. 86. See, however, as attaching higher weight, *Blackburn v. Com.*, 12 Bush, 181.

⁵ *R. v. Philp*, 1 Mood. C. C. 271.

⁶ 3 Stark. Ev. 1187.

⁷ *Ray v. State*, 50 Ala. 104.

⁸ See cases as holding that false "puffs" are not false pretences, *R. v. Hamilton*, 9 Q. B. 270; *State v. Estes*, 46 Me. 150; *People v. Crissie*, 4 Denio, 525; *State v. Phifer*, 65 N. C. 321. See fully *infra*, § 627.

a sensation. If so, it cannot be made the basis on which a conviction can be sustained, since on its face its want of truthfulness appears. To the credibility of a confession of guilt, therefore, it is necessary that there should be an *animus confitendi*, or intention to speak the truth as to the specific charge of guilt. Such intention, however, is not essential to attach credibility to admissions of particular facts, in themselves indifferent, but which go to make up a case on which guilt is assumed to rest.¹ It is a part of the case against a defendant, for instance, that he rode a specific distance in a given time. It is admissible to put in evidence against him his admissions, that on other occasions his horse had a speed which, it might afterwards have been argued, would have enabled him to make the time in question. And it is not necessary to the admissibility of such statements that it should be proved that they were made with any particular intention.² In fact, the more undesigned and fortuitous they appear to have been, the more likely they are to be true.³ Hence we may conclude that designedness is one of the conditions of the credibility of a confession of the conclusion of guilt; while undesignedness enhances the weight of admissions of incidental facts from which the conclusion of guilt is drawn. A man cannot be convicted of forgery on an inadvertent statement made by him, not in response to any particular charge, that he was a forger. But his conviction may properly be rested on a series of inadvertent acts on his part not meant as confessions; *e. g.*, writings or other matters showing an identity of penmanship with that of the alleged forgery, and the materials for forgery which he may have exposed.

§ 627. The credibility of a self-dis-serving confession of guilt, therefore, as distinguished from incidental admissions of facts, is a question of fact resting on the presumption that no prudent man would declare an untruth to his own disadvantage.⁴ “Quum legibus nostris dictum sit, quaecunque *quis pro*

Credibility
a question
of fact.

¹ *Fraser v. State*, 55 Ga. 325; *State v. Lewis*, 45 Iowa, 20.

² *Fraser v. State*, 55 Ga. 325. *Supra*, § 625.

³ *Linnehan v. Sampson*, 126 Mass. 506; *Ettinger v. Com.*, 98 Penn. St. 338.

⁴ *Com. v. Galligan*, 113 Mass. 202; *Com. v. Sanborn*, 116 Mass. 61; *Black-*

burn v. Com., 12 Bush, 181; *Kiland v. State*, 52 Ala. 522. And see *Brown v. Com.*, 76 Penn. St. 319, noticed, *infra*, § 629.

It is on this ground that confessions are excluded whenever it appears that they were induced by promises. *Infra*, § 650.

se dixerit aut scripserit, ea nihil ipsi prodesse, neque creditoribus praejudicare.”¹ “Exemplo perniciosum est, ut ei scripturae credatur, qua unusquisque sibi adnotatione propria debitorem constituit. Unde neque fiscum neque alium quemlibet *ex suis subnotationibus* debiti *probationem* praebere posse oportet.”² Hence “*contra se dicere*” is essential to constitute a credible confession of guilt. Self-love, so it is justly argued, will hinder a prudent man from falsehoods that would disgrace him.³ Yet we must remember that this proposition applies mainly to matters of pecuniary interest. When we come to questions of pedigree, of *status*, and of marriage, different influences come in which render the tests just given of but little weight. In matters of pedigree, in particular, a statement which one man would shrink from as discreditable, another would advance with pride. Nor can we forget that pecuniary interest may sometimes be overbalanced by other more powerful passions. A villain may try to make a point by falsely confessing adultery with a woman whom he desires to humble;⁴ while a person craving notoriety may take satisfaction in intimating his complicity in merely imaginary crimes.⁵ Even among prudent men, a little obvious interest, against which a party makes an admission, may be greatly overbalanced by a superior secret interest, of which nobody knows but the declarant. The truthfulness, therefore, of an apparently self-disserving statement is a presumption of fact, depending upon all the circumstances of the case. We must inquire whether the statement was really self-disserving, and even if it were so, in a business sense, we must remember that it may be discredited by showing that it was made under mistake, or from a desire on the decla-

¹ Hesse, 29.

² L. 7. C. 4. 19.

³ Hesse, *ut supra*, 29; citing further, I. 26, § 2; D. xvi. 3.

⁴ As illustrating false confessions of adultery may be mentioned the charges brought against Anne Hyde, Duchess of York, by parties who sought in this way to prevent her husband from acknowledging her as his wife. A remarkable instance of a similar false charge is to be found in Shillito's Case, noticed in Alb. L. J. Feb. 28, 1880.

⁵ “For the gratification of his ‘mor-

bid love of a bad reputation,’ which Harness happily designated ‘hypocrisy reversed,’ Byron is said on good (though by no means the best) authority to have been in the habit of libelling himself in the continental journals, in order that the libels, on being reproduced in English newspapers, should exasperate and deepen the abhorrence with which he was regarded by the more rigid and censorious of his fellow-countrymen.” Jeaffreson, Real Lord Byron, Am. ed. 64.

rant's part to produce a sensation, or to avoid a disclosure of a fact with which the admission is inconsistent. Incidental admissions of facts on which the prosecution's case depends become the more reliable as we have just seen, in proportion to their undesignedness. But to the credibility of confessions of guilt it is essential that they should have been made with a sincere intention of telling the truth.¹

¹ Illustrations to this point will be found in Cockburn's *Memorials*, vol. i. pp. 141 *et seq.*

See further illustrations *infra*, § 634.

Lord Clarendon tells us of a Frenchman, named Hubert, who was convicted and executed on a most circumstantial confession of his guilt, in having occasioned the great fire in London, "although," adds the historian, "neither the judges nor any one present believed him guilty, but that he was a poor, distracted wretch, weary of life, and who chose to part with it in that way." Continuation of Lord Clarendon's *Life*, written by himself, p. 352. And so Bunyon tells us of a case where the confession was also evidently the result of a disordered mind: "Since you are entered upon stories, I will also tell you one, the which, though I heard it not with my own ears, yet my author I dare believe: It is concerning one old *Tod*, that was hanged about twenty years ago, or more, at *Hartford*, for being a thief. The story is this: At a summer assize holden at *Hartford*, while the judge was sitting upon the bench, comes this old *Tod* into the court, clothed in a green suit, with his leathern girdle in his hand, his bosom open, and all in a dung sweat as if he had run for his life; and being come in, he spake aloud as follows: *My Lord*, said he, *here is the veryest rogue that breathes upon the face of the earth; I have been a thief from a child: when I was but*

a little one, I gave myself to rob orchards, and to do other such like wicked things, and I have continued a thief ever since. My Lord, there has not been a robbery committed this many years, within so many miles of this place, but I have either been at it or privy to it. The judge thought the fellow was mad; but after some conference with some of the justices, they agreed to indiet him, and so they did, of several felonious actions; to all which he heartily confessed guilty, and so was hanged with his wife at the same time."

In Burnett's *Cr. L.* 595, is cited a case (*R. v. Angus*) in which a young girl's conviction of infanticide, which she had confessed under an insane delusion, was prevented by the introduction of medical proof that she never could have had a child. See 3 *Wh. & St. Med. Jur.* § 874.

For information as to the confessions of the New England witches in 1689-92 see the 7th chapter of the 6th book of Cotton Mather's *Magnalia Christi Americana*; Governor Hutchinson's *History of Massachusetts*, ii. pp. 15, 63; *State Trials*, vol. v. pp. 647, 682; Upham's *Lectures on the Salem Witchcraft*, Boston, 1831. Two English cases are given in Best's *Evidence*, 9th ed. Ap. p. 839.

In the proceedings of the N. Y. Med. Leg. Soc. (N. Y. 1872, pp. 318-331) will be found an article by Dr. Hammond on confessions viewed in relation to legal medicine.

§ 628. We have just had occasion to notice that while a confession of guilt intention pointed to a particular charge is necessary, such is far from being the case with the incidental admission of isolated facts, which derive their peculiar reliability from their inadvertence. Another distinction is now to be considered. A confession of guilt is of no weight unless it is a short-hand admission of facts; an admission of an incidental fact is of no weight unless it afford a basis for an induction of guilt. The first is inoperative unless, as an answer to a particular offence charged, it implies a specification which is sufficiently exact to sustain a conviction. The second is inoperative unless it is supported collaterally by a series of other facts from which guilt may be cumulatively inferred. The first is, "I am guilty of this," and this implies an admission of all the acts constituting guilt. The second is, "Such an act, part of a complicated web of circumstances, is true;" and this involves the examination of all other relevant circumstances.¹ Relevancy in the first case is sustained by deductive reasoning: Whosoever is guilty of the acts making up the result; in the second case by inductive reasoning: Whosoever did the component acts is guilty of the result. As to the first, we must remember that the party confessing may himself have reasoned falsely. He may have shot a man already dead, for instance, and may therefore, by assuming a false premise, confess a murder which he did not commit. As to the second, we must remember that *we* may reason falsely.² The inculpatory facts admitted by the accused may be true, and yet we may be in error in supposing they are grounds from which his guilt may be rightly inferred.³

§ 629. A confession must be brought specifically home to the party charged with making it, and, independently of the cases, to be hereafter discussed, in which parties are induced through fear to make statements which are not really their own, we may easily conceive of cases of forged confessions, or confessions by one man imputed by mistake to another. The person alleged to have confessed, there-

¹ See *Com. v. Allen*, 128 Mass. 46; *State v. Howard*, 82 N. C. 623.

² See *Haynie v. State*, 2 Tex. Ap. 168.

³ See *supra*, § 378; *infra*, § 635.

fore, must be identified as the party to whom the confession is charged. But the identification may be by voice as well as by face. Thus, it has been held in Pennsylvania that a prisoner could testify to a confession from another prisoner through a soil pipe, the identification of the speaker being by the voice alone.¹

§ 680. The imperfection of the medium through which an oral confession is transmitted must also be considered in weighing the confession. Aside from the considerations based on the infirmity of memory, we must recollect that there are influences peculiarly likely to affect witnesses as to confessions. Partisan sympathy, preconceived prejudice, the desire to detect an offender, especially in cases of heinous crime, are apt in such cases to have distinctive force. In any view, we must remember that the accuracy of the witness testifying to the confession is a question of fact for the jury.²

Imperfection of medium of transmission to be considered.

§ 681. Subject to the qualifications we have just noticed, the rule is firmly established that a free and voluntary confession either of an offence as specifically charged, or of a fact from which such offence can be inferred, whether made before or after apprehension, and whether in writing, or in unwritten words, or by signs, is admissible when offered against the accused, no matter where or to whom it was made.³

Voluntary confession is admissible.

§ 682. Admissibility, however, is to be distinguished from sufficiency. While voluntary confessions of specific charges or of inculpatory facts are always admissible, under the conditions above stated, they cannot sustain a conviction, unless there be corroborative proof of the *corpus delicti*.⁴

But without proof of *corpus delicti* insufficient.

¹ *Brown v. Com.*, 76 Penn. St. 319; *infra*, § 803.

² See *Com. v. Gallighan*, 113 Mass. 202. See *supra*, § 378.

³ Per Grose, J., *Lambe's Case*, 2 Leach C. C. 625; 2 Hawk. P. C. c. 46; *Com. v. Sanborn*, 116 Mass. 61; *State v. Brown*, 48 Iowa, 553, and cases hereafter cited. By statute in Texas unless a prisoner is warned that his statements may be used against him, they cannot be admitted in evidence. *Williams v. State*, 10 Tex. Ap. 526.

And the truth of inculpatory statements in an unwarned confession must always be shown by evidence *aliunde*. *Kennon v. State*, 11 Tex. Ap. 356.

⁴ *Wills Cir. Ev.* § 6; 1 *Greenl. Ev.* § 316; *State v. Davidson*, 30 Vt. 377; *Com. v. McCann*, 97 Mass. 580; *Com. v. Smith*, 119 Mass. 305; *People v. Hennessey*, 15 Wend. 147; *People v. Badgley*, 16 Wend. 53; *Ruloff v. People*, 18 N. Y. 179; S. C., 3 *Parker C. R.* 401; *People v. Bennett*, 49 N.

§ 633. Unless the *corpus delicti*, so far as concerns the proof of an objective crime, be sustained, a confession is not by itself enough

Y. 137; Com. v. Pettit, 8 Phil. 608; Com. v. Hanlon, 3 Brewst. 461; Smith v. Com., 21 Grat. 809; State v. Long, 1 Hayw. 455; State v. Cowan, 7 Ired. 239; Karp v. State, 55 Ga. 136; Daniel v. State, 63 Ga. 339; Matthews v. State, 55 Ala. 187; Johnson v. State, 59 Ala. 37; Keithler v. State, 10 S. & M. 229; Stringfellow v. State, 26 Miss. 157; Jenkins v. State, 41 Miss. 582; Lee v. State, 45 Miss. 114; Heard v. State, 59 Miss. 545; Robinson v. State, 12 Mo. 592; State v. Scott, 39 Mo. 424; State v. Gorman, 54 Mo. 526; Dixon v. State, 13 Fla. 636; Bergen v. People, 17 Ill. 426; May v. People, 92 Ill. 343; South v. People, 98 Ill. 261; Williams v. People, 101 Ill. 382; People v. Lane, 49 Mich. 340; State v. Keeler, 28 Iowa, 553; State v. Knowles, 48 Iowa, 598; State v. Lallyer, 4 Minn. 368; People v. Jones, 31 Cal. 565; People v. Ah How, 34 Cal. 218; People v. Thrall, 50 Cal. 415; Hill v. State, 11 Tex. Ap. 132; Lovelady v. State, 14 Tex. Ap. 546. See Young v. State, 68 Ala. 569; Territory v. McClin, 1 Mont. 304; Priest v. State, 10 Neb. 393.

As attaching a higher efficiency to confessions, see State v. Guild, 5 Halst. 165; State v. Carrick, 16 Nev. 120; Rice v. State, 47 Ala. 38; Moses v. State, 58 Ala. 117; State v. Kring, 74 Mo. 612; State v. Patterson, 73 Mo. 695. In Kentucky the rule in the text is established by statute. Cunningham v. Com., 9 Bush, 149. As to Minnesota statute, see State v. Grear, 29 Minn. 221.

In preliminary examinations a naked confession is enough to warrant a holding the defendant for trial. U. S. v. Bloomgart, 2 Benedict, 356.

Mr. Taylor (Evidence, § 794) argues that in each of the English cases usu-

ally cited in favor of the sufficiency of this evidence (uncorroborated confessions) some corroborated circumstance will be found. See R. v. Sutcliffe, 4 Cox, 270. Thus, in the case of Eldridge (R. & R. 440), who was indicted for horse-stealing, the horse was found in his possession, and he had sold it for £12, after asking £35, which was its fair value. In the case of Falkner and Bond (ibid. 481), the person robbed was called upon his recognizance, and it was proved that one of the prisoners had endeavored to send a message to him to keep him from appearing. In White's Case (ibid. 508), there was strong circumstantial evidence, both of the larceny of the oats from the prosecutor's stable, and of the prisoner's guilt; and in the case of Tippet (ibid. 509), who was indicted for the same larceny, part of this evidence was also given, together with the additional proof that the prisoner was an under-hostler in the same stable. In all these cases, too, except that of Falkner and Bond, the confessions were solemnly made before the examining magistrate, and taken down in due form of law; while the confessions of Falkner and Bond were repeated, once to the officer who apprehended them, and again on hearing the depositions read over which contained the charge. So in Stone's Case, which is a very brief note, it does not appear that the *corpus delicti* was not otherwise proved; on the contrary, the natural inference from the report is that it was. Wheeling's case, indeed, seems to be an exception; but it is far too briefly reported to be relied on as an authority, for it merely states that "in the case of John Wheeling, tried before Lord

to support a conviction.¹ This is strikingly illustrated in a trial in Mississippi, where the evidence was that the circumstances of the deceased's death, and the state of his body, indicated poison by stramonium, or Jamestown weed; ^{Meaning of corpus delicti.} but that the same symptoms might have been caused by congestions of the brain, stomach, or heart; and it was properly ruled by the court, that a confession of the defendant, that he had administered to the deceased Jamestown weed, was not enough to warrant a conviction, the *corpus delicti* not being fully proved.² But the proof for this purpose need not amount to certainty: it is enough if it be beyond reasonable doubt.³

Kenyon, at the Summer Assizes at Salisbury, 1789, it was determined that a prisoner may be convicted, on his confession, when proved by legal testimony, though it is totally uncorroborated by any other evidence." See as to proof of *corpus delicti*, 3 Whart. and St. Med. Jur. 4th ed. (1884) §§ 776 *et seq.*

¹ *Supra*, § 325; Com. v. Johnson, 21 Grat. 811; Merritt v. State, 2 Tex. Ap. 177; Davis v. State, 2 Tex. Ap. 588.

² Pitts v. State, 43 Miss. 472.

In Paul v. State, 65 Ga. 152, a boy of fourteen was tried for the murder of a girl of nine. He confessed that he whipped her near a spring for having told a lie on him; that when she cursed him he got a rail and knocked her on the head. The body was found near the spring, with the skull fractured; near by were the switches and a broken rail stained with blood. It was held that these facts were sufficient to uphold the confession and that a verdict of guilty should not be disturbed.

³ Gray v. Commonwealth, 101 Penn. St. 38, decided in 1882, was an indictment for the murder of a Mrs. McCready, who had disappeared in February, 1877. The body was not produced, nor accounted for, unless by the production of a skull, and the identity of that was

disputed. In the opinion of the court, by Paxson, J., it is said: "On the 4th of April, 1878, a human skull was found on the river shore near the house in which Mrs. McCready lived. The hair attached to the skull was evidently that of a woman; it was black and gray, corresponding to the hair shown to have belonged to her. The skull showed marks of violence, there were two wounds, either of which would be sufficient to produce death. The jaw bone found near the skull was identified by the witness Rudolf, and by Mary McCready, as the jaw bone of the deceased, by reason of certain peculiarities which they described. Under these circumstances we cannot say it was error to admit the prisoner's confession. While it is familiar law that a confession is not evidence in the absence of proof of the *corpus delicti*, yet I am not aware of any case which holds that the *corpus delicti* must first be proved beyond the possibility of doubt. It is a fact to be proved like any other fact in the cause, and be found by the jury upon competent evidence. The true rule in such cases is believed to be this: when the commonwealth has given sufficient evidence of the *corpus delicti* to entitle the case to go to the jury, it is competent to show a confession made by the prisoner connecting

§ 634. To confessions, so far as concerns credibility, are to be applied most of the tests we have already noticed as applicable to the testimony of witnesses. On a prosecution of A., for instance, it is offered to prove that some weeks prior to trial A. narrated certain inculpatory transactions in which he was concerned. We have, therefore, two distinct periods of time to be kept in view. The first is that of the occurrence of the inculpatory transaction. Did the objects described by the witness actually exist at the time, or did they exist only apparently? A person is wounded, for instance, and is left for dead by the assailant, and the assailant confesses afterwards that he murdered the supposed deceased.¹ But unless a real crime is proved to have

him with the crime. Under such circumstances the jury should first pass upon the sufficiency of the evidence of the *corpus delicti*. If it satisfies them beyond a reasonable doubt that the crime had been committed, then they are at liberty to give the confession such weight as it is entitled to, taking into view the circumstances surrounding it, and the extent to which it has been corroborated. There is no rule of the criminal law which requires absolute certainty about this or any other question of fact. If it were otherwise it would be impossible to convict of any offence in any case. All the law requires is that the *corpus delicti* shall be proved as any other fact, that is, beyond a reasonable doubt, and that doubt is for the jury. The identity of a human body, or even of a skeleton, may be proved by circumstances, as may any other fact. *Rex v. Hindmarsh*, 2 Leach. Cr. Cas. 569; *McCulloch v. State*, 48 Ind. 109. When all other means of identification fail the hair and teeth form the chief means of recognition. *Wharton Crim. Ev.* § 804. In the case of *Udderzook v. Commonwealth*, 26 P. F. S. 340, a mutilated body, whose face was discolored and swollen, was found, having been apparently buried for some days. The

witness who found it had never seen the person before. He was allowed to testify that the face resembled a photograph of a person alleged to be the one found; the question whether the witness could identify it was for the jury. So we say here. The question whether Rudolph and Mary McCready could identify the jaw found, as that of the deceased, was for the jury. It would have been bald error for the court below to have excluded their testimony. We are in no sense responsible for the view which the jury took of it, and it would be dangerous, even if we had the power, to attempt to review their finding. The confession of the prisoner, as detailed by the witness Dixon, was corroborated in a remarkable degree. Not only was the skull found in the immediate vicinity of the place where the prisoner said he threw the body, but the wounds correspond precisely with those the prisoner said he inflicted. From all that appeared the locality was unknown to the witness; he had never seen the skull, and the facts could only have been known to him from the statements of the prisoner."

¹ As illustrating the text may be mentioned the following cases:—

Two brothers named Boorns, who,

been committed, the confession, as we have seen, is inoperative.¹ The same observation may be made as to statements, under a mistake of law, of non-existent facts as if they really exist.²

§ 635. We must also, applying the same tests as we have already applied to witnesses, inquire whether the defendant, at the time of the occurrence narrated, was capable of accurate observation.³ Hence it is admissible, in order to affect the credibility of the declaration, to show that the declarant was drunk⁴ or insane⁵ at such time. But the fact that the declarant

And also
subject-
ively.

on being charged in Vermont with the murder of a man whose body was alleged to have been identified, were convicted and sentenced to death, chiefly on their admissions, were relieved from execution by the reappearance of their alleged victim. N. Am. Review, vol. x. p. 418; 5 Law Reporter, 195; 1 Greenl. on Ev. § 214; 1 Wh. & St. Med. J. § 200 a, 791 a; 3 ib. (4th. ed.) § 780. *Supra*, § 325; *infra*, § 804.

In Illinois, in 1841, three brothers named Traylor were arrested on the charge of murdering a man named Fisher, who, when last seen, had been in their company. Strong circumstantial evidence was produced, showing the traces of a death struggle in the spot where the homicide was alleged to have been committed; and the case was fortified by expressions alleged to have been subsequently used by one of the brothers as to his having become legatee of the deceased's property. The examination was scarcely finished, when one of the three defendants made a confession, detailing circumstantially the whole transaction, showing the previous combination, and ending with a direct statement, under oath, of the homicide. Fisher, however, made his appearance in just time enough to intercept

a conviction; and the only way of accounting for the confession which had been produced was, that the party who made it, in the desperation of the moment, took this method of cutting short suspense. See 4 Western Law Journal, 25; Lamon's Life of Lincoln, cited in 1 Wharton & St. Med. Jur. § 791 a. See *State v. West*, 1 Houst. C. C. 371.

¹ For cases see *supra*, §§ 625, 626-632.

² *Supra*, § 625.

³ *Supra*, §§ 373, 374.

⁴ *Supra*, § 384 a; *infra*, §§ 675-6.

Mr. Abercrombie relates the following instance where a *quasi* confession was made by an innocent person, which shows also that it may not be impracticable for an artful man to so operate upon the nervous sensibility of another less intelligent, as to lead the latter to declarations or conduct which would produce a strong presumption of guilt. During an investigation in Scotland, respecting an atrocious murder committed on a pedler, a man came forward voluntarily and declared that he had had a dream, in which there was represented to him a house, and a voice directed him to a spot near the house, in which there was buried the pack, or box for small articles of merchandise, of the murdered person. On

⁵ *State v. Feltes*, 51 Iowa, 495.

was incompetent on the ground of infamy does not exclude his declarations.¹

§ 636. A person, also, in narrating a past transaction, may be without the power of due expression, or may express himself so as to be misunderstood.² We have, therefore, to consider, in addition to the declarant's capacity of observation and of narration, what is the real meaning of his words. In determining, therefore, whether a confession of guilt by a party under mental excitement or prostration is true, allowance must be made for such incapacitating conditions.³ The same qualification, though in less force, is applicable to incidental admission of inculpatory facts.

§ 637. In addition to the considerations first mentioned, there are peculiar reasons for applying a close criticism to confessions of adultery. Such confessions may be a convenient mode of getting rid of the marriage tie, or may be induced by a desire to injure another, or to gratify a base vanity, and may be made, therefore, without solid foundation. Hence such confessions, unless corroborated, are not usually regarded as ground for divorce.⁴

search being made, the pack was found, not precisely on the spot which he had mentioned, but very near it. The first impression on the minds of the public authorities was that he was either the murderer or an accomplice in the crime. But the individual accused was soon after convicted of the crime; and before his execution he fully confessed his guilt, and in the strongest manner exculpated the dreamer from any participation in, or knowledge of, the murder. The only fact that could be discovered calculated to throw any light upon the occurrence was, that immediately after the murder the dreamer and the murderer had been together in a state of almost constant intoxication, for several days: and it is supposed that the latter might have

allowed statements to escape from him which had been recalled to the other in his dream, though he had no remembrance of them in his sober hours. Abercrom. on the Intellect. Powers, 12th ed. 222. See 1 Whart. & St. Med. Jur. §§ 200 a, 804.

¹ See *State v. Delwood*, 33 La. An. 1229; *supra*, § 363.

² See *State v. Long*, 1 Hayw. 455. *Supra*, § 374.

³ *Infra*, §§ 675-6.

⁴ See, for full citation of cases, Whart. on Ev. § 1220. See also *supra*, § 627, as to false confessions of adultery. That the wife's confessions will be disregarded when made under the husband's influence, see *Summerbell v. Summerbell*, 37 N. J. Eq. 603.

II. JUDICIAL ADMISSIONS.

§ 688. A *confessio*, to be *judicialis*, must be before a court competent to try the pending prosecution, in which the proceedings must be regularly brought. Nor is the confession conclusive if in an *ex parte* proceeding; it must be on an issue accepted by both prosecution and defence.¹

Confessions by plea conclusive.

Absente adversario, the confession is operative only *quae solam voluntatem confitentis declarat*, or *in his quae dependent solum ex voluntate confitentis*.² But when formally made, under such circumstances, a judicial confession is conclusive as to the issue, unless shown to have been made by mistake or to have been secured by fraud.³ And it may be used against the party making it in all other cases in which it is relevant, though it may not in such cases work an estoppel.⁴ A plea of guilty, however, withdrawn by permission of the court, does not so bind.⁵ And a plea by the defendant's attorneys, such plea being signed only by them and rejected by the court, cannot be used as a confession.⁶ Nor can a plea of guilty be binding if made by a person incompetent by reason of infancy.⁷

§ 689. In criminal pleading, a plea of abatement binds the party making it to the allegations it contains, and unless it be withdrawn, these allegations cannot be repudiated by him.⁸ When a plea of abatement is decided against a defendant, in this country, the defendant is usually permitted to plead over.⁹

So of pleas in abatement.

¹ See Whart. on Ev. § 1078.

State v. Cotton, 4 Foster, 143. See

² Mascard. concl. 348, nr. 1. That an informal confession in open court is evidence to sustain a conviction, see *Dantz v. State*, 87 Ind. 398.

State v. Salge, 2 Nev. 321. See *supra*, § 615.

³ *Com. v. Lannan*, 13 Allen, 563.

⁴ *Marsh v. Mitchell*, 26 N. J. Eq. 497; *Com. v. Jackson*, 2 Va. Cas. 501; *Gridley v. Conner*, 4 La. An. 416; *Denton v. Erwin*, 5 La. An. 18; *Edson v. Freret*, 11 La. An. 710. See *State v. Colvin*, 11 Humph. 599.

⁷ *R. v. Stone*, 1 F. & F. 311; *R. v. Simmonds*, 4 Cox C. C. 277.

⁴ *R. v. Fontaine Moreau*, 11 Q. B. 1033; *Bradley v. Bradley*, 2 Fairf. 367; *Perry v. Simpson Co.*, 40 Conn. 313.

⁵ 2 Hale, 176, 238; Burn, *Indictment*, ix.; *State v. Dresser*, 54 Me. 569; *Com. v. Gale*, 11 Gray, 320; *Lewis v. State*, 1 Head, 329. The judgment for the defendant is no bar to an indictment against him in his true name. *Com. v. Farrell*, 105 Mass. 187. See *supra*, §§ 94, 582.

⁸ *U. S. v. Williams*, 1 Dillon, 485.

⁹ *R. v. Brown*, 17 L. J. M. C. 143; In England, the liberty is limited to

§ 640. So far as concerns the particular prosecution in which the plea is entered, it may be held that whenever a material averment well pleaded is passed over by the adverse party without denial, whether this be by pleading in confession and avoidance, or by demurring in law, or by suffering judgment to go by default, it is thereby, for the purpose of pleading, if not for the purpose of trial before the jury, conceded.¹ "It is a fundamental rule in pleading, that a material fact asserted on one side, and not denied on the other, is admitted."²

In pleading, that which is not disputed is admitted.

§ 641. An answer under oath is to be regarded as admissible against the party making it, in all independent suits in which it is relevant,³ and so of a written admission of facts made voluntarily in order to obtain a continuance,⁴ and so of a schedule in bankrupt proceedings.⁵ And a plea entered by a party in another suit is also collaterally admissible against him as a *prima facie* case,⁶ though it is otherwise if the defendant was incapable by infancy of binding himself by a plea.⁷

Pleadings in other cases may be admissions.

§ 642. What has been said of pleading equally applies to process. A party by issuing process *prima facie* admits the facts which such process assumes.⁸

So of process.

III. WRITTEN CONFESSIONS.

§ 643. A written statement by a defendant, when prepared deliberately and seriously, is not only admissible in evidence against

cases where the plea is to matter of law. *R. v. Johnson*, 6 East, 583; *R. v. Gibson*, 8 East, 107; *R. v. Duffy*, 4 Cox C. C. 190. See Whart. Cr. Pl. & Pr. §§ 433 *et seq.*

¹ Taylor's Ev. § 748; citing Steph. Pl. 248; *Jones v. Brown*, 1 Bing. N. C. 484; *De Gaillon v. L'Aigle*, 1 B. & P. 368; *Prowse v. Shipping Co.*, 13 Moore P. C. 484. See also *State v. Homer*, 40 Me. 438; *Coffin v. Knott*, 2 Greene (Iowa), 582.

² McAllister, J., *Simmons v. Jenkins*, 76 Ill. 482; citing *Dana v. Bryant*, 1 Gilm. 104; *Pearl v. Wellman*, 3 *ibid.*

311; *Briggs v. Dorr*, 19 Johns. 95; *Jack v. Martin*, 12 Wend. 316; *Raymond v. Wheeler*, 9 Cow. 295.

³ Whart. on Ev. § 1116. *Supra*, § 615.

⁴ *Gonzales v. State*, 12 Tex. Ap. 657; but see *Powers v. State*, 87 Ind. 144.

⁵ *Abbott v. People*, 75 N. Y. 602.

⁶ *State v. Homer*, 40 Me. 438.

⁷ *R. v. Simmonds*, 4 Cox C. C. 277; *R. v. Stone*, 1 F. & F. 311; and see *supra*, § 615.

⁸ See cases in Whart. on Ev. § 1118. *Supra*, §§ 610-11-12.

him, but is of weight proportioned to its solemnity and pertinency.¹ Thus on the trial of an indictment for the malicious burning of a building, the voluntary testimony of the defendant before a fire inquest, reduced to writing and signed by him, makes a strong case against him;² and so of the bank books of a bank, kept by the defendant, an officer of the bank, in the course of his business.³

Written
confessions
entitled to
peculiar
weight.

§ 644. A letter written by the defendant, when self-disserving, is *prima facie* evidence against him;⁴ though in such case the confession, to be operative, must be distinctly to a point material to the issue.⁵ It is not necessary to the admissibility of such a letter that it should be signed; if traceable to the writer, and if involving a self-disserving admission of any kind, this is enough.⁶ Nor is it an objection that a letter stands by itself, since a letter containing a particular confession may come in alone;⁷ nor is it necessary, when a letter is thus independent in its character, that the whole pertinent correspondence should be put in.⁸ Nor is it fatal to the admissibility of such a letter that it was in answer to a letter meant as a trap.⁹

Letters are
thus ad-
missible.

On the other hand, letters of third parties are inadmissible when hearsay.¹⁰ Hence a letter addressed to a party cannot be admitted as proof against him¹¹ unless it be proved that he received it and

¹ Whart. on Ev. § 1122; Abbott v. People, 75 N. Y. 602; Dubose v. State, 13 Tex. Ap. 418.

² Com. v. Bradford, 126 Mass. 42.

³ Humphrey v. People, 18 Hun, 393.

⁴ Longfellow v. Williams, Peake Add. Ca. 225; Rose v. Cunynghame, 11 Ves. 550; Gibson v. Holland, L. R. 1 C. P. 1; Wilkins v. Burton, 5 Vt. 76; Robertson v. Ephraim, 18 Tex. 118.

⁵ Betts v. Loan Co., 21 Wis. 80.

⁶ Bartlett v. Mayo, 33 Me. 518.

⁷ North Berwick Co. v. Ins. Co., 52 Me. 336; Newton v. Price, 41 Ga. 186.

A letter containing an admission by a party is evidence against him, although the letter was in reply to

another which the party is not called upon to produce. Wiggin v. R. R., 120 Mass. 201. See *infra*, § 688.

⁸ Whart. on Ev. § 618. *Supra*, § 521; *infra*, § 688.

⁹ R. v. Derrington, 2 C. & P. 418; U. S. v. Champagne, 1 Ben. 241; Com. v. Knapp, 10 Pick. 496; Com. v. Tuckerman, 10 Gray, 173; Price v. State, 18 Oh. St. 418. *Infra*, § 670.

¹⁰ Williams v. Manning, 41 How. (N. Y.) Pr. 454; Wolstenholme v. Wolstenholme, 3 Lans. 457; Rosenstock v. Tormey, 32 Md. 169; Underwood v. Linton, 44 Ind. 72; Livingston v. R. R., 35 Iowa, 555.

¹¹ Payne v. Com., 31 Grat. 855.

acted on it,¹ or in some way invited it.² Whether a letter written, but not sent, can be put in evidence against a party, is elsewhere discussed.³

§ 645. Telegrams, under the same restrictions as those which have been noticed as appertaining to letters, may be also treated as constituting admissions on the part of the person by whom they are sent.⁴ Duly proved, they may be treated as self-dissevering admissions, which, so far as concerns the party from whom they emanate, are subject to the usual incidents of such admissions.⁵ In order, however, to charge a party with a telegram, the original draft, in the handwriting of the party or his agent, must be produced.⁶ But a sender may be regarded as the employer of the telegraph company in such a sense as to make the message sent and delivered by the company primary evidence.⁷

Telegram
may be a
confession.

IV. ADMISSIBILITY OF CONFESSIONS AS DETERMINED BY THREATS OR PROMISES.

§ 646. Not only is it an indictable offence to apply torture to another for the purpose of extorting a confession;⁸ but all confessions so induced will be rejected, if offered to prove a case of guilt.⁹ And even when violence is not

Threats
exclude.

¹ *Smiths v. Shoemaker*, 17 Wall. 630; *Wright v. People*, 1 N. Y. Cr. 462. See fully *infra*, § 682.

² *Infra*, § 682.

³ *Whart. on Ev.* § 1123.

⁴ See *supra*, § 521.

⁵ *Com. v. Jeffries*, 7 Allen, 548; *Beach v. R. R.*, 37 N. Y. 457; *Taylor v. The Robert Campbell*, 20 Mo. 254; *Wells v. R. R.*, 30 Wis. 605. See, to same general effect, *Beach v. Raritan & Del. Bay R. R. Co.*, 37 N. Y. 457; *Coupland v. Arrowsmith*, 18 Law T. (N. S.) 75; *Henkel v. Pape*, L. R. 6 Exch. 7; *Verdin v. Robertson*, 10 Sess. Cas. (3d series) 35; *Alb. L. J.*, Jan. 20, 1877.

⁶ *Durkee v. R. R.*, 29 Vt. 127; *Benford v. Zanner*, 40 Penn. St. 9; *Matteson v. Noyes*, 25 Ill. 591; *Williams v. Brickell*, 37 Miss. 682. *Supra*, §§ 162, 521.

⁷ *Durkee v. R. R.*, 29 Vt. 127. *Supra*, §§ 162, 521. As to such agency in case of letters, see *R. v. Cooper*, L. R. 1 Q. B. D. 19, cited fully, *infra*, § 682.

⁸ *State v. Hobbs*, 2 Tyler, 380.

⁹ *Infra*, § 661; *U. S. v. Nott*, 1 Mo. Lean, 499; *Flagg v. People*, 40 Mich. 706; *Berry v. State*, 10 Ga. 511; *Butler v. Com.*, 2 Duv. 435; *Joe v. State*, 38 Ala. 422; *Serpentine v. State*, 1 How. (Miss.) 256; *Frank v. State*, 39 Miss. 705; *Hector v. State*, 2 Mo. 135; *McGlothlin v. State*, 2 Cold. 223; *Greer v. State*, 31 Tex. 129. In *Com. v. Cuffee*, 108 Mass. 285, it was held that a confession was not excluded by the fact that the defendant, a boy of about thirteen years, was previously stripped by officers arresting without a warrant, roughly handled and put in a cell.

used, the mere threat to apply it in any shape works a similar exclusion. Hence, a confession will not be received if it appear, in the opinion of the court, to have been influenced by threats of physical punishment of any kind, or of any kind of pecuniary or other temporal penalty.¹ And this is the case when the contested declaration was made in fright in the terror of threatened mob-violence.²

As will be presently seen, a confession made under oath by a party called and compulsorily examined as a witness for the prosecution as to his own guilt cannot be afterwards used against him.³

§ 647. But a mere adjuration to speak the truth does not vitiate a confession when neither threats nor promises are applied.⁴ Thus when a prisoner under fourteen years of age, charged with murder, was told by a man who was present when he was apprehended, "Now kneel down; I am going to ask you a very serious question, and I hope you will tell me the truth, in the presence of the Almighty," and the prisoner in consequence made a statement, this was held admissible.⁵ So where the mother of a young lad of eight, who was arrested by the police, said to him and another, "You had better, as good boys, tell the truth," it was held that the confession was admissible.⁶ Nor, as it has been held, is it a valid objection

Mere adjuration to speak the truth does not exclude.

¹ *State v. Grant*, 22 Me. 171; *State v. Phelps*, 11 Vt. 116; *Com. v. Chab-book*, 1 Mass. 144; *Com. v. Drake*, 15 Mass. 161; *Com. v. Knapp*, 9 Pick. 496; *People v. Ward*, 15 Wend. 231; *People v. Rankin*, 2 Wheel. C. C. 467; *State v. Brick*, 2 Harring. 530; *Moore v. Com.*, 2 Leigh, 701; *Smith v. Com.*, 10 Grat. 734; *Brown v. People*, 91 Ill. 506; *Stephen v. State*, 11 Ga. 225; *Rarp v. State*, 55 Ga. 136; *Rector v. Com.*, 80 Ky. 468; *Deathridge v. State*, 1 Sneed, 75; *Boyd v. State*, 2 Humph. 39; *Ann v. State*, 11 Humph. 159; *Self v. State*, 6 Bax. 244; *Garrard v. State*, 50 Miss. 147; *Hector v. State*, 2 Mo. 135; *Runnels v. State*, 28 Ark. 121; *Barnes v. State*, 36 Tex. 356; *Territory v. McClint*, 1 Mont. 394; *Berry v. U. S.*, 2 Col. T. 186.

² *Flagg v. People*, 40 Mich. 706; *Self v. State*, 6 Bax. 244; but see *Honeycutt v. State*, 8 Bax. 37.

³ *Infra*, § 668.

⁴ See *infra*, § 654.

⁵ *R. v. Wild*, 1 Mood. C. C. 452; *R. v. Kerr*, 8 C. & P. 179.

⁶ *R. v. Reeve*, L. R. 1 C. C. 362; *S. C.*, 12 Cox C. C. 179; 1 Green C. R. 398. See, also, *Cady v. State*, 44 Miss. 333. In *Com. v. Sego*, 125 Mass. 210, an employer, after the arrest of his clerk, nineteen years old, for larceny of the employer's goods, said to the clerk when out on bail, "I am satisfied that there are other receivers whom we have not yet discovered. I should like to have you make a clean breast of this matter." This was held not to exclude a confession which followed.

that the defendant had been called upon to touch the deceased's body.¹ But where a constable, after having asked the prisoner what he had done with the stolen property, said, "You had better not add a lie to the crime of theft," Gaselee, J., refused to receive in evidence a statement thereupon made by the prisoner.² The mere fact, however, that the appeal to speak the truth is made by an officer to a party under arrest, does not exclude the confession.³

§ 648. A confession, though made under the representation of the infamy or folly of a concealment, if without threats or promises, may be received.⁴ Yet this should be carefully guarded, since if such statements take the shape of a threat, they operate to exclude.

Nor does a statement of the wrongfulness of concealing.

Nor does the bare fact that the confession is made to a person in authority.

§ 649. As has just been incidentally seen, confessions made to constables or other arresting parties, or to magistrates, cannot be excluded, unless it appear that there was a threat of harm or a promise of worldly advantage employed by an authoritative person.⁵ Who is such an authoritative person will be hereafter considered.⁶

§ 650. It is, however, a settled rule that a confession induced by promises by persons in authority is inadmissible.⁷ Thus, a confes-

¹ *People v. Johnson*, 2 Wheel. C. C. 361.

² *R. v. Shepherd*, 7 C. & P. 579.

³ *R. v. Thornton*, 1 Mood. C. C. 27; *R. v. Gibney*, *Jebb*, C. C. 15; *R. v. Kerr*, 8 C. & P. 176; *R. v. Johnston*, 15 Ir. Law R. N. S. 60; *Com. v. Holt*, 121 Mass. 61; *Harding v. State*, 54 Ind. 359; *Wolf v. Com.*, 30 Grat. 833; *State v. McLaughlin*, 44 Iowa, 82; *King v. State*, 40 Ala. 314; *Davis v. State*, 2 Tex. Ap. 588. "The case of *R. v. Devlin*, 2 Crawf. & D. C. C. 152, is *contra*, but seems not to be law." Taylor's Ev. § 804.

⁴ *Com. v. Mitchell*, 117 Mass. 431; *State v. Crank*, 2 Bailey, 66; *Hawkins v. State*, 7 Mo. 190; *Fonts v. State*, 8 Oh. St. 98; but see *People v. Ward*, 15 Wend. 231; *Oakley v. Schoonmaker*, 15 Wend. 226; *Cady v. State*. 44 Miss. 333. *Infra*, § 654.

⁵ *R. v. Baldry*, 12 Eng. L. & Eq. 591; 5 Cox C. C. 523; 2 Den. C. C. 430; *Com. v. Sturdivant*, 117 Mass. 122; *Com. v. Smith*, 119 Mass. 305; *Murphy v. People*, 63 N. Y. 590; *Wolf v. Com.*, 30 Grat. 833; *Aaron v. State*, 37 Ala. 106; *State v. Carlisle*, 57 Mo. 102; *State v. Bruce*, 33 La. An. 186; *State v. Staley*, 14 Minn. 105; *State v. McLaughlin*, 44 Iowa, 83; *State v. Ingram*, 16 Kans. 14.

As to Texas statute, see *supra*, § 631. That a voluntary but rejected offer to a jailer to tell all the prisoner knew may be proved, see *Perkins v. State*, 60 Ala. 7.

⁶ *Infra*, §§ 650, 651, 672, 673.

⁷ Cases cited *infra*, §§ 673-4; *State v. Walker*, 34 Vt. 396; *State v. Day*, 55 Vt. 510; *Com. v. McCann*, 97 Mass. 580; *Vaughan v. Com.*, 17 Grat. 576; *Deathridge v. State*, 1 Sneed, 75; New-

sion obtained by an official promise to put an end to a prosecution will not be received,¹ though it has been said that the confessions of a person charged with stealing may be proved, even if made after the owner of the goods stolen had promised not to prosecute, where it does not appear that the confession and the promise were directly connected, and the owner not being a person in authority.²

Confession induced by authoritative promises is inadmissible.

§ 651. In the earlier English cases, the tendency was to exclude confessions induced by promises, irrespective of the condition of the person promising. Thus, confessions have been held inadmissible when they resulted from such statements by prosecutors as the following: "Tell me where the things are, and I will be favorable to you;"³ or, "You had better say where you got the property;"⁴ or, "It would have been better for you if you had told at first;"⁵ or, "You had better tell all you know;"⁶ or, "I should be obliged to you if you would tell all you know; if you will not, of course we can do nothing."⁷ And it is now agreed that any advice to a prisoner by a person in authority, telling him it would be better for him if he confesses, vitiates a confession induced by it.⁸ The advice, however, must be

Promise must be made by person in authority.

man v. State, 49 Ala. 9; Ward v. State, 50 Ala. 135; Spicer v. State, 69 Ala. 159; State v. Lowhorne, 66 N. Car. 639; Austine v. People, 51 Ill. 236; Rutherford v. Com., 2 Metc. (Ky.) 387; People v. Barrie, 49 Cal. 342; State v. Wintzengerode, 9 Oreg. 153. See, as to rule under Georgia code, Johnson v. State, 61 Ga. 305.

¹ Smith v. Com., 10 Grat. 734; Boyd v. State, 2 Humph. 39.

² Ward v. People, 3 Hill (N. Y.), 395. See, however, R. v. Jones, R. & R. 152; and see *infra*, §§ 650, 652 *et seq.*

A confession by the party arrested to the officer having him in custody, made the day after the party had been told by the officer that "he could make him no promises, but if he made any disclosure that would be of benefit to the government, the officer would use his influence to have it go in his favor," was held inadmissible; although

the officer testified that he thought the statement was voluntary, and would have been made if the inducements the day before had not been held out. Com. v. Taylor, 5 Cush. 605.

³ R. v. Cass, 1 Leach, 293, n.; Boyd v. State, 2 Humph. 39.

⁴ R. v. Dunn, 4 C. & P. 543.

⁵ R. v. Wakley, 6 C. & P. 175.

⁶ R. v. Kingston, 4 C. & P. 387.

⁷ R. v. Partridge, 7 C. & P. 551. But see Com. v. Sego, 125 Mass. 210.

⁸ 2 East P. C. 659; R. v. Drew, 8 C. & P. 140; R. v. Richards, 5 C. & P. 318; R. v. Thomas, 6 C. & P. 353; R. v. Jones, R. & R. 152; R. v. Parratt, 4 C. & P. 570; R. v. Garner, 2 C. & K. 920; 1 Den. 329; R. v. Feunell, 7 Q. B. D. 147; 14 Cox C. C. 607; R. v. Hatts, 49 L. T. N. S. 780; State v. York, 37 N. H. 175; Vaughan v. Com., 17 Grat. 576; though see Hawkins v. State, 7 Mo. 190; and see *infra*, §§ 672-4.

made or sanctioned by a person in authority to justify the exclusion of the confession.¹ It has been doubted whether the principle extends to any other cases; and it has been held that a promise made by an indifferent person, who interfered officiously without any kind of authority, and promised, without the means of performance, cannot be deemed sufficient to produce any effect even on the weakest mind, as an inducement to confess; and accordingly confessions, made under such circumstances, to unauthoritative persons, have been admitted in evidence.² In such cases the question is simply

In *R. v. Fennell*, which was affirmed in *R. v. Hatts*, *at sup.*, the prisoner, previously to being given in charge, was taken into a room where the prosecutor and an inspector of police were. The prosecutor then said to the prisoner: "He" (meaning the police inspector) "tells me you are making housebreaking implements. If that is so, you had better tell the truth; it may be better for you." The prisoner then made admissions which contributed materially to his conviction upon an indictment for larceny. It was held that these admissions were inadmissible after the inducement in the words "it may be better for you."

In *R. v. Mansfield*, 14 Cox C. C. 639, the defendant, when in custody for arson, said to her mistress, before the policeman, "If you forgive me I will tell you the truth." The mistress answered, "Ann, did you do it?" The confession was held by Williams, J., to be inadmissible. And see, also, *infra*, § 654; *Com. v. Nott*, 135 Mass. 269.

¹ *R. v. Row*, R. & R. 153; *R. v. Gibbon*, 1 C. & P. 97; *R. v. Hardwick*, 1 C. & P. 98, in note; *R. v. Tyler*, 1 C. & P. 129; *R. v. Green*, 6 C. & P. 655; *R. v. Baldry*, 12 Eng. L. & Eq. 591; 5 Cox C. C. 523; 2 Den. C. C. 430; *R. v. Berigan*, 1 Irish Cir. R. 177 (Cork Lent Assizes, 1841); *R. v. Parker*, 8 Cox C.

C. 465; *R. v. Hall*, 12 Cox C. C. 159; *Com. v. Tuckerman*, 10 Gray, 173; *Young v. Com.*, 8 Bush, 366; *State v. Kirby*, 1 Strobh. 155; *Wilson v. State*, 3 Heisk. 232; *contra*, *R. v. Drew*, 8 C. & P. 140. Compare *R. v. Parratt*, 4 C. & P. 570, per Alderson, B., which was a confession by a sailor to his captain, who threatened him with prison on a charge of stealing his watch. *R. v. Thompson*, 1 Leach, 291; *R. v. Fleming*, 1 Arm., M. & O. 330.

² *R. v. Hardwick*, 6 Petersd. Ab. 84, per Wood, B.; *R. v. Taylor*, 8 C. & P. 734; *R. v. Sleeman*, P. & D. 249; 6 Cox C. C. 245. Compare *R. v. Gibbons*, 1 C. & P. 97; *R. v. Tyler*, 1 C. & P. 129; *R. v. Lingate*, 6 Petersd. Ab. 84; *R. v. Spencer*, 7 C. & P. 776; 2 Lew. C. Cas. 125; *R. v. Reason*, 12 Cox C. C. 228; *R. v. Jones*, 12 Cox C. C. 241; *U. S. v. Stone*, 12 Rep. 421; *State v. Simon*, 50 Mo. 370.

"Where there were three prisoners in custody on the same charge, and one said to another, 'Well, John, you had better tell Mr. Walker' (the prosecutor) 'the truth,' and the prisoner addressed thereupon made a confession; evidence of this confession was received, and its admissibility reserved for the consideration of the Court of Criminal Appeal; that court affirmed the conviction. No counsel appeared, and no reasons were given; but prob-

whether the influences applied were likely to produce untruth. Authority, however, in this sense, is assumed to belong to a prosecutor, when exercising the power of instituting or withholding a prosecution.¹ But even in such case the language used must be such as to leave the impression that the accused, being in custody, would be bettered by a confession, or that he would be punished if he did not confess.²

§ 652. An apparent exception, however, is recognized when the confession is made to a master, who holds out threats or promises, when the offence directly concerns himself, which threats or promises are such as are likely to lead the defendant to confess falsely, either from a feeling of dependent prostration, or from the expectation of lighter penalties if the confession be made.³ But where the offence does not concern the master, mere advice does not exclude the confession.⁴ Thus, where the prisoner was indicted for infanticide, and her mistress told her "she had better speak the truth," the confession was received.⁵

Promise made by master does not exclude when offence does not concern master.

ably it was thought that though what is said in the presence of a person in authority may generally be considered as said with his sanction, yet that this did not apply to what was said by one prisoner to another; as it could hardly be imagined that what was thus said was sanctioned by the person in authority. *R. v. Parker*, 9 W. R. 699." *Roscoe's Cr. Ev.* 44.

¹ *R. v. Ruce*, 34 L. T. (N. S.) 400; *R. v. Hatts*, 49 L. T. (N. S.) 780; *Deathridge v. State*, 1 Sneed, 75; *Heard v. State*, 59 Miss. 545. *Infra*, § 656.

² *Infra*, §§ 672-3. *Com. v. Sego*, 125 Mass. 210; cited *supra*, § 647; *Cox v. People*, 80 N. Y. 500.

³ *R. v. Garner*, 2 C. & K. 920. See Joy on Confessions, 23. In New York, it has been held that a promise made by the owner of stolen goods not to prosecute does not exclude. *Ward v. People*, 3 Hill (N. Y.), 395.

⁴ *Com. v. Sego*, 125 Mass. 210.

⁵ *R. v. Moore*, 2 Den. C. C. 522; 5

C. & K. 153; 12 Eng. L. & Eq. 583; 5 Cox C. C. 554; 34 L. T. (N. S.) 400, cited *infra*, § 677. But see *supra*, § 651.

"The cases," said Parke, B., "have gone quite far enough, and ought not to be extended. It is admitted that the confessions ought to be excluded unless voluntary, and the judge, not the jury, ought to determine whether they are so. One element in the consideration of the question as to their being voluntary is, whether the threat or inducement was such as to be likely to influence the prisoner. Perhaps it would have been better to have held (when it was determined that the judge was to decide whether the confession was voluntary), that in all cases he was to decide that point upon his own view of all the circumstances, including the nature of the threat or inducement, and the character of the person holding it out, together; not necessarily excluding the confession on account of the char-

§ 658. It should be remembered that the age, experience, intelligence, and constitution, both physical and mental, of prisoners, are

acter of the person holding out the inducement or threat. But a rule has been laid down in different precedents by which we are bound, and that is, that if the threat or inducement is held out, actually or constructively, by a person in authority, it cannot be received, however slight the threat or inducement; and the prosecutor, magistrate, or constable is such a person, and so the master or mistress may be. If not held out by one in authority, they are clearly admissible. The authorities are collected in Mr. Joy's very able treatise on Confessions and Challenges, p. 23. But, in referring to the cases where the master and mistress have been held to be persons in authority, it is only when the offence concerns the master or mistress that their holding out the threat or promise renders the confession inadmissible. In *R. v. Upchurch*, Ry. & M. 865, the offence was arson of the dwelling-house in the management of which the mistress took a part. *R. v. Taylor*, 8 C. & P. 733, is to the like effect. So *R. v. Carrington*, *ibid.* 109, and *R. v. Hewett*, C. & M. 534. So where the threat was used by the master of a ship to one of the crew, and the offence committed on board the ship by one of the crew towards another; and in that case also the master of the ship threatened to apprehend him; and, the offence being a felony, and a felony actually committed, would have a power to do so on reasonable suspicion that the prisoner was guilty. *R. v. Parratt*, 4 C. & P. 570. In *R. v. Warringham*, tried before me at the Surrey Spring Assizes, 1851, the confession was in consequence of what was said by the mistress of the prisoner, she being in the habit of managing the

shop, and the offence being larceny from the shop. This appears from my notes. In the present case the offence of the prisoner, in killing her child, or concealing its dead body, was in no way an offence against the mistress of the house. She was not the prosecutrix then, and there was no probability of herself or the husband being the prosecutor of an indictment for that offence. In practice, the prosecution is always the result of the coroner's inquest. Therefore, we are clearly of opinion that her confession was properly received." See, also, remarks of Shaw, C. J., *Com. v. Morey*, 1 Gray, 462; and see *Com. v. Taylor*, 5 Cush. 608; *Spears v. State*, 2 Oh. St. 583.

"In *R. v. Upchurch*, 1 Moo. C. C. 465, the prisoner, a servant girl, aged thirteen, was indicted for attempting to set fire to her master's house. After the attempt was discovered, her mistress said to her, 'Mary, my girl, if you are guilty do confess; it will perhaps save your neck; you will have to go to prison; if W. H. C.' (a person whom the prisoner had charged) 'is found clear, the guilt will fall on you.' She made no answer. 'Pray tell me if you did it.' The prisoner then confessed. The evidence was admitted, and the point reserved; but the judges thought that it ought not to have been received. In *R. v. Hearn*, 1 C. & M. 109, a servant was charged with attempting to set fire to her master's house. It was proved that the furniture in two bedrooms was on fire, and a spoon and other articles were found in the suoker of the pump. The master told the prisoner, that if she did not tell the truth about the things found in the pump, he would send for the constable to take her, but he said

so various, and the power of performance so different in the different persons promising, that any rule will necessarily sometimes fail of meeting the needs of a case. The test is whether the accused was likely to view the promise as authoritative. And this test is to be determined by the standard of the person confessing.¹

Condition of party confessing to be considered.

§ 654. A confession is not incompetent because made under advice that if the party was guilty the confession could not put him in any worse condition, and that he had better tell the truth at all times.² Admonitions to tell the truth do not exclude, though coupled with statements that to tell the truth is best.³ It is otherwise only when the party is led to believe that he will be bettered by saying a particular

Mere advice does not exclude.

nothing to her respecting the fire. Coltman, J., held that this was such an inducement to confess as would render inadmissible any statement that the prisoner made respecting the fire, as the whole was to be considered as one transaction. Where the prisoner's master, in the presence of two policemen, said, 'I think it is right I should tell you, that besides being in the presence of my brother and myself, you are in the presence of two officers of the police; and I should advise you that to any question that may be put to you you will answer truthfully, so that if you have committed a fault you may not add to it by stating what is untrue;' it was held that these words did not make the evidence inadmissible. Kelly, C. B., said, 'The words that have been used import advice only on moral grounds.' *R. v. Jarvis*, L. R. 1 C. C. R. 96." *Roscoe's Cr. Ev.* 8th ed. 42.

In another case, a daughter of the prosecutor (the prisoner's master), but who did not live with her father, and was not the prisoner's mistress, whilst she had temporary charge of the prisoner, who had been previously taken into custody, said to her, "I am sorry

for you; you ought to have known better. Tell me the truth, whether you did it or no. Do not run your soul into more sin, but tell the truth;" when the prisoner made a full confession. It was held that the confession was not made to a person in authority, and was therefore admissible. *R. v. Sleeman*, Dears. C. C. 249; 6 Cox C. C. 245. See, also, *R. v. Luckhurst*, 1 Dears. C. C. 245.

A person to whom a negro is bound as an apprentice, though a justice of the peace, if not acting as such, and in no way affected by the offence is not, it has been held in Virginia, a person in authority in the sense of the above rule. *Smith v. Com.*, 10 Grat. 734.

¹ See *Com. v. Smith*, 119 Mass. 305; *Karp v. State*, 55 Ga. 136.

² *Supra*, § 647; *infra*, § 674; *Fouts v. State*, 8 Ohio St. 98; *Young v. Com.*, 8 Bush, 366; *Stafford v. State*, 55 Ga. 592; *State v. Whitefield*, 75 N. C. 356; *State v. Crank*, 2 Bailey, 66; *Matthews v. State*, 9 Lea, 128; *Ulrich v. People*, 39 Mich. 245; *Hawkins v. State*, 7 Mo. 190; *State v. Hagan*, 54 Mo. 192.

³ *State v. Day*, 55 Vt. 610.

thing.¹ And, as we have seen, where a prosecutor, in the presence of policemen, tells a prisoner in custody, "you had better tell the truth," this excludes.²

§ 655. Difficult questions may arise where there is reason to believe that the confession was made with the hope of compromise, or of obtaining a lighter sentence. To exclude such confessions arbitrarily would exclude almost all confessions. To work an exclusion there must be shown a causal connection between an authoritative promise and the confession. If this be not shown, the confession is admissible. Thus a statement by a jailer, after the arrest of a prisoner, "that if the Commonwealth should use any of them as witnesses, he supposed it would prefer her to either of the others" who were arrested and charged with the same offence, is not sufficient to exclude a voluntary confession made by her, on the same day, to a magistrate, after the magistrate had told her such confession might be used as evidence against her;³ but a confession of guilt, made with a view to compromise the matter with the injured party, on the condition that the accused shall not be prosecuted, is inadmissible against the accused.⁴ And *a fortiori* is an offer to compromise inadmissible, when made without prejudice and an unqualified assertion of innocence.⁵ But a voluntary offer to return goods if there be no prosecution is admissible;⁶ and so of any voluntary offer of compromise from which guilt can be implied.⁷

Confessions of accomplices when called as state's evi-

§ 656. It may be justly argued that the State, by calling an accomplice as a witness against his associates, is precluded from subsequently using his admissions on the witness stand to procure his conviction in a prosecution instituted against himself.⁸ Where, however, the

¹ *Supra*, § 647; *infra*, § 674.

⁵ *State v. Emerson*, 48 Iowa, 182.

² *R. v. Hatts*, 49 L. T. (N. S.) 780; *Aff. R. v. Fennell*, 7 Q. B. D. 147; 14 Cox C. C. 607; cited more fully *supra*, § 651.

See, for a discussion on this question in its civil bearings, *Whart. on Ev.* § 1090.

⁶ *Murdock v. State*, 68 Ala. 567.

³ *Fife v. Com.*, 29 Penn. St. 429. See *Com. v. Tuckerman*, 10 Gray, 173.

⁷ *State v. Bruce*, 33 La. An. 186.

⁴ *R. v. Ruce*, cited *supra*, § 652; *R. v. Jones, R. & R.* 152; *Austine v. People*, 51 Ill. 236. See *Ward v. People*, 3 Hill (N. Y.), 395.

⁸ *U. S. v. Lee*, 4 McLean, 1103; *Jackson v. State*, 56 Miss. 311. See, however, *Com. v. Woodside*, 105 Mass. 594; *Dabney's Case*, 1 Robinson, 696.

accomplice shirks or prevaricates in rendering his testimony, then this protection cannot be claimed.¹

dence cannot be used.

§ 657. A confession, though made under the influence of some collateral benefit or boon, no hope or fear being held out in respect to the particular criminal charge, may be received;² and so where a promise of an employer is not to discharge the defendant if he will "settle" for things stolen, on which defendant confesses.³

Collateral inducement does not exclude.

In an Alabama case, the evidence was that the owner of lost property, not suspecting the defendant, offered him a reward if he would secure the property and the thief. The defendant brought back the property, and on being asked for the thief, said that he

¹ Where an accomplice had a promise from the attorney-general that he should not be prosecuted if he became State's evidence, and made a full disclosure, and upon such promise he made a confession, but refused afterwards to testify, it was held that he might be put on his trial, and the confession given in evidence against him. *Com. v. Knapp*, 10 Pick. 478.

"Where, in a case of burglary, an accomplice who had been allowed to go before the grand jury as a witness for the crown, upon the trial pretended to be ignorant of the facts on which he had before given evidence, Coleridge, J., ordered a bill to be preferred against him, to which he pleaded guilty, and judgment of death was recorded. *R. v. Moore*, 2 Lew. C. C. 37. So where an accomplice, after making a full disclosure before the committing magistrate, refused, when before the grand jury, to give any evidence at all, Wightman, J., ordered his name to be inserted in the bill of indictment, and he was convicted on his own confession. *R. v. Holtham*, Staff. Ass. 1843, 2 Russ. by Greav. 958. So where an accomplice, who was called as a witness against several prisoners, gave evidence which showed that all, except

one, who was apparently the leader of the gang, were present at a robbery, but refused to give any evidence as to that one being present, and the jury found all the prisoners guilty, Parkes, B., thinking that the accomplice had refused to state that the particular prisoner was present in order to screen him, ordered the accomplice to be kept in custody till the next assizes, and then tried. *R. v. Hokes*, Staff. Spr. Ass. 1837, 2 Russ. by Greav. 958 (d). The prisoner made a statement to a constable, and then repeated it to a magistrate upon oath. He then made a further statement on oath, adding, 'I came here to save myself.' Subsequently, he refused to prosecute. It was held by five judges out of nine that both the statements made by him were receivable in evidence against him; and by seven out of nine that the first statement was admissible. *R. v. Gillis*, 11 Cox C. C. R. (Irish) 69." *Roscoe's Cr. Ev.* 8th ed. 133.

As to accomplices as witnesses see *supra*, §§ 439-444.

As to admissions of accomplices made during the continuance of the confederacy see *infra*, § 698.

² *State v. Wentworth*, 37 N. H. 196.

³ *Com. v. Howe*, 2 Allen, 153.

was the thief, and claimed the reward. It was held that his admission could be put in evidence against him.¹

§ 658. The question, it is now settled,² is whether the inducement held out to the prisoner was calculated to make his confession untrue; if not, it will be admissible.³ Thus in 1872, it was held in England that the words, "I must know more about it," addressed by a police constable to a prisoner in the course of a conversation about the offence, just after arrest, are not sufficient to exclude a confession.⁴ In this case Keating, J., after consulting with Quain, J., said: "In my time it used to be held that a mere caution given by a person in authority would exclude an admission, but since there has been a return to doctrines more in accordance with the common sense view. *The real question is, whether there has been any threat or promise of such a nature that the prisoner would be likely to tell an untruth, from the fear of the threat, or hope of profit from the promise.*"⁵ And where a prisoner was taken before a magistrate on a charge of forgery, and the prosecutor said, in the hearing of the prisoner, that he considered him as the tool of G., and the magistrate then told the prisoner to be sure to tell the truth, and upon this the prisoner made a statement, this was held receivable.⁶ The same conclusion was reached where the confes-

¹ McIntosh v. State, 52 Ala. 355.

² Archb. C. P. 9th ed. 110; R. v. Jarvis, L. R. 1 C. C. 96; State v. Grant, 22 Me. 171.

³ 2 Russ. on Cr. 845; R. v. Thomas, 7 C. & P. 345. See U. S. v. Nott, 1 McLean, 499; U. S. v. Graff, 14 Blatch. 381; State v. Grant, 22 Me. 171; Com. v. Morey, 5 Cush. 461; Com. v. Smith, 119 Mass. 305; O'Brien v. People, 48 Barb. 274; People v. Phillips, 42 N. Y. 200; Fife v. Com., 29 Penn. St. 420; People v. Wolcott, Sup. Ct. Mich. 1884, 17 Rep. 275. See to same general effect Fouts v. State, 8 Oh. St. 98; State v. Kirby, 1 Strobhart, 155; Brown v. People, 91 Ill. 506.

⁴ R. v. Reason, 12 Cox C. C. 228.

⁵ To the same effect is R. v. Dingley, 1 C. & K. 637; R. v. Jones, 12 Cox

C. C. 241 (1871), before the Court of Criminal Appeal; Com. v. Ackert, 133 Mass. 402; People v. McGloin, 1 N. Y. Cr. Rep. 105, 154; S. C., 91 N. Y. 241; State v. Simon, 50 Mo. 370; State v. Vaigneur, 5 Rich. 391; Merritt v. State, 59 Ala. 47; Sylvester v. State, 71 Ala. 17; State v. Wilson, 3 Heisk. 232; Rice v. State, 47 Ala. 38; Levy v. State, 49 Ala. 390; Alphonse v. State, 34 La. An. 9; State v. Davis, 34 La. An. 351; Revels v. State, 34 La. An. 381; State v. Platte, 34 La. An. 106.

⁶ R. v. Court, 7 C. & P. 486; R. v. Thomas, 7 C. & P. 345.

A person under arrest for stealing was visited in jail by the prosecutor, who said to him that if he wished for any conversation, he could have a chance; the prisoner made no reply for

sion was the result of friendly advice, though the person advising was a stockholder in a corporation defrauded by the defendant.¹

§ 659. Assurances that the confession would not be disclosed, if not made by a person in authority in such a way as to lead to a false statement, do not exclude a confession they induced, such assurances being likely rather to elicit than to suppress truth;² and on the same reason-

Assurances of secrecy do not exclude.

a minute or two; the prosecutor then told the prisoner he thought it was better for all concerned, in all cases for the guilty party, to confess; the prisoner then said he supposed he should have to stay there whether he confessed or not; the prosecutor replied that he supposed he would, and in his opinion it would make no difference as to legal proceedings, and that it was considered honorable in all cases, if a person was guilty, to confess. It was held that the confessions of the prisoner, made immediately after this conversation, were admissible in evidence against him. *Com. v. Morey*, 1 Gray, 461. And see, to same effect, *State v. Freeman*, 12 Ind. 100.

¹ *Com. v. Tuckerman*, 10 Gray, 172. See, also, *Com. v. Whittemore*, 11 Gray, 201.

In *Hopt v. People*, Sup. Ct. U. S. 1884, Harlan, J., states the case as follows: "It appears that the defendant was arrested at the railroad depot at Cheyenne, Wyoming, by the witness, Carr, who is a detective, on the charge made in the indictment. The father of the deceased, present at the time, was much excited, and may have made a motion to draw a revolver on the defendant; but of that fact the witness did not speak positively. The witness may have prevented him from drawing a weapon, and thinks he told him to do nothing rash. At the arrest a large crowd gathered around the defendant; Carr hurried him off to jail,

sending with him a policeman, while he remained behind, out of the hearing of the policeman and the defendant. In two or three minutes he joined them, and immediately the accused commenced making a confession. What conversation, if any, occurred between the latter and the policeman during the brief period of two or three minutes preceding the confession was not known to the witness. So far as witness knew, the bill of exceptions states, 'the confession was voluntary and uninfluenced by hopes of reward or fear of punishment; he held out no inducement, and did not know of any inducement being held out to defendant to confess.' This was all the evidence showing, or tending to show, that the confession was voluntary or uninfluenced by hope of reward or fear of punishment." It was held that there was no reason to exclude the confession.

Where a prisoner, when arrested, was told by the officer that he was not obliged to answer any questions, but a few days later he was questioned by the officer, and made statements prejudicial to himself, it was held that no inducement or influence on the part of the officer being shown, the statements were admissible in evidence, although the prisoner had no counsel at the time he made them. *Com. v. Sturdivant*, 117 Mass. 122.

² *R. v. Thomas*, 7 C. & P. 345; *Com. v. Knapp*, 9 Pick. 496; *State v. Dar-*

ing, where the defendant confessed his guilt to a fellow-prisoner on being assured by the latter that one criminal cannot testify against another, it was held that the confession was admissible.¹

§ 660. The inducement must refer to a temporal benefit, for hopes which are referable only to a future state are not within the principle which excludes confessions obtained by improper influence.² Hence, the fact that the confession was made in response to spiritual exhortations, even by a clergyman or priest, does not exclude them.³

§ 661. When a party is compelled by duress to make a self-disserving statement, this statement cannot be put in evidence against him.⁴ Legal imprisonment, however, does not operate to exclude a confession made during its continuance when no threats or promises are used.⁵ Thus, when a prisoner after his arrest, upon being interrogated why he had killed his wife, replied, "Because I loved her;" and said further, "I killed her because she loved another better than me;" and also said to a fellow-prisoner in jail, that he had killed her, but if it was to do again he would not do it; it was held that there was nothing in the circumstances under which these confessions were made to

nell, 1 Houst. C. C. 321; *Dumas v. State*, 63 Ga. 600. Though see *Murphy v. State*, 63 Ala. 1.

¹ *State v. Mitchell*, Phill. (N. C.) 447. ² *R. v. Gilham*, 1 Mood. C. C. 186; *Com. v. Drake*, 15 Mass. 161; *State v. Bostick*, 4 Harring. 564; *Matthews v. State*, 9 Lea, 128; though see *R. v. Griffin*, 6 Cox C. C. 219.

³ *R. v. Dingley*, *supra*; *R. v. Gilham*, *supra*, as explained in *Joy on Conf.* 186. See, however, *R. v. Griffin*, 6 Cox C. C. 219. As to privilege of priests in respect to confessional, see *supra*, § 507.

⁴ *Stockflesh v. De Tastet*, 4 Camp. 11; *Robson v. Alexander*, 1 M. & P. 448; *Tilley v. Damon*, 11 Cush. 247; *Foss v. Hildreth*, 10 Allen, 76; *Speer v. State*, 4 Tex. Ap. 474. As to torture, see *supra*, § 646. That the prisoner's feet were tied does not exclude; *State v. Patterson*, 73 Mo. 695; nor

does the fact that the custody was illegal. *Balbo v. People*, 80 N. Y. 484.

⁵ *Com. v. Cuffee*, 108 Mass. 285; *People v. Rogers*, 18 N. Y. 9; *Hartung v. People*, 4 Park. C. R. 324; *Com. v. Mosler*, 4 Barr, 264; *Stephen v. State*, 11 Ga. 225; *Meinaka v. State*, 55 Ala. 47; *Redd v. State*, 68 Ala. 492; *Spicer v. State*, 69 Ala. 159; *Jackson v. State*, 69 Ala. 251; *State v. Guy*, 69 Mo. 430; *Auston v. State*, 14 Ark. 556; and cases cited *supra*, §§ 647, 649, 556-7.

On the question of compelling defendant to expose himself to view, see *supra*, § 315. In *State v. Graham*, 74 N. C. 646, where an officer compelled defendant to put his foot in a track and testified as to the result, it was held that the evidence was competent. *Contra*, *Day v. State*, 63 Ga. 667, and cases cited *supra*, § 315; *infra*, § 796. See fully *supra*, § 315.

render them inadmissible.¹ But it is otherwise when the confession is brought out by compulsion.² And when duress is applied, the burden is on the prosecution to show that it did not influence the defendant.³ But the fact that mob violence is feared does not by itself exclude.⁴

§ 662. A confession is admissible when voluntarily made to a public officer, even though the prisoner be in custody of such officer, unless the confession be in some sense elicited by threats or promises.⁵

Answers to interrogations admissible.

§ 668. A prisoner's confession will not be rejected as evidence merely because it was made in answer to a question which assumed his guilt.⁶ Thus where the officer, who committed the prisoner on a charge of murder, asked

Even when questions are leading.

¹ *State v. Freeman*, 1 Speers, 57.

² *State v. Diddy*, 72 N. C. 325. *Supra*, § 646.

³ *Young v. State*, 68 Ala. 569.

⁴ *Honeycutt v. State*, 8 Baxt. 371. See *supra*, § 646.

⁵ *R. v. Wild*, 1 Mood. C. C. 452; *R. v. Thornton*, 1 Mood. C. C. 27; *R. v. Gibney*, Jebb C. C. 15; *R. v. Upchurch*, 1 Mood. C. C. 465; *R. v. Johnston*, 15 Ir. L. R. 60; *R. v. Kerr*, 8 C. & P. 179; *R. v. Rees*, 7 C. & P. 569; *R. v. Bartlett*, 7 C. & P. 832; *R. v. Ellis*, R. & M. (N. P.) 432; see qualifications in *R. v. Mick*, 3 F. & F. 822; *R. v. Bodkin*, 9 Cox C. C. 403; *R. v. Devlin*, 2 Craw. & Dix, 152; *People v. Murphy*, 63 N. Y. 590; *Balbo v. People*, 80 N. Y. 484; *Cox v. People*, id. 500; *Com. v. Harman*, 4 Barr, 269; *State v. Guy*, 69 Mo. 430; *Jones v. State*, 58 Miss. 349; though see *People v. Wentz*, 37 N. Y. 303; *Young v. Com.*, 8 Bush, 366.

Admissions by a prisoner, elicited by questions of a police officer, with an admonition to tell all she knew, are inadmissible. But a subsequent statement by the prisoner to another officer is not necessarily so far under the same influence as to exclude it. *R. v. Cheverton*, 2 F. & F. 833—Erle.

⁶ *Thornton's Case*, 1 Mood. C. C. 28; *Gibney's Case*, Jebb C. C. 15; *Cox v. People*, 80 N. Y. 500; *State v. Sanders*, 84 N. C. 728; *Phil. on Ev.* 427.

A person being in custody, and having been charged with setting fire to some bobbins of cotton in a mill, was shown a piece of paper (partially burnt) with writing on it, which had been found among the burnt property. Without receiving any caution whatever, he was then asked by the policeman whose writing it was, and what he had done with the remainder of it. It was held, that what he said in answer to the questions was receivable, as the question did not amount to a threat. *R. v. Regan*, 17 L. T. (N. S.) 325.

A policeman asked a prisoner, who was suspected of having made away with her illegitimate child, to tell him where it was. She refused to do so, upon which he said that if she did not tell she might get herself into trouble, and it would be the worse for her. Then she made a statement. It was held that the statement was inadmissible. *R. v. Coley*, 10 Cox C. C. 536. See, also, *Com. v. Nott*, 135 Mass. 269.

"whether, if it was to do over again, he would do it," and the reply was, "Yes sir-ree, Bob;" it was held that both the question and answer were admissible in evidence, as well as the fact that, in making the reply, the prisoner's "manner was short."¹

§ 664. Nor, as has been seen, will a confession, even under oath, be excluded by the fact that it was elicited by questions in prior judicial proceedings, if no compulsion or undue influence was used.² Thus, as we have seen, voluntary admissions of a defendant, given by him in evidence at a fire inquest, and reduced to writing and signed by him, are admissible against him on a trial for arson;³ and so of a schedule of a bankrupt's assets, filed by him in bankruptcy proceedings.⁴ Declarations, also, of the defendant, though made as a witness before a committee of the House of Commons, and under compulsory process, were holden by Abbott, C. J.,⁵ to be afterwards admissible against him, upon an indictment for corruptly granting licenses to public houses. So a statement made

Not excluded by the fact that the statement was under oath, nor by defendant on former trial.

¹ *Carroll v. State*, 23 Ala. 28.

² *R. v. Ellis*, R. & M. (N. P.) 432; *R. v. Thornton*, 1 Mood. C. C. 27; *R. v. Garbett*, 1 Den. C. C. 236; 2 Cox C. C. 448; *R. v. Wheeler*, 2 Mood. C. C. 45; *R. v. Goldshede*, 1 C. & K. 657; *R. v. Tubby*, 5 C. & P. 530; *Com. v. King*, 8 Gray, 501; *Com. v. Reynolds*, 122 Mass. 454; *Hendrickson v. People*, 6 Selden, 13; *Teachout v. People*, 41 N. Y. 7; *People v. McGloin*, 91 N. Y. 241; *S. C.*, 1 N. Y. Cr. Rep. 155; *Anderson v. State*, 26 Ind. 89; *Alston v. State*, 41 Tex. 39; *contra*, *Josephine v. State*, 39 Miss. 615.

³ *Com. v. Bradford*, 126 Mass. 42. See *R. v. Coote*, *infra*, § 665.

⁴ *Abbott v. People*, 75 N. Y. 602. See *infra*, §§ 655, 665.

And so as to sworn admissions before a commissioner in bankruptcy, though the defendant was at the time under criminal charge. *R. v. Wheeler*, 2 Mood. C. C. 45; *R. v. Sloggett*, P. & D. 656; 7 Cox, 139.

A compulsory examination, however,

of a bankrupt under oath, has been held inadmissible, under the U. S. statute, in a criminal proceeding. *U. S. v. Prescott*, 2 Dill. 405.

⁵ *R. v. Mercer*, 2 Stark. 366.

"There is much contradiction in the older cases on the point whether confessions made in the course of legal proceedings, not having reference to the charge upon the prosecution of which they are sought to be used, are admissible. But the subject was fully considered in *R. v. Scott*, 25 L. J. M. C. 128; 7 Cox C. C. 164; and the distinction pointed out. That was a case in which the prisoner had been examined in the Court of Bankruptcy touching his trade, dealings, and estate, under the provisions of the 12 & 13 Vict. c. 106, s. 117 (repealed); and this examination was given in evidence on a criminal charge against the bankrupt of mutilating his trade books. The question whether such evidence was admissible was argued before the Court of Criminal Appeal, and it was

voluntarily under oath by a witness before a coroner's inquest in answer to interrogatories there put to him, although he was at the time informed he was suspected of the crime, has been held subsequently admissible when he was on trial for the homicide.¹ And where a defendant, being mistaken for a witness, was partially examined upon oath, this was held not to vitiate a confession subsequently made by him after due caution from the magistrate.² It is ruled, however, that when a party under charge of committing a particular crime is called by the prosecution and compelled to answer under oath as to such crime, on the trial of another party, his testimony is regarded as given under compulsion, and cannot afterwards be introduced against him when he is on trial; and the same privilege is applied to all cases in which he is forced to answer under oath when charged with the crime as to which his confession is sought to be used against him.³ And, as we will presently see, when the defendant is in custody under charge of crime, and is

admitted on all hands that, in ordinary cases, what is stated by a person in a lawful examination may be used in evidence against him. The main contention was, that inasmuch as by the act it was compulsory upon the bankrupt to answer the questions put to him, whether they tended to criminate him or no, he ought not to be criminally prejudiced by such answers, otherwise the fundamental maxim, '*Nemo tenetur seipsum accusare*,' would be violated. In this view Coleridge, J., concurred; but all the other judges, Lord Campbell, C. J., Willes, J., Alderson and Bramwell, BB., thought the evidence was admissible, and that the maxim relied on had been overruled by the legislature. And the same view of the law has been recently taken with respect to the Bankruptcy Act, 1869. See *R. v. Hillam*, 12 Cox C. C. 174; *R. v. Widdup*, 42 L. J. M. C. 9. Now, where it is made compulsory to answer questions under all circumstances, it is usual for the legislature to insert a clause declaring that the evidence so given shall not be made use of in any

criminal proceedings." Roscoe's Cr. Ev. 50.

¹ *Teachout v. People*, 41 N. Y. 7. See, to same general effect, *R. v. Hawthorth*, 4 C. & P. 254; *R. v. Tubby*, 5 C. & P. 530; *R. v. Braynell*, 4 Cox C. C. 402; *State v. Gilman*, 51 Me. 206; *People v. Hendrickson*, 1 Parker C. R. 409; *People v. Banker*, 2 Parker C. R. 26; *People v. McMahon*, 2 Parker C. R. 663; *Snyder v. State*, 59 Ind. 105; *State v. Broughton*, 7 Ired. 96; *State v. Vaigneur*, 5 Rich. 391; *Shoefler v. State*, 3 Wis. 820; *Dickerson v. State*, 48 Wis. 288; *infra*, § 668; though see *R. v. Lewis*, 6 C. & P. 161; *R. v. Davis*, *ibid.* 177; *R. v. Owen*, 9 C. & P. 238, where the prisoner was examined in his own case. The testimony, however, must be voluntary. *People v. McMahan*, 15 N. Y. 384; *People v. Soto*, 49 Cal. 69.

² *R. v. Webb*, 4 C. & P. 564.

³ *Jackson v. State*, 56 Miss. 311, citing *People v. McMahon*, 15 N. Y. 384; 1 Arch. Cr. Pl. & Pr. (Pomeroy's ed.) 386. *Infra*, § 668.

then sworn and questioned by the examining magistrate, his answers thus compelled cannot afterwards be put in evidence against him.¹ But the fact that the statement was made by the defendant on oath on a former trial when he was examined in his own behalf,

¹ *Infra*, §§ 668-9; *Com. v. Harman*, 4 Barr, 269.

Mr. Taylor (*Ev.* § 821) on this topic says: "On the trial of an indictment for conspiracy, the answers in chancery of the defendants, made on oath by them in a suit instituted against them by the prosecutor, have been received. *R. v. Scott*, 25 L. J. M. C. 128, cited *infra*, § 665; *R. v. Goldshede*, 1 C. & K. 657, per *Ld. Denman*; *R. v. Highfield*, per *Vaughan, B.*, cited 2 Russ. on Cr. 359. See, also, *R. v. Sloggett, P. & D.* 556; 7 Cox, 139, S. C. An affidavit, too, has been given in evidence against a prisoner, which was sworn by him in a suit in Doctors' Commons (*R. v. Walker*, per *Ld. Ellenborough*, cited by *Gurney, B.*, in 6 C. & P. 162, 664); and depositions made by prisoners, when examined as witnesses against other persons on criminal charges, have several times been admitted against themselves. *R. v. Haworth*, 4 C. & P. 254, per *Parke, J.*; *R. v. Tubby*, 5 C. & P. 530, per *Vaughan, B.*; *R. v. Braynell*, 4 Cox C. C. 402. Nay, in one case, the very point decided by Mr. Baron Gurney was distinctly overruled by Chief Justice Cockburn; and a deposition was admitted against a prisoner, who had made it before the justices while under examination as a witness, and who, in consequence of its self-implicating character, had been committed to take his trial. *R. v. Chidley*, 8 Cox C. C. 365. See, also, *R. v. Colmer*, 9 Cox C. C. 506, per *Martin, B.* So, upon a trial for manslaughter, the prisoner's deposition on oath, taken by the coroner upon the inquest,

has been admitted in evidence against him. *R. v. Bateman*, 4 F. & F. 1068, per *Martin, B.*, and *Willes, J.* So the testimony, given by a prisoner before a committee of the House of Commons, has been read against him on a criminal trial (*R. v. Mercer*, 2 Stark. 366, per *Abbott, J.*); though this case is of little authority on the subject under discussion, as the evidence could not then have been given on oath. See per *Ld. Tenterden*, in *R. v. Gilham*, 1 Mood. C. C. 203. The case of *R. v. Britton* (1 M. & Rob. 297, per *Patteson and Alderson, JJ.*), which is sometimes cited as a decision conflicting with the above proposition, is in fact no hostile authority, as the only question there determined was, that on an indictment against a bankrupt for not disclosing his effects under the commission, his balance-sheet, which was only admissible in the event of the commission being valid, could not be given in evidence to prove the petitioning creditor's debt as a part of the commission. Per *Patteson, J.*, in *R. v. Wheeler*, 2 Mood. C. C. 51. On the whole, it seems clear that if a prisoner, on being examined as a witness, has consented to answer questions to which he might have demurred as tending to criminate himself, and which, therefore, he was not bound to answer, his statement will be deemed voluntary, and, as such, may be subsequently used against himself for all purposes (but see *contra*, *R. v. Gillis*, 17 Ir. L. R. (N. S.) 512; 11 Cox C. C. 69), unless he be protected by the special language of some statute."

does not exclude it; he having made it voluntarily, though under oath.¹

§ 665. The privilege extends to all cases where the defendant can prove that the answers offered in evidence were given by him when examined as a witness in another suit, in which he claimed the protection of the court, and had still been illegally compelled to answer.² Testimony so obtained is excluded, not as it seems, because it may possibly be untrue, but because the right of the witness to be silent has been infringed; and it is deemed expedient, on grounds of public policy, to uphold the broad legal maxim, that no man shall be forced to criminate himself.³ But if the witness is wrongfully compelled to answer, and he does answer, that does not render his evidence illegal as respects other parties. It is the witness's own affair, and another party cannot complain of it.⁴

Excluded when answers are compelled against witness's consent.

§ 666. At common law a party accused of a crime cannot be required to answer any questions which may expose him to prosecution. In England, however, in the days of Philip and Mary, a statute was passed authorizing such an examination, under certain conditions; and this statute has been reproduced, with various modifications, in several of the

Examination of prisoner when admissible.

¹ See *State v. Witham*, 72 Me. 531; *People v. Arnold*, 43 Mich. 303; *State v. Eddings*, 71 Mo. 545; *State v. Jefferson*, 77 Mo. 136; *Dumas v. State*, 63 Ga. 600; *Mack v. State*, 48 Wis. 271; *State v. Glass*, 50 Wis. 218; *People v. Kelly*, 47 Cal. 125; *supra*, § 463.

² *Supra*, §§ 463 *et seq.*; *R. v. Garbett*, 1 Den. C. C. 236; 2 C. & K. 474; *R. v. Coote*, L. R. 4 P. C. 599.

³ *Taylor's Ev.* § 822; see *State v. Spier*, 86 N. C. 600.

⁴ *R. v. Kinglake*, 11 Cox C. C. 499. In *R. v. Coote*, 12 Cox C. C. 557; 4 Moore, P. C. C. 463, the alleged confession was made in proceedings under an act of the Quebec legislature, in conformity with which certain officers called "fire marshals" are appointed, with power to inquire into the origin of fires in Quebec and Montreal, and for that purpose to examine

persons on oath. Upon an inquiry, held in pursuance of this statute, as to the origin of a fire in a warehouse occupied by the prisoner, he was examined on oath as a witness. No caution was given to him that his evidence might be used against him. At the time of such examination there was no charge against the prisoner or any other person. Subsequently the prisoner was tried for arson of the said warehouse, and his depositions made at the inquiry before the fire marshals were admitted as evidence against him. It was held by the Privy Council (reversing the judgment of the Court of Queen's Bench for the Province of Quebec, Canada), that the depositions were properly admitted. See *Com. v. Bradford*, 126 Mass. 42, cited *supra*, § 664.

States of the American Union. To give these statutes would transcend the limits of the present work. In England the rule is now defined by 11 & 12 Vict. c. 42, and 14 & 15 Vict. c. 93. By these statutes, which are now noticed because they are of the same character as several American statutes on the same topic, "it would seem that in order to render a prisoner's statement strictly valid as a statutory confession, the following circumstances must all have occurred. The charge must have been read to the accused;¹ all the witnesses must have been examined in his presence, and the depositions read to him after the examinations were completed; he must then, and not till then, be twice cautioned by the justice: first, generally;² and, secondly, as to the inefficacy of any promises or threats which may have been formerly held out to him; his whole statement must next be taken down in his own words;³ it must then be read to him,⁴ and he must be pressed for his signature,⁵ though the act is silent as to the effect of his refusing to sign it, or even to admit its correctness; the justice must also sign the statement;⁶

¹ Taylor's Ev. § 812.

² See *State v. Rorie*, 74 N. C. 148, where it was held that the prisoner should be cautioned that silence would not be used against him. And see *State v. Spier*, 86 N. C. 600.

³ See *R. v. Roche*, C. & M. 341; *R. v. Sexton*, and *R. v. Mallett*, cited 2 Russ. on Cr. 867.

⁴ See § 18; and 2 Russ. on Cr. 881, 882.

⁵ See 2 Russ. on Cr. 881, 882; *R. v. Lambe*, 2 Leach, 552; *R. v. Thomas*, *ibid.* 637; *R. v. Foster*, 1 Lew. C. C. 46; *R. v. Hirst*, *ibid.*; *R. v. Tellicoate*, 2 Stark. 483; *R. v. Pressly*, 6 C. & P. 183.

⁶ See *R. v. Tarrant*, 6 C. & P. 182.

"Although a written examination, if it purport to be taken in conformity with the act, and to be signed by the committing magistrate, is in strictness admissible without proof, it may still be advisable in serious cases, as a matter of caution, to call either the justice or the clerk, so that it may

clearly appear that the proceedings have been conducted in the proper manner. See *R. v. Pikesley*, 9 C. & P. 124; *R. v. Wilshaw*, C. & M. 145. Indeed, this course may become necessary, if the document has not been drawn out in the form given in the schedule, or if it contains erasures or interlineations which require explanation. See *R. v. Brogan*, cited 2 Russ. on Cr. 887; *R. v. Dwyers*, *ibid.* n. p. If, too, the prisoner has not signed his name or mark to the paper, some witness, who was present at the inquiry, should, in prudence, be forthcoming to speak to its identity, and to prove that it was read over to the accused, and assented to by him. See *R. v. Reading*, 7 C. & P. 649; *R. v. Hearn*, C. & M. 109; *R. v. Hopes*, 7 C. & P. 136; 1 M. & Rob. 396, n., S. C.; *R. v. Haines*, 2 Russ. on Cr. 886. It would seem to be further necessary to the validity of an examination as evidence *per se*, that it should appear on the face of the document that it was taken

and this being done, it must be kept with the depositions, and be transmitted together with them and certain other documents to the court where the trial is to be had, on or before the opening of such court."

§ 667. Where the prisoner voluntarily confesses before an examining magistrate, and where it is the duty of the latter to take the examination in writing, when such is done, the writing alone, if producible, is evidence of the confession, and the writing cannot be varied by parol proof.¹

Parol evidence of written examination inadmissible.

Parol evidence, however, of a confession made during an examination before a magistrate, is admissible, although it was taken down in writing by the magistrate, if from informality the written examination is not admissible.² When the official record is lost, its contents may be proved by parol.³ An examination, though informal, may be used to refresh the memory of a witness who was present and took it down.⁴

while the prisoner was under examination on a charge of felony or misdemeanor, or of suspicion of one of those crimes, and that the justices signing it were acting as justices pursuant to statute. *R. v. Tarrant*, 6 C. & P. 182. Whether these facts must appear by a separate caption is a point which is not yet determined. The form in the schedule gives a separate caption, but that form, though legalized, is not rendered necessary by the act; and, under the old law, provided the examination was written on the same paper as the depositions, the heading at the commencement was held to apply to all the statements contained in the document. In this respect the rule agreed with that which governs examinations taken under the Poor Law Acts; for it is not necessary, as was once supposed, that such examinations should have distinct captions, but it will suffice to state in the first caption the names of all the witnesses." *Taylor's Ev.* § 815.

¹ 1 Leach, 309; *Foster*, 255; *Roscoe's Cr. Ev.* 60; *R. v. Walter*, 7 C. & P.

267; *R. v. Morse*, 8 C. & P. 605; *R. v. Bond*, 4 Cox C. C. 231; *State v. Vincent*, 1 *Houst. C. C.* 11; *State v. Brister*, *id.* 150; *Robinson v. State*, 87 *Ind.* 292; *State v. Branham*, 13 *S. C.* 389; *State v. Parish*, 1 *Busbee*, 239; *State v. Irwin*, 1 *Hayw.* 113; *Cicero v. State*, 54 *Ga.* 156; *Wright v. State*, 50 *Miss.* 332. Under Nevada statute see *State v. Rover*, 13 *Nev.* 17.

² *R. v. Bell*, 5 C. & P. 162; *R. v. Fearshire*, 1 *Leach C. C.* 240; *R. v. Read, M. & M.* 403; *State v. Vincent*, 1 *Houst. C. C.* 11; *State v. Brister*, *id.* 150; *Brown v. State*, 71 *Ind.* 470; *State v. Parish*, *Busbee*, 239; see *People v. Taylor*, 59 *Cal.* 640.

³ *Hightower v. State*, 58 *Miss.* 636.

⁴ *Telloote's Case*, 2 *Stark. (N. P.)* 483; *Foster's Case*, 1 *Lew. C. C.* 46; *Hirst's Case*, 1 *Lew. C. C.* 46; *Presely's Case*, 6 C. & P. 183; *R. v. Jones*, *Carlington Suppl.* 13; *R. v. Watkins*, 4 C. & P. 550, *n. b.*; *R. v. Thomas*, 2 *Leach C. C.* 637; *R. v. Jacobs*, 1 *Leach C. C.* 310; *R. v. Fisher*, 1 *Leach C. C.* 310, 311.

Statements collateral to the examination are not excluded by the examination;¹ nor does a subsequent examination necessarily exclude a prior oral confession.²

In Maine it is held that parol evidence of a confession made in a written examination is admissible.³

¹ *R. v. Ball*, 5 C. & P. 267; *R. v. Spilsbury*, 7 C. & P. 788; *Rowland v. Ashbury*, Ry. & M. 221; *Leach v. Simpson*, 4 M. & W. 312; *Harris's Case*, 1 Mood. C. C. 338.

"Thus where one of two prisoners was committed before the other was apprehended, and the depositions against that prisoner were read over before the magistrate to the other prisoner, and after they were read the prisoner went across the room to witness, who was called, and said something to him so loud that it might have been heard by the magistrate if he had been attending, and the magistrate proved the examination of the prisoner before himself, and that the statement to the witness was not contained in it; *Park, J.*, held, that what the prisoner had said to the witness might be given in evidence. *R. v. Johnson*, Glouc. Spr. Ass. 1829, 2 Russ. on Crimes, by Greaves, 4th ed. 453. So where a man and woman were brought before the magistrate on a charge of burglary, and, in the course of the examination of a witness, a glove was produced, which had been found on the man with part of the stolen property in it; on which the man said: 'She gave me the glove, but she knew nothing of the robbery;' the depositions having been put in, and the clerk to the magistrates having proved them, and there being no such statements in the depositions or the examination of the prisoner, *Erskine, J.*, held that what the man said might be proved by parol evidence. *R. v. Hooper*, Glouc. Sum. Ass. 1842, *ibid.*

And it was said by *Best, C. J.*, that his opinion was, that upon clear and satisfactory evidence, it was admissible to prove something said by the prisoner beyond what was taken down by the committing magistrate. *Rowland v. Ashbury*, Ry. & M. 232. So it has been ruled by *Park, J.*, that an incidental observation made by a prisoner in the course of his examination before a magistrate, but which does not form a part of the judicial inquiry, so as to make it the duty of the magistrate to take it down in writing, and which was not so taken down, may be given in evidence against the prisoner. *R. v. Moore*, *Matthew's Dig. Cr. Law*, 157; *R. v. Spilsbury*, 7 C. & P. 187, per *Coleridge, J.* But where it ought to have been taken down in writing, and it was not, *Littledale, J.*, ruled that it was inadmissible. *R. v. Maloney*, *Matthew's Dig. Cr. Law*, 157." *Roscoe's Cr. Ev.* 8th ed. 59.

² *R. v. Carty*, *McNally's Ev.* p. 45.

³ *State v. Rowe*, 61 Me. 171. In this case *Barrow, J.*, said:—

"In some of the cases touching the admissibility of confessions made by prisoners at their examinations before magistrates, the question has been whether any evidence of such confessions, aside from the magistrate's record, could be allowed. With us the practice has constantly been to admit both the record and oral evidence. To this there seems no objection in principle. What is there said by the prisoner does not constitute a plenary judicial confession, because not made before a court competent to

§ 668. But the testimony of an accused party, *taken as such*, is not admissible, when such accused party is put on his oath and sworn, and examined, not on his own motion, but on the motion of the prosecution.¹ This rule is

Answers
under oath
are inad-
missible.

try the case. Hence it is not conclusive upon him, as such a plea in this court would be, unless for cause shown he had leave to withdraw it. But, disregarding his plea before the magistrate, he has the right to plead anew in the court having jurisdiction to determine the cause, and his former confession is simply regarded as evidence for the consideration of the jury."

¹ R. v. Lewis, 6 C. & P. 161; R. v. Davis, *ibid.* 177; U. S. v. Williams, 1 Clifford, 5; Shoeffler v. State, 3 Wis. 820; People v. Gibbons, 49 Cal. 557; State v. Garvey, 25 La. An. 191. As to defendant's testimony on a former trial, see *supra*, § 664.

"One species of irregularity," says Mr. Taylor (Ev. § 818), "in excluding the examination as evidence *per se*, prevents its being used to refresh the writer's memory, and shuts out all parol testimony of what was said on the same occasion. The irregularity in question is where the *examination purports* to have been *taken upon oath*. R. v. Smith, 1 Stark. 242, per Le Blanc, J.; R. v. Davis, 6 C. & P. 177, per Gurney, B.; R. v. Bentley, *ibid.* 148, per *ibid.*; R. v. Rivers, 7 C. & P. 177, per Park, J.; R. v. Owen, 9 C. & P. 238, per Gurney, B.; R. v. Pikeley, *ibid.* 124, per Parke, B., and Bosanquet, J.; R. v. Wheeley, 8 C. & P. 250, per Alderson, B. This rule, which is supported by too many authorities to admit of dispute, rests upon two principles of law, both of which are of very questionable policy, as applied to the particular case under discussion. The first is a principle which has been several times men-

tioned above, namely, that the confession of a prisoner must be voluntary; and it is contended, that a statement made under oath is not so. This is certainly true in one sense, though not in that in which it is used by the advocates for exclusion. A confession not voluntary is excluded. Why? because it may be untrue. A confession made upon oath cannot be rejected on this ground; since it is absurd to contend that an oath, which in all other cases is rightly considered as the most effectual test of truth, should, if taken by a prisoner, be regarded as an inducement to falsehood. But then, it is urged, *Nemo tenetur prodere seipsum*; a prisoner should not be compelled to criminate himself. Admitted; but what then? A prisoner, though sworn, is no more bound to criminate himself than if he were simply interrogated without any oath being administered to him. He has still full liberty to decline to make any explanation or declaration whatever; though if he does consent to answer the questions put to him, he may, perhaps, incur the penalties of perjury should he knowingly utter what is false. 'But a friendless accused is not aware of the law in his favor.' This may be so; but in what other case is a party at liberty to set up his ignorance of the law? If the maxim of the common law, *Ignorantia legis neminem excusat*, be sound, as it unquestionably is; and if, consequently, the defence of acting in ignorance cannot protect an offender even from punishment; on what principle of justice is the accused entitled to say, 'I confessed my crime, and

founded upon the unreliable as well as the inquisitorial character of such statements; and therefore where a man, having been arrested by a constable, without a warrant, upon suspicion of having committed murder, was compelled to answer under oath as a witness at the coroner's inquest, it was held that the statements thus made by him were not admissible against him on his trial for the murder.¹ The same rule obtains where the defendant is compelled to answer under oath questions by the committing magistrate.²

§ 669. But it is otherwise as to voluntary statements. Thus where a magistrate told a prisoner, on examination before him for larceny of a watch, that unless he accounted for the manner in which he became possessed of the watch, he should be obliged to commit him to be tried for stealing, and also warned him not to commit himself by his confessions, it was held that the statements of the prisoner on his examination were admissible as a confession on a subsequent trial;³ though it would be otherwise if there were no such warning.⁴ And the same rule, as we have seen, will apply to a defendant's voluntary testimony given under recent statutes enabling him to be a witness in his own behalf.⁵

As has been seen, the most solemn adjurations do not exclude a confession when there were no threats or promises used.⁶

§ 670. A confession is not rendered inadmissible by the fact that it was made under a mistaken supposition that some of the de-

have sworn that my statement is true; but you, the jury, must not hear what I said, because I was not aware of the existence of a rule of law, which would have expressly justified me in holding my peace?' If the practice of examining prisoners on oath be deemed inquisitorial and harsh, let it be discountenanced, not by rejecting a confession so obtained, but by prohibiting justices from acting in this manner, or even rendering them liable to a penalty in case of disobedience."

¹ *People v. McMahon*, 15 N. Y. 384; *State v. Young*, Wins. (N. C.) 126. See *supra*, § 664. *Aliter*, when the evidence was "entirely voluntary," after notice, and given on the hearing

of another person charged with the same crime. *Teachout v. People*, 41 N. Y. 7; *Dickerson v. State*, 48 Wis. 288.

² *Com. v. Harman*, 4 Barr, 269; *supra*, § 665.

³ *State v. Cowen*, 7 Ired. 239. See *R. v. Stripp*, Dears. C. C. 648; 36 Eng. L. & Eq. 587; *Beggary v. State*, 8 Baxt. 520; *State v. Branham*, 13 S. C. 389; *State v. Rigby*, 6 Lea, 554. The prisoner may explain such statements when proved by the State. *Shivers v. State*, 7 Tex. Ap. 450. But see *Honeycutt v. State*, 8 Baxt. 371.

⁴ *Supra*, § 666.

⁵ *Supra*, §§ 463, 664; *People v. Kelly*, 47 Cal. 125.

⁶ *Supra*, § 647.

defendant's accomplices were in custody, even though the mistake was created by artifice, with a view to obtain the confession, supposing there was nothing in the artifice calculated to produce an untrue confession.¹ Nor do false statements made to the defendant exclude the answer, if such false statements did not amount to promises or threats.² Confessions elicited by a detective while disguised as a confederate are in like manner admissible.³

Artifice
does not
exclude.

On the same reasoning, a letter given by the defendant to the jailer to put into the post is evidence against him though surreptitiously detained and opened.⁴

§ 671. Wherever a promise or threat is held out in such a way as to reach the defendant, although not made to the defendant directly, it will exclude the confession. "Thus, where a superior clerk in the post-office said to the wife of a postman, who was in custody for opening and detaining a letter, 'Do not be frightened; I hope nothing will happen to your husband beyond the loss of his situation;' the prisoner's subsequent confession was rejected, it appearing that the wife might have communicated to him the substance of this statement."⁵ So where, in a case of murder, government had published a handbill, offering pardon to any one of the offenders, except the person who struck the blow, who should give such information as would lead to the conviction of his accomplices; and it appeared that the prisoner was aware of this offer, and was induced by it to make a confession, the court held that what he said could not be given in evidence."⁶

Not necessary that the inducement should be held out directly to the defendant.

§ 672. The presence of persons in authority does not *per se* exclude a confession,⁷ nor does the fact that the custody was with-

¹ *R. v. Burley*, 1 Phil. Evid. 104; *R. v. Derrington*, 2 C. & P. 418; *U. S. v. Champagne*, 1 Ben. 241; *Com. v. Knapp*, 9 Pick. 496; *Com. v. Tuckerman*, 10 Gray, 173; *Com. v. Hanlon*, 3 Brewst. 461; *Price v. State*, 18 Oh. St. 418; *State v. Fortner*, 43 Iowa, 494; *State v. Phelps*, 74 Mo. 128. *Supra*, § 644.

² See *People v. Murphy*, 63 N. Y. 590.

³ *Supra*, § 440.

⁴ *R. v. Derrington*, 2 C. & P. 418.

⁵ *R. v. Harding*, 1 Arm., M. & O. 340.

⁶ *R. v. Boswell*, C. & M. 584. *Taylor's Ev.* § 808. See *Com. v. Morey*, 1 Gray, 461; *Ward v. People*, 3 Hill (N. Y.), 395.

⁷ *Cox v. People*, 80 N. Y. 500; *State v. Cook*, 15 Rich. 29; *Wiley v. State*, 3 Cold. 362. *Supra*, § 652.

out a warrant.¹ Hence the confessions of a prisoner in jail, made by him in the presence of an officer, who had no control over the jail, to a friend who advised him to tell the truth, such friend being in no way connected with the prosecution, and the officer not in any way countenancing the advice, have been held admissible.² The same position was taken in a case where the evidence was that the prisoner, when arrested, made certain confessions to the officer, who used no threats and made no promises, and the prisoner was very much frightened at the time, and spoke partly in English and partly in German; the officer not understanding the latter.³

Presence of person in authority does not necessarily exclude.

§ 673. In conclusion, we may hold that a confession is only to be excluded on the ground of undue influence where it is elicited by temporal inducement, *e. g.*, by threat, promise, or hope of favor held out to the party, in respect of his escape from the charge against him, by a person in authority, under circumstances likely to lead to a false statement; or where there is reason to presume that such person appeared to the party to sanction such a threat or promise.⁴ If the influence applied was such as to make the defendant believe that his condition

Apparent authoritative influence must be applied.

¹ Balbo v. People, 80 N. Y. 484.

² *Supra*, § 649; R. v. Parker, L. & C. 42; Com. v. Smith, 119 Mass. 305; State v. Gossett, 9 Rich. 428. And so where the confession was made directly to the arresting officer. People v. Thoms, 3 Parker C. R. 256; Aaron v. State, 37 Ala. 106.

³ People v. Thoms, 3 Parker C. R. 256; and see State v. Rorie, 74 N. C. 148.

⁴ *Supra*, §§ 650-5; R. v. Upchurch, 1 Mood. C. C. 465; R. v. Jones, R. & R. 152; R. v. Jenkins, R. & R. 492; R. v. Hearn, C. & M. 109; R. v. Thompson, 1 Leach C. C. 4th ed. 291; R. v. Parratt, 4 C. & P. 570; R. v. Enoch, 5 C. & P. 539; R. v. Mills, 6 C. & P. 146; R. v. Thomas, 4 C. & P. 353; R. v. Lloyd, 6 C. & P. 393; R. v. Court, 7 C. & P. 486; R. v. Shepherd, 7 C. &

P. 579; R. v. Drew, 8 C. & P. 140; R. v. Heeman, 1 Dears. C. C. 269; R. v. Nolan, 1 Crawf. & Dix, 74; R. v. Cain, 1 Craw. & Dix, 37; R. v. Wright, 1 Lew. C. C. 48; R. v. Sexton, 1 Deac. Cr. Law, 424, 427; R. v. Thornton, 1 Mood. C. C. 27; R. v. Simpson, 1 Mood. C. C. 410; R. v. Moody, 2 Craw. & Dix, 547; R. v. Luckhurst, 1 Dears. C. C. 245; 6 Cox C. C. 243; 22 Eng. L. & Eq. 604; Com. v. Culver, 126 Mass. 464; People v. Wentz, 37 N. Y. 303; King v. State, 40 Ala. 314; Miller v. People, 39 Ill. 457; Redd v. State, 69 Ala. 257.

In Texas it is required by statute that confessions by parties accused should not be received unless they were previously "warned" of the consequences. *Supra*, §§ 623 *et seq.*

would be bettered by making a confession, true or false, or that he would be made to suffer if he did not confess, the confession is to be excluded ; but if not, the confession is admissible.

§ 674. Where the arresting officer says : " It is better for a man who is guilty to plead guilty, for he gets a lighter sentence ;"¹ and where he says : " You had better tell all about it ;"² these expressions have been held to vitiate confessions so induced.³ Undoubtedly the line of discrimination between the words last quoted and others which have been subjected to a contrary interpretation is difficult to draw accurately. But the principle is of easy definition. Was the inducement likely to lead to a false confession ? If so, the confession must be rejected.⁴

What expressions are to be construed as likely to produce a false impression.

§ 674 a. Whether the confession was voluntary is an independent issue to be determined by the court. The defendant is entitled to produce evidence to prove that it was induced by threats or promises to rebut proof that it was voluntary.⁵ The prosecution may produce evidence that it was voluntary to rebut proof that it was induced by threats or promises.⁶

Question of voluntariness a distinct issue.

V. SLEEP AND DRUNKENNESS.

§ 675. We have already had occasion to observe,⁷ that the capacity of a person making a confession is to be taken into consideration in determining what credence is to be assigned to the confession. It follows that declarations made by a party during sleep are ordinarily inadmissible against him.⁸

Confessions during sleep inadmissible.

§ 676. The mere fact of intoxication, unless amounting to mania, does not exclude a confession made during its continuance,⁹ even though the intoxication was induced by a police officer, who sought in this way to lead the prisoner

to mania, How far drunkenness excludes.

¹ *Com. v. Curtis*, 97 Mass. 574.

⁶ *Com. v. Ackert*, 133 Mass. 402 ; *infra*, § 689.

² See cases cited *supra*, § 651 ; and see, also, *State v. York*, 37 N. H. 175 ;

⁷ *Supra*, § 635.

Vaughan v. Com., 17 Grat. 576.

⁸ *People v. Robinson*, 19 Cal. 49.

³ See *supra*, §§ 650-55.

See *Lanergan v. People*, 39 N. Y. 39 ; *infra*, § 680.

⁴ *Supra*, §§ 650-58.

⁵ *Infra*, § 689 ; *S. P.*, *State v. Platte*, 34 La. An. 1061.

⁹ *Lester v. State*, 32 Ark. 727 ; *State v. Grear*, 28 Minn. 426.

to confess.¹ Confusion, however, produced by intoxication, is a fact for the jury, tending to discredit a confession.²

VI. HOW FAR ORIGINAL IMPROPER INFLUENCE VITIATES SUBSEQUENT CONFESSIONS.

§ 677. Where a confession has once been obtained by means of hope or fear, confessions subsequently made may be inferred to come from the same motive, and are inadmissible, though no immediate influence is shown.³ But if it appear that the original influence has ceased to operate, the confessions are admissible.⁴ On this reasoning,

When influence ceases, confession becomes admissible.

¹ *R. v. Spilsbury*, 7 C. & P. 187; *Gore v. Gibson*, 13 M. & W. 625; *Jeffords v. People*, 5 Parker C. R. 522; *Eskredge v. State*, 25 Ala. 30; *People v. Ramirez*, 56 Cal. 533.

² *Com. v. How*, 9 Gray, 110; *State v. Bryon*, 74 N. C. 351; *State v. Feltes*, 51 Iowa, 495; and an expert may be called to testify that defendant had delirium tremens. *Id. Supra*, § 460.

³ 2 Russ. on Cr. 832; *R. v. Hewett*, C. & Marsh. 534; *R. v. Cooper*, 5 C. & P. 535; *R. v. Howes*, 6 C. & P. 404; *R. v. Rue*, 13 Cox C. C. 209; *Com. v. Cullen*, 111 Mass. 435; *Com. v. Harman*, 4 Barr, 269; *State v. Roberts*, 1 Dev. 259; *Peter v. State*, 4 Sm. & M. 31; *Deathridge v. State*, 1 Sneed, 75; *State v. Guild*, 5 Halst. 163; *Ward v. State*, 50 Ala. 120; *Redd v. State*, 69 Ala. 255; *State v. Jones*, 54 Mo. 478; *Barnes v. State*, 36 Tex. 356; *Walker v. State*, 7 Tex. Ap. 245; *Love v. State*, 22 Ark. 336. But see *Moore v. Com.*, 2 Leigh, 701.

In *R. v. Rue*, *supra*; S. C., 34 L. T. Rep. (N. S.) 400, the prisoner, a servant girl, was questioned by the mother of a child who had been found dead; and she was asked whether she had anything to do with its disappearance; upon which she cried, and said, "If you won't send for the police I will tell

the truth," whereupon her mistress replied, "I will not hurt you if you tell the truth; you will be much happier if you tell the truth;" and she promised not to send for the police; whereupon the prisoner made a confession, which upon the trial was rejected as being made under an inducement. It further appeared that shortly after this confession the mistress sent for a neighbor and informed him of the confession, whereupon he had an interview alone with the prisoner, and asked her questions upon the subject, but he held out no inducement, and she then made a similar confession. It was held that the second confession was so connected, under the circumstances, with the first, that it was inadmissible.

⁴ *R. v. Thompson*, 1 Leach C. C. 325; *R. v. Cheverton*, 2 F. & F. 833; 2 Russ. on Cr. 824; *State v. Howard*, 17 N. H. 171; *State v. Carr*, 37 Vt. 191; *Guild's Case*, 5 Halst. 163; *State v. Roberts*, 1 Dev. 259; *Peter v. State*, 4 Sm. & M. 31; *State v. Vaigneur*, 5 Rich. 391; *State v. Hash*, 12 La. An. 895; *Dinah v. State*, 39 Ala. 359; *Levison v. State*, 54 Ala. 520; *Sampson v. State*, 54 Ala. 241; *Porter v. State*, 55 Ala. 95; *People v. Jim Ti*, 32 Cal. 60; *Strady v. State*, 5 Cold. 300; *Salvidge v. State*, 30 Tex. 60.

in an early case in Pennsylvania, where a boy of twelve years old, who had been indicted for arson, was urged to make a confession, by holding out the expectation of a pardon if he did, and by threats of a rigorous confinement if he did not, but without effect; and afterwards on an examination before a magistrate voluntarily confessed the crime; it was ruled the confession was admissible, the early improper influence being supposed to have passed away, it being left to the jury to consider whether the prisoner had falsely declared himself guilty or not.¹

But under such circumstances, after the fact is known that the influence of either hope or fear existed inducing a former confession, an explicit warning should be given the prisoner of the consequences of a confession; and it must be clear that he was relieved from the effect of the improper influence previously applied before such second confession is admissible in evidence.² When such a warning has been given authoritatively, or when the defendant has been cautioned by a person in recognized authority, that a confession would not benefit him, or that he must not say anything against himself, a subsequent confession based on this warning may be received.³

The burden is on the prosecution to prove that the second confession was not made under influences which rendered the first inadmissible.⁴

VII. HOW FAR EXTRANEOUS FACTS REACHED THROUGH AN INADMISSIBLE CONFESSION MAY BE RECEIVED.

§ 678. Although confessions made by threats or promises are not evidence, yet if they are attended by extraneous facts which show

¹ *Com. v. Dillon*, 4 Dall. 116.

Mass. 144; *Jones v. State*, 58 *Miss.*

² *Meynell's Case*, 2 *Lew. C. C.* 122; 349.

Van Buren v. State, 24 *Miss.* 512; *State v. Fisher*, 6 *Jones (N. C.)*, 478; *State v. Scates*, 5 *ibid.* 420; *State v. Gregory*, *ibid.* 315; *State v. Jones*, 54 *Mo.* 478.

⁴ *Deathridge v. State*, 1 *Sneed*, 75; *State v. Roberts*, 1 *Dev.* 259; *Thompson v. Com.*, 20 *Grat.* 724; *Peter v. State*, 4 *Sm. & M.* 37; *Cady v. State*, 44 *Miss.* 333; *State v. Drake*, 82 *N. C.* 592; and see, also, observations of *Patteson, J.*, in *R. v. Sherrington*, 2 *Lew. C. C.* 123; *Roscoe's Cr. Ev.*, 8th ed. 68. Compare *McAdory v. State*, 62 *Ala.* 677.

³ *R. v. Howes*, 6 *C. & P.* 404; *Joy on Conf.* 72-4; *Chabcock's Case*, 1

that they are true, any such facts which may be thus developed, and which go to prove the existence of the crime of which the defendant was suspected, will be received as testimony;¹ *e. g.*, where the party thus confessing points out or tells where the stolen property is;² or where he states where the deceased was buried;³ or gives a clew to other evidence which proves the case.⁴ But if, in consequence of the confession of the prisoner thus improperly drawn out, the search for the property or person in question proves ineffectual, no proof of confession or search will be received.⁵ And in case of larceny the property must be identified by other evidence as that which was actually stolen.⁶ But when the search is successful, and

Extra-
neous facts
reached
through an
inadmis-
sible con-
fession may
be proved.

¹ That this involves the admission of the confession, so far as it relates to the discovery, see *Laros v. Com.*, 84 Penn. St. 200; *Sampson v. State*, 54 Ala. 241; *Spicer v. State*, 69 Ala. 159; *Clemons v. State*, 4 Lea, 23; *Rhodes v. State*, 11 Tex. Ap. 563.

² *Montgomery v. State*, 63 Ala. 1.

³ 1 Ph. Ev. 411; *R. v. Warickshall*, 1 Leach, 263; *R. v. Mosey*, *ibid.* 265, n., per Buller, J., and Perryn, B.; *R. v. Lockhart*, *ibid.* 386; *R. v. Gould*, 9 C. & P. 364, per Tindal, C. J., and Parke, B.; *R. v. Thurtell*, cited Joy on Conf. 84; *R. v. Cain*, 1 Cr. & D. C. C. 37, per Torrens, J.; *Russ. on Cr.* 861, 862; *Com. v. Knapp*, 9 Pick. 496; *Duffy v. People*, 27 N. Y. 589; *State v. Brick*, 2 Harring. 530; *State v. Crank*, 2 Bailey, 67; *State v. Vaigneur*, 5 Rich. 391; *Hudson v. State*, 9 Yerg. 408; *Deathridge v. State*, 1 Sneed, 75; *Jordan v. State*, 32 Miss. 382; *Belote v. State*, 36 Miss. 96; *Jane v. Com.*, 2 Metc. (Ky.) 30; *Elizabeth v. State*, 27 Tex. 329; *Mountain v. State*, 40 Ala. 344; *People v. Hoy Yen*, 34 Cal. 176; *People v. Parton*, 49 Cal. 632; *Fredrick v. State*, 3 W. Va. 695; *Nolen v. State*, 14 Tex. Ap. 482.

⁴ *R. v. Leatham*, 8 Cox C. C. 498; *Rice v. State*, 3 Heisk. 215; *Strait v. State*, 43 Tex. 486; *Davis v. State*, 8

Tex. Ap. 510; *Massey v. State*, 10 Tex. Ap. 645; *State v. Mortimer*, 20 Kans. 93.

⁵ *R. v. Jenkins*, R. & R. 492; *R. v. Hearn*, C. & M. 109.

⁶ *State v. Due*, 7 Foster, 256.

Mr. Joy states the rule to be, that where confessions are not admissible, from the circumstances under which they were obtained, contemporaneous declarations of the party are receivable in evidence or not according to the attending circumstances, but any act of such party, though done in consequence of such confessions, is admissible in evidence, if it appears from a fact thereby discovered that so much of the confession as immediately relates to it is true. See *R. v. Warickshall*, 1 Leach C. C. 263; *R. v. Gould*, 9 C. & P. 364; *R. v. Harris*, 1 Mood. C. C. 338; *Com. v. Knapp*, 9 Pick. 496, 511; *R. v. Cain*, 1 Craw. & Dix, 37; *R. v. Griffin*, R. & R. 151. But see *R. v. Jones*, R. & R. 152; *R. v. Jenkins*, R. & R. 492; *Frederick v. State*, 3 W. Va. 695.

Unless the fact developed is relevant independently of the confession of guilt, it is not adequate evidence of guilt. *State v. Garvey*, 28 La. An. 925.

the inculpatory thing is thus identified, this necessarily brings with it the reception in evidence of the defendant's statements giving the clue.¹

VIII. ADMISSIONS BY SILENCE OR CONDUCT.

§ 679. If A., when in B.'s presence and hearing, makes statements which B. listens to in silence, interposing no objection, A.'s statements may be put in evidence against B. whenever B.'s silence is of such a nature as to lead to the inference of assent.² Thus, although neither the evidence nor the declaration of a wife is admissible

Statements
silently ac-
quiesced
in may be
treated as
admis-
sions.

¹ *Ibid.*; *Montgomery v. State*, 63 Ala. 1.

² *R. v. Bartlett*, 7 C. & P. 832; *Hay-slep v. Gymer*, 1 Ad. & E. 162; *Morgan v. Evans*, 3 Cl. & F. 205; *Gaskill v. Skene*, 14 Q. B. 664; *Wiggins v. Burkh-am*, 19 Wall. 129; *Rea v. Missouri*, 17 Wall. 532; *Bailey v. Woods*, 17 N. H. 365; *Corser v. Paul*, 41 N. H. 24; *State v. Reed*, 62 Me. 129; *Com. v. Call*, 21 Pick. 515; *Com. v. Sliney*, 126 Mass. 49; *Jewett v. Banning*, 23 Barb. 13; *Kelley v. People*, 55 N. Y. 565; *Wright v. People*, 1 N. Y. Cr. 462; *McClenkan v. McMillan*, 6 Penn. St. 366; *Ettinger v. Com.*, 98 Penn. St. 338; *Knight v. House*, 29 Md. 194; *Murphy v. State*, 36 Ohio State, 628; *Hagenbaugh v. Crabtree*, 33 Ill. 225; *Pierce v. Goldsberry*, 35 Ind. 317; *State v. Waltz*, 52 Iowa, 227; *State v. Devlin*, 7 Mo. App. 32; *Green v. Har-ris*, 3 Ired. 210; *State v. Bowman*, 80 N. C. 432; *Wells v. Drayton*, 1 Mill (S. C.), 111; *Block v. Hicks*, 27 Ga. 522; *Drumright v. State*, 29 Ga. 430; *Alston v. Grantham*, 26 Ga. 374; *Brad-ford v. Haggerthy*, 11 Ala. 698; *Ben-ziger v. Miller*, 50 Ala. 207; *Kendricks v. State*, 55 Miss. 436; *Ford v. State*, 34 Ark. 649; *People v. McCrea*, 32 Cal. 98; *People v. Estrado*, 49 Cal. 171. See 1 Cow. & Hill N. 191; *Noonan v. State*, 1 Sm. & M. 562; *Ingle v. State*, 1 Tex. Ap. 307. See *Bejarano v. State*, 6 Tex.

Ap. 565; *Loggins v. State*, 8 Tex. Ap. 434; *Jeffries v. State*, 9 Tex. Ap. 598; *Robins v. State*, 9 Tex. Ap. 671.

"In the case of *R. v. Newman*, 1 R. & B. 268; 3 C. & K. 252, it was sought to push this doctrine to an unwarrantable length. That was an information for libel, to which truth was pleaded as a justification under the Act of 6 and 7 Vict. c. 96, and the defendant tendered evidence to prove that the very imputations contained in the libel in question had been previously published in another work, and that the prosecutor, though well aware of that fact, had taken no steps to obtain redress. The court, however, very properly rejected the evidence, as being far too vague to be received in a court of justice as any proof of acquiescence." *Taylor's Ev.* § 828. See *Neile v. Jakle*, 2 C. & K. 709.

As suggesting cautions as to such evidence, see *Campbell v. State*, 55 Ala. 80.

"A statement is made either to a man, or within his hearing, that he was concerned in the commission of a crime, to which he makes no reply; the natural inference is, that the imputation is well founded or he would have repelled it." *Best on Presump-tions*, § 241; affirmed in *State v. Cleaves*, 59 Me. 300, and reaffirmed in *State v. Reed*, 62 Me. 142; *S. P., Kel-*

against the husband on a criminal charge, yet observations made by her to him upon the subject of the offence, to which he gives no answer or an evasive reply, are receivable in evidence as an implied admission on his part.¹

It has been held admissible, on an indictment for an illegal operation on a woman, for an officer to testify that he took the defendant, after his arrest, into the presence of the woman, and asked her if the defendant performed an operation upon her; that the woman said he did; that the defendant asked the woman if she had been operated on previously by any other person; that the woman said, "No, she came there to be operated on to get rid of a child," to which he made no response.²

It makes no difference, in such cases, that the person making the statement acquiesced in was incompetent as a witness.³

ley v. People, 55 N. Y. 565. See, also, State v. Swink, 2 Dev. & Bat. 9; State v. Stone, Rice, 147; Donnelly v. State, 2 Dutch. 463; Keith v. State, 27 Ga. 483; State v. Pratt, 20 Iowa, 267.

In People v. Ah Yute, 53 Cal. 613; 54 Cal. 89, it was held that in prosecutions for murder, the testimony of the officer who made the arrest as to statements then made by third persons in the presence of defendant and of the dead body of deceased, to the effect that the defendant was guilty of the killing, and testimony that certain other persons had identified defendant at the jail soon after the arrest as the guilty party, is hearsay, unless accompanied with proof of such conduct and statements of defendant as might imply assent.

That such an admission may corroborate an accomplice, see R. v. Cramp, 5 Q. B. D. 307.

¹ R. v. Smithers, 5 C. & P. 332; R. v. Bartlett, 7 C. & P. 832; State v. Middleham, Sup. Ct. Iowa, 1883.

² Com. v. Brown, 121 Mass. 69.

"The admission," said Morton, J., "of the Statements of Emma L. Smith and Frances A. Chase, made in the

presence and hearing of the defendant, was proper. The rule is, that a statement made in the presence of a defendant, to which no reply is made, is not admissible against him, unless it appears that he was at liberty to make a reply, and that the statement was made by such person and under such circumstances as naturally to call for a reply, unless he intends to admit it. But if he makes a reply, wholly or partially admitting the truth of the facts stated, both the statement and the reply are competent evidence. Com. v. Kenney, 12 Met. 235; Com. v. Galavan, 9 Allen, 271. In this case, when Emma L. Smith and Frances A. Chase stated that the defendant had performed an operation on them, he did not remain silent, but asked them in reply if they had been previously operated upon by another person."

³ R. v. Smithers, R. v. Bartlett, *ut supra*; People v. McCrea, 32 Cal. 98. That the inference of assent is strengthened when the statement is an answer to a question, see Andrews v. Frye, 104 Mass. 234; Mitchell v. Napier, 22 Tex. 120.

§ 680. To give such silence, however, effect as an admission, the party charged with it must have been in a position to explain.¹ "Before acquiescence in the language or conduct of others can be assumed as a concession of the truth of any particular statement, or of the existence of any particular fact, it must plainly appear that the language was heard and the conduct understood."² Thus, neither a person when asleep,³ nor when intoxicated,⁴ nor a deaf person,⁵ can be in this way prejudiced by statements made in his presence; though it is otherwise of a foreigner if it appear that he understood the language spoken.⁶ Nor even under our present practice does a defendant's silence, when charges are judicially made against him, authorize such charges to be proved against him on future trials;⁷

But not so when accused was not in a position to speak.

¹ *Com. v. Kenney*, 12 Met. 235; *Com. v. Harvey*, 1 Gray, 487; *Larry v. Sherburne*, 2 Allen, 35; *Drury v. Harvey*, 126 Mass. 519; *Donnelly v. State*, 2 Dutch. 601; *Slattery v. People*, 76 Ill. 217; *Sylvester v. State*, 71 Ala. 17; *Loggins v. State*, 8 Tex. Ap. 434; *Boyd v. Bolton*, Irish Rep. 8 Eq. 113. See note in 1 Hawley's Cr. Rep. 31.

In *Com. v. Bradley*, 134 Mass. 530, it was said by Morton, C. J.: "Declarations made in the presence of a party, to which he makes no reply, are sometimes competent, as equivalent to tacit admission by him. This depends on whether he heard and understood them, whether he is at liberty to reply, whether he is in custody or under any restraint or duress, and whether the statements are made by such persons and under such circumstances as naturally to call for a reply. *Commonwealth v. Kenney*, 12 Met. 235; *Commonwealth v. Harvey*, 1 Gray, 487; *Commonwealth v. Galavan*, 9 Allen, 271. In this case the question was put by the son to the defendant when he was under no restraint or duress; and it was properly left to the jury to decide whether he heard it, and whether it was put to him under such

circumstances that, according to human experience, he would naturally reply to it."

² *Com. v. Harvey*, 1 Gray, 487; *Long v. State*, 13 Tex. Ap. 211. See *State v. Edwards*, 13 S. C. 30. That it is for the jury to judge whether the defendant heard the statements, see *Moyer v. State*, 66 Ga. 740.

³ *Lanergan v. People*, 39 N. Y. 39; *supra*, § 675.

⁴ *State v. Perkins*, 3 Hawks, 377; *supra*, § 676.

⁵ *Tufts v. Charlestown*, 4 Gray, 537; *Com. v. Galavan*, 9 Allen, 271; *State v. Perkins*, 3 Hawks, 377; *Perry v. State*, 10 Ga. 511.

⁶ *Wright v. Maseras*, 56 Barb. 521.

⁷ *Child v. Grace*, 2 C. & P. 193; *R. v. Turner*, 1 Mood. C. C. 347; *R. v. Appleby*, 3 Stark. (N. P.) 33. See, however, Lord Denman's remarks in *Simpson v. Robinson*, 12 Q. B. 512; and see *R. v. Coyle*, 7 Cox C. C. 74; *U. S. v. Brown*, 4 Cranch C. C. 508; *Com. v. Kenney*, 12 Met. 235; *Com. v. Walker*, 13 Allen, 570; *Bob v. State*, 32 Ala. 560; *Noonan v. State*, 9 Miss. 562; *Broyles v. State*, 47 Ind. 251. That this is the case with silence at a coroner's inquest, see *People v. Willett*, 92

nor can silence, when a party is under arrest, be used as sustaining the hypothesis of acquiescence.¹ Silence, also, while in custody, when charged with crime by a person jointly arrested, does not authorize the admission of such charge.² It has also been held that statements, made by a clergyman to his congregation in a sermon, cannot be put in evidence against the congregation, although they listened in silence to the statements;³ nor generally is such silence to be deemed an assent when it is explicable on other grounds than that of consciousness of guilt.⁴

§ 681. A party is not at common law in any way bound by the testimony of witnesses called by him and examined on a trial.⁵ Even under the recent statutes, permitting the parties to be witness, such evidence, it has been held in Pennsylvania, cannot be employed in other suits against the party introducing it.⁶ It is otherwise, so it has been held in Maine, in respect to the statements of witnesses made at a prior hearing of the same case, which statements the party is at

N. Y. 29; S. C., 27 Hun, 469; 1 N. Y. Cr. Rep. 355. See *supra*, §§ 230, 668, 680.

¹ U. S. v. Brown, 4 Cranch C. C. 508; Com. v. Kenney, 12 Met. 235; Com. v. Walker, 13 Allen, 570; Com. v. McDermott, 123 Mass. 470; Bob v. State, 32 Ala. 560; Noonan v. State, 9 Miss. 562.

² Com. v. Walker, 13 Allen, 570; Com. v. Kenney, 12 Met. 235; Com. v. McDermott, 123 Mass. 440. It is otherwise when defendant makes partial reply. Com. v. Brown, 121 Mass. 69. *Supra*, § 679.

³ Johnson v. Trinity Church, 11 Allen, 123.

⁴ Com. v. Harvey, 1 Gray, 487; Com. v. Kenney, 12 Met. 235; Donnelly v. State, 2 Dutch. 601; Slaterry v. People, 76 Ill. 217. See note in 1 Hawley's Cr. R. 36, and cases cited Whart. Ev. § 680.

In Com. v. Sliney, 126 Mass. 49, which was a trial for keeping a house for prostitution, a witness testified, against the defendant's objection, that he had a conversation on the piazza

of the house in question with a girl; that the defendant was also at the same time out of doors, and from fifteen to twenty feet distant from him and the girl; that the girl spoke very loud, and solicited him to have criminal intercourse with her in the house, and stated that the price would be a certain sum, a portion of which she was obliged to pay the defendant. The judge instructed the jury that it was for them to say, upon the evidence, whether the defendant heard the conversation; and that, if they did not find she heard it, they were to disregard the evidence, it being outside of the house. It was held that the defendant had no ground of exception.

⁵ Melen v. Andrews, M. & M. 336; R. v. Appleby, 3 Stark. 33; R. v. Turner, 1 Mood. C. C. 347; Child v. Grace, 2 C. & P. 193; R. v. Swinner-ton, C. & M. 593; Com. v. Kenney, 12 Met. 237.

⁶ See Ayres v. Wattson, 57 Penn. St. 360; McDermott v. Hoffman, 70 Penn. St. 52.

liberty to contradict, he being entitled to be sworn as a witness in the case.¹ But silence of this kind by a defendant on the trial of a criminal issue cannot in any view be rightfully admitted against him under the statutes providing that his non-testifying shall not be used against him, he not offering himself as a witness.² But if the defendant, having full opportunity to do so, fail, when on the stand, to controvert that which was testified against him, this may be regarded, when the matter is one within his personal knowledge, as an admission of the truth of such testimony.³

§ 682. The fact that an unanswered letter or other paper is found in the custody of a party, but not acknowledged by him, is not ground for the admission of the paper as evidence against him.⁴ Were it admitted, an innocent man might, by the artifices of others, be charged with a *prima facie* case of guilt which he might find it difficult to repel.⁵ It is otherwise, however, when the party addressed in any way invited the sending to him of the letter;⁶ or when there is

Letter in possession of a party not admissible against him.

¹ Blanchard v. Hodgkins, 62 Me. 120.

² *Infra*, § 435.

³ Comstock v. State, 14 Neb. 205.

⁴ U. S. v. Crandell, 4 Cranch C. C. 683; Com. v. Edgerly, 10 Allen, 184; People v. Green, 1 Parker C. R. 11; People v. Thoms, 3 Parker C. R. 256.

⁵ See to this effect R. v. Hevey, 1 Leach C. C. 232; R. v. Plumer, R. & R. 264; Doe v. Frankis, 11 A. & E. 795; Smiths v. Shoemaker, 17 Wall. 630; Com. v. Eastman, 1 Cush. 189; Dutton v. Woodman, 9 Cush. 262; Robinson v. R. R., 7 Gray, 92; Fearling v. Kimball, 4 Allen, 125; Com. v. Edgerly, 10 Allen, 184; People v. Green, 1 Parker C. R. 11; Waring v. Tel. Co., 44 How. (N. Y.) Pr. 69. See remarks of Lord Denman in Doe v. Frankis, 11 A. & E. 795, and of Lord Tenterden, in Fairlie v. Denton, 3 C. & P. 103.

In a portmanteau, not proved to belong to a prisoner on trial, was found a paper folded like a letter, and con-

taining in the inside what purported to be an inventory of goods pawned at different times. The inventory was not in his handwriting; but on the outside of the paper his name, and the word private, both in his handwriting, were indorsed. It was ruled that the contents of the paper were not admissible against him. R. v. Hare, 3 Cox C. C. 247.

⁶ R. v. Cooper, L. R. 1 Q. B. D. 19.

In this case it was said by Lord Coleridge, "that it has often been held that when a letter is put in course of transmission, the postmaster-general holds it as the agent of the receiver," citing R. v. Jones, 1 Den. C. C. 551; 19 L. J. (M. C.) 162; R. v. Burdett, cited in 4 B. & Ald. 179. For the crown it was argued that if the prisoner had been indicted in respect of any specific one of the letters in question, no doubt the sender ought to have been called; but here it was otherwise. It was said by the court that, "even apart from the authori-

any ground to infer he acted on the letter.¹ Where such tacit recognition is claimed, the whole conversation or correspondence which constitutes the recognition must be given.²

§ 683. Confessions may be by *acts* as well as by *words*. For a man to put on the dress of a policeman, or of an army officer, is equivalent to saying, "I am a policeman," or "I am an army officer."³ Where, also, the question is whether the stationing a flagman at a crossing is requisite to public safety, the fact that a flagman has been assigned by the company to such station (he being absent at the time of the collision) may be treated as an admission by the company that a flagman should be so placed.⁴ In the same line may be mentioned the acts of a prisoner in hiding stolen property, and in flight,⁵ and the conduct of an accused party when informed of the accusation.⁶

IX. WHAT CONFESSIONS MAY PROVE.

§ 684. We may now regard it as settled that the admissions of a party may be received when relating to the contents of a writing, without notice to produce; nor can such testimony be excluded on the ground that it is parol

ties, which show generally that the postmaster is the agent of the person to receive a letter, here the terms of the advertisement expressly made him so. At any rate it was insisted the letters must be admissible under the last count. Under that count he might have been guilty of an attempt, and for that they are clearly material. By the majority of the court it was held that the letters were admissible. The ground on which this decision can be best sustained is that the letters were invited by the defendant, and were in the hands of the postmaster as his agent." See *Com. v. Eastman*, 1 Cush. 189. As to agency, see distinctions taken *infra*, § 695.

¹ *Dewett v. Piggott*, 9 C. & P. 75; *R. v. Horne Tooke*, 25 How. St. 120; *R. v. Watson*, 2 Stark. 144; *Smiths v. Shoemaker*, 17 Wall. 630.

In *Com. v. Waterman*, 122 Mass. 43, it was held that a letter from the defendant's housekeeper, intimately acquainted with his affairs, and admitted by him to have been received by him, advising him to disguise himself for the trial, was admissible against him.

² *Mattocks v. Lyman*, 16 Vt. 113.

³ See *supra*, § 223; *Nolen v. State*, 14 Tex. Ap. 482.

⁴ *Readman v. Conway*, 126 Mass. 374; *McGrath v. R. R.*, 63 N. Y. 522. See *Penn. R. R. v. Henderson*, 51 Penn. St. 315; *West Chester R. R. v. McKelwee*, 67 Penn. St. 311; *McKee v. Bidwell*, 74 Penn. St. 218; *Russell v. Miller*, 26 Mich. 1.

⁵ See *infra*, §§ 748-51.

⁶ *Ibid.*; *Com. v. McPike*, 3 Cush. 181; *Jewett v. Banning*, 21 N. Y. 27; *People v. McKee*, 36 N. Y. 113.

proof of a written instrument. "There does not, on principle, seem any reason why the admissions of a prisoner should not be receivable in evidence as well when they relate to the contents of a written document as when they amount to direct confessions of guilt. The rule is generally laid down in the broadest terms: *Optimum habemus testem confitentem reum*. Everything which the prisoner says against himself is proper for the consideration of the jury, who are to ascribe such weight to it as it may seem to them to deserve."¹

§ 685. It has been also held that the rule requiring the best evidence attainable will not preclude the putting in evidence the confessions of a party, made out of court, even though he be in court, open to examination, at the time they are offered.²

Confessions not excluded because party could be examined.

§ 686. A confession, if there be independent proof of the *corpus delicti*, we have elsewhere seen,³ may prove marriage;⁴ and an admission of a party that he had been married according to the laws of a foreign country may render it unnecessary, if the confession be corroborated, to prove that the marriage had been celebrated according to the laws of that country.⁵

May prove marriage.

§ 687. It is settled, however, that an admission, whether under oath on an examination, or otherwise, is not admissible to prove record facts.⁶ It is at the same time competent to show by admissions the consequences of facts provable by record. Thus a witness can be asked whether he has not been in prison.⁷

But not record facts.

¹ 1 Russ. on Cr. 218, n., relying on *Slatterie v. Pooley*, 6 M. & W. 669. See more fully Whart. on Ev. § 1091, for the authorities in civil relations. In *R. v. Walsh*, 1 Den. C. C. 199, this rule is recognized.

² *Supra*, §§ 360, 429, 433; *Clark v. Hougham*, 2 B. & C. 149; *Woolray v. Rowe*, 1 Ad. & El. 114; *Brubacker v. Taylor*, 76 Penn. St. 83; *Mason v. Poulson*, 43 Md. 162.

³ *Supra*, §§ 180-2; Whart. on Ev. § 83.

⁴ See *Com. v. Jackson*, 11 Bush, 679.

⁵ *R. v. Newton*, 2 M. & Rob. 503, per Wightman and Cresswell, JJ.; 1 C. & K. 164, S. C., *nom. R. v. Simmonsto*. But see *R. v. Flaherty*, 2 C. & K. 782; and *supra*, § 172.

⁶ *Supra*, §§ 153, 179; Whart. on Ev. §§ 63, 64, 541, 991.

⁷ *Supra*, § 474.

X. HOW CONFESSIONS ARE TO BE CONSTRUED.

§ 688. The admission, in a conversation or document, by the defendant of a fact disadvantageous to himself will not be received without receiving at the same time all such other parts of such conversation or document, whether emanating from himself or from another, as may tend to explain or qualify the part first given.¹ The whole relevant context is in such case to be left to the jury, who are to say whether the facts asserted by the defendant in his favor are true.²

Whole confession must be proved.

¹ *Supra*, § 627; *R. v. Clewes*, 4 C. & P. 221; *R. v. Jones*, 2 C. & P. 629; *R. v. Higgins*, 3 C. & P. 603; *Rouse v. Whited*, 25 N. Y. 170; *Platner v. Platner*, 78 N. Y. 90; *Hanrahan v. People*, 91 Ill. 142; *McCulloch v. State*, 48 Ind. 109; *Chambers v. State*, 26 Ala. 59; *Frank v. State*, 27 Ala. 37; *Hais-ton v. Hixen*, 3 Sneed, 691; *State v. Phillips*, 24 Mo. 476; *State v. Brans-tetter*, 65 Mo. 149; *State v. Napier*, 65 Mo. 462; *Massey v. State*, 1 Tex. Ap. 563; and see the *Queen's Case*, 2 B. & E. 294. So, however, did not act Sir E. Coke, whatever he may have thought. Among the many stains which recent developments have cast on the memory of that profound jurist, but most arbitrary judge, the blackest is that which has been brought to public notice by the researches of Mr. Amos, in that very curious book, "The Great Oyer of Poisoning; the Trial of the Earl of Somerset, for the Poisoning of Sir Thomas Overbury: London, 1846." Mr. Amos places it beyond all doubt that Coke, when prosecuting officer for the crown, superintended in person the examination of prisoners; applied the most inhuman and indecent influences to extort confessions; and then, when the confession was got, altered it to suit his own purposes, striking out qualifications, and even working with his own hand into the text

glosses which would meet what he well knew would be the pinch of the case. No counsel was then allowed to the prisoner; and the fraud was either not detected, or if observed, the attempt to expose it was bluffed off by the coarse and bullying tone Coke could so well assume. But the papers themselves survive, and incorporate the original confession, with Sir E. Coke's marginal notes, erasures, and interlineations. The reports in the State Trials follow the papers as amended, and it was on them the convictions took place. The originals are now exhibited by Mr. Amos, to show how different the confession was, as actually given, from what it was when Coke procured by it a conviction. *Great Oyer*, etc. 208, 224, 342, 346.

² *Whart. on Ev.* §§ 1108-9; *Smith v. Blandy, R. & M. (N. P.)* 258; *R. v. Higgins*, 3 C. & P. 603; *R. v. Clewes*, 4 C. & P. 221; *Resp. v. M'Carty*, 2 Dall. 86; *Brown's Case*, 9 Leigh, 633; *Blackburn v. State*, 23 Oh. St. 146; *Elland v. State*, 52 Ala. 322; *Bower v. State*, 5 Mo. 364; *Green v. State*, 13 Mo. 382; *Young v. State*, 2 Yerg. 292; *Crawford v. State*, 4 Cold. 190; *State v. Worthington*, 64 N. C. 594; *Griswold v. State*, 24 Wis. 144; *Shrivers v. State*, 7 Tex. Ap. 248; *Brown v. State*, 8 Tex. Ap. 139. Such evidence is not excluded by the fact that part of

A confession, however, is not excluded by the fact that it is part of a conversation, the rest of which the witness did not hear,¹ or does not remember.²

Only the relevant parts of the context are to be received.³

That these rules are applicable to written admissions is shown in another work.⁴

While a letter can be put in evidence without that to which it is a reply, yet if an entire correspondence be offered, it is to be given complete.⁵ Nor can a letter found on a party's person, or addressed to him, be admitted, without showing that he answered it, or invited it, or in some way acquiesced in its contents.⁶

The accuracy requisite in the reproduction, by a witness, of oral statements of another, has been already considered.⁷ It would be absurd to require an exact recital of the words used by the party whose statement is testified to. It is enough if the substance be given.⁸ But a mere vague impression of what the defendant said will not be enough.⁹

XI. HOW ADMISSIBILITY OF CONFESSIONS IS TO BE DETERMINED.

§ 689. It is the province of the court, and not of the jury, to determine whether a confession be made with that degree of freedom which is necessary to make it admissible evidence.¹⁰ And when there is a general objection

Question of admissibility is for the court.

the conversation referred to the admission of other crimes by the defendant. *State v. Underwood*, 75 Mo. 13.

¹ *Com. v. Pitsinger*, 110 Mass. 101; *State v. Pratt*, 88 N. C. 639; *Redd v. State*, 68 Ala. 492.

² *Kendall v. State*, 65 Ala. 492.

³ *Garrard v. State*, 50 Miss. 147.

⁴ See, for cases, *Whart. on Ev.* § 1103.

⁵ *Ibid.*

⁶ *Supra*, § 682; *Com. v. Eastman*, 1 Cush. 189.

⁷ *Supra*, § 231.

⁸ *Kendall v. State*, 65 Ala. 492.

⁹ *Berry v. Com.*, 10 Bush, 15.

¹⁰ *R. v. Gould*, 9 C. & P. 364; *State v. Squires*, 48 N. H. 364; *Com. v. Harman*, 4 Barr, 269; *Fife v. Com.*, 29 Penn. St. 429; *Nicholson v. State*, 28

Md. 140; *Thompson v. Com.*, 20 Grat. 724; *Young v. Com.*, 8 Bush, 366; *State v. Fidment*, 35 Iowa, 541; *Hector v. State*, 2 Mo. 135; *Boyd v. State*, 2 Humph. 39; *State v. Vann*, 82 N. C. 631; *Simon v. State*, 5 Fla. 285; *Brister v. State*, 26 Ala. 107; *Meinaka v. State*, 55 Ala. 47; *Whaley v. State*, 11 Ga. 125; *Clarke v. State*, 35 Ga. 75; *State v. Garvey*, 28 La. An. 925; *Carter v. State*, 37 Tex. 362; *Powell v. State*, 44 Tex. 63; *Runnels v. State*, 28 Ark. 121; *Wallace v. State*, 28 Ark. 531. When, after the case is closed, there is a conflict of fact as to whether the confessions were voluntary, the question may be argued to the jury. *Garrard v. State*, 50 Miss. 147. *Supra*, § 626.

that the confessions were made under threats, the court may inquire what these threats were, so as to ascertain their sufficiency in law to exclude the confessions.¹ The mode of conducting such examination is at the discretion of the court.² And when on the defendant objecting to an alleged confession on the ground that it was induced by offers of favor made to him by the officer who arrested him and had him in custody, the officer is called by the prosecution and denies that he made such offers of favor, and the defendant then offers evidence to prove that he did, it is the duty of the judge to hear such evidence before admitting the confession.³

If the confession is on its face voluntary, the burden is on the defendant to show it to be incompetent.⁴ If a confession be received in evidence, it not appearing that any inducement had been held out, but, at a later period of the trial, it appears that such an inducement was held out before the making of the confession as would render it inadmissible, the judge will order the jury to disregard it, or will strike the evidence of the confession out of his notes, and if there be no other proof of guilt direct an acquittal.⁵ But to justify this course the evidence should be such as would have excluded the confession if offered in time.⁶ Ordinarily, the testimony of the defendant, to show improper influence, should be offered and received before the confession is admitted.⁷ But in cases of surprise the court will permit the statement of the alleged confession to be interrupted for the purpose of showing *aliunde* that it was improperly extorted.⁸

¹ *Whaley v. State*, 11 Ga. 125; *Washington v. State*, 53 Ala. 29.

² *Com. v. Morrell*, 99 Mass. 542.

³ *Com. v. Culver*, 126 Mass. 464. That the prosecution may rebut, see *Com. v. Ackert*, 133 Mass. 402.

"It is the duty of the court, before receiving the evidence, to examine whether influences brought to bear on the defendant were such as to convey to his mind an intimation that it would be better for him to confess that he committed the crime, or worse for him if he did not; and in this way to induce a false confession." *R. v. Garner*, 2 C. & K. 920; *S. C.*, 1 Den. C.

C. 329; *Nicholson v. State*, 28 Md. 140; *State v. Platte*, 34 La. An. 1061; *Barnes v. State*, 36 Tex. 356. *Supra*, § 672.

⁴ *Rufer v. State*, 25 Oh. St. 464; though see *Nicholson v. State*, 28 Md. 140.

⁵ *Berry v. State*, 10 Ga. 511; *Barp v. State*, 55 Ga. 136; *Cain v. State*, 18 Tex. 387; *Metzger v. State*, 18 Fla. 481.

⁶ *Woodford v. People*, 62 N. Y. 117.

⁷ *Com. v. Culver*, 126 Mass. 464.

⁸ *Com. v. Harman*, 4 Barr, 269; *Serpentine v. State*, 1 How. (Miss.) 256; *State v. Platte*, 34 La. An. 1061.

XII. SELF-SERVING DECLARATIONS.

§ 690. Declarations made by a defendant in his own favor unless part of the *res gestae*, or of a confession offered by the prosecution, are not admissible for the defence.¹ *Nullus idoneus testis in re sua intelligitur.*² Hence comes the maxim, *Scriptura pro scribente nihil probat.*³ Nor is the result changed by the statutes enabling a party to be called as a witness in his own behalf. That which he could prove by his sworn statements he is not permitted to prove by statements which are unsworn. In any view, therefore, the extra-judicial self-serving declarations of a party are inadmissible for him, with the exceptions hereafter stated, as evidence to prove his case.⁴

§ 691. It is otherwise when such declarations are part of the *res gestae*.⁵ It is not, however, necessary that such declarations,

Self-serving declarations inadmissible for defence.

¹ *State v. Scott*, 1 Hawks, 24; *State v. Reitz*, 83 N. C. 634; *Bland v. State*, 2 Ind. 608; *State v. Miller*, 53 Iowa, 84; *State v. Jackson*, 17 Mo. 544; *State v. Van Zant*, 71 Mo. 541; *Tipper v. Com.*, 1 Metc. (Ky.) 6; *State v. Wisdom*, 8 Porter, 511; *Campbell v. State*, 23 Ala. 44; *Corbett v. State*, 31 Ala. 329; *Hall v. State*, 40 Ala. 698; *Birdsong v. State*, 47 Ala. 68; *Atwell v. State*, 63 Ala. 61; *Newcomb v. State*, 37 Miss. 383; *People v. Wyman*, 15 Miss. 70; *Riggs v. State*, 6 Cold. 517; *State v. Dufour*, 31 La. Ann. 804; *Golden v. State*, 19 Ark. 590; *Butler v. State*, 34 Ark. 480; *Walker v. State*, 13 Tex. Ap. 618. See §§ 262 *et seq.*

A self-serving declaration may be made competent by the evidence of the opposite party. Thus, where a witness testified on the trial of S. for theft that he had accused him of it, S. was allowed to prove his answer, though in his own favor. *Sager v. State*, 11 Tex. Ap. 110.

² L. 10. D. xxii. 5.

³ See more fully Whart. on Ev. §§ 170, 265, 1101.

⁴ *Handly v. Call*, 30 Me. 9; *Bus-*

well v. Davis, 10 N. H. 413; *Judd v. Brentwood*, 47 N. H. 430; *Jacobs v. Whitcomb*, 10 Cush. 255; *Nourse v. Nourse*, 116 Mass. 101; *Com. v. Sturdivant*, 117 Mass. 122; *North Stonington v. Stonington*, 31 Conn. 412; *Downs v. R. R.*, 47 N. Y. 83; *Graham v. Hollinger*, 46 Penn. St. 55; *Murray v. Cone*, 26 Iowa, 276; *Hogsett v. Ellis*, 17 Mich. 351; *White v. Green*, 5 Jones (N. C.), 47; *Gordon v. Clapp*, 38 Ala. 357; *Marx v. Bell*, 48 Ala. 497; *Ray v. State*, 50 Ala. 104; *Heard v. McKee*, 26 Ga. 332; *Bowie v. Maddox*, 29 Ga. 285; *Hall v. State*, 48 Ga. 607; *Tucker v. Hood*, 2 Bush, 85; *Darrett v. Donnelly*, 38 Mo. 492; *State v. Brown*, 46 Mo. 367; *Rice v. Cunningham*, 29 Cal. 492; *State v. Anderson*, 10 Oreg. 448.

⁵ *Com. v. Rowe*, 105 Mass. 590. See *R. v. Crowhurst*, 1 C. & K. 370; *R. v. Smith*, 2 C. & K. 207; *Milne v. Leisler*, 7 H. & N. 786; *Green v. Bedell*, 48 N. H. 546; *Blake v. Damon*, 103 Mass. 199; *Beardslee v. Richardson*, 11 Wend. 25; *Tomkins v. Saltmarsh*, 14 B. & R. 275; *Louden v. Blythe*, 16 Penn. St. 532; *Potts v. Everhardt*, 26

to be part of the *res gestae*, should be precisely concurrent with the act under trial; it is enough if they spring from it, and are made under circumstances which preclude the idea of design.¹ The test is, were the declarations the facts talking through the party, or the party's talk about the facts. *Instinctiveness* is a requisite, and when this obtains, the declarations are admissible.² Hence, a defendant's explanations, immediately upon stolen goods being found in his possession, are admissible,³ and so are the defendant's utterances, when his right was first called in question,⁴ as well as those made at the commission of the offence charged.⁵ But when the declarations are distinguishable in point of time, or are open to the suspicion of being part of the defendant's plan of defence, they must be ruled out.⁶ Thus, on an indictment against a prisoner for having in his possession coining tools, with intent to use them, he cannot give in evidence his declarations to an artificer, at the time he employed him to make such instruments, as to the purpose for which he wished them made.⁷ Where also a defendant, in conversation with a witness, admitted the existence of a particular fact which tended strongly to establish his guilt, but coupled it with an explanation which, if true, would exculpate him, it was held that the accused could not show that he had at other times make the same statement and explanation to

Penn. St. 493; Little v. Com., 25 Grat. 921; Purkiss v. Benson, 28 Mich. 538; State v. Abbott, 8 W. Va. 741; Manier v. State, 6 Baxt. 595; O'Shields v. State, 55 Ga. 696; Flanders v. Maynard, 58 Ga. 56; Roberts v. State, 68 Ala. 515; Head v. State, 44 Miss. 731; Payne v. State, 57 Miss. 348; Colquitt v. State, 34 Tex. 550; Taliaferro v. State, 40 Tex. 522; Maddox v. State, 41 Tex. 205; State v. Garrand, 5 Oregon, 216. *Supra*, §§ 263, 264.

¹ State v. Vincent, 24 Iowa, 570; People v. Vernon, 35 Cal. 49; State v. Patterson, 63 N. C. 520; Neyland v. State, 13 Tex. Ap. 536; and see cases cited *supra*, § 264.

² See *supra*, §§ 262-3.

³ *Supra*, § 263. *Infra*, § 761; R. v. Smith, 2 C. & K. 207; Com. v. Millard,

1 Mass. 6; State v. Jones, 3 Dev. & B. 122. Where A. was on trial for stealing a heifer, and alleged that he supposed it to be one which he had lost, he was allowed to prove his declarations made while hunting for his own heifer. State v. Daley, 53 Vt. 442; and see People v. Dowling, 84 N. Y. 478; Bennett v. People, 96 Ill. 602; Lander v. People, 104 Ill. 248; Henderson v. State, 70 Ala. 23; Payne v. State, 59 Miss. 348; McPhail v. State, 9 Tex. Ap. 164. *Supra*, §§ 263, 272.

⁴ *Ibid*. But not afterwards. Hampton v. State, 5 Tex. Ap. 463.

⁵ *Supra*, §§ 262-3.

⁶ State v. Brown, 64 Mo. 367. See *supra*, § 263. See, however, Anderson v. State, 11 Tex. Ap. 576.

⁷ Com. v. Kent, 6 Met. § 221.

others.¹ So one indicted for murder cannot give in evidence his own conversations, had after going half a mile from the place of murder, when he has had time to collect himself to make out his case.² And so where a defendant, indicted for murder, was met after the transaction at some distance from the scene with blood on his hands, it was held that his declarations at the time to account for the blood on his hands, and other suspicious circumstances, were not admissible;³ and this, though there was no person present when the homicide was committed.⁴

§ 692. A party may in certain cases show by his own contemporaneous statements, that he was acting at the particular moment, not illegally, but under the direction of the law. Thus it is ruled that an officer indicted as an accessory to a burglary may, for the purpose of explaining his frequent intercourse with those indicted as principals, and to prove his own diligence and fidelity in pursuing them, give in evidence the conversations between himself and another officer as to the best means of gaining their confidence and thereby bringing them to justice, and also the information received by him in answer to inquiries made of persons whom he met while in pursuit of the burglars.⁵

Coincident
declarations
admissible to
prove authority.

§ 693. Another exception to the rule that self-serving declarations are inadmissible is to be found in the reception, under the limitations already noticed, of a party's declarations as to his physical or mental condition, when such are in controversy.⁶

And so as
to state of
party's
mind.

§ 694. When a defendant's statements in his own behalf are admissible, their weight is for the jury,⁷ and they can be disproved by the prosecution.⁸

Weight of
for jury.

XIII. AGENTS.

§ 695. When the relation of principal and agent in a particular transaction is established, the agent's admissions may be imputed

¹ *Barhart's Case*, 9 Leigh, 671.

⁴ *Bland v. State*, 2 Ind. 608.

² *Gardner v. People*, 3 Scam. 83.

⁵ *Com. v. Robinson*, 1 Gray, 555.

³ *Soaggs v. State*, 8 Sm. & M. 723.

See *supra*, § 274.

See *Bennett v. People*, 96 Ill. 602; *Pharr v. State*, 9 Tex. Ap. 129; 10 Tex. Ap. 485; *Childress v. State*, 10 Tex. Ap. 698.

⁶ *Supra*, §§ 271-4.

⁷ *Tipton v. State*, Peck (Tenn.), 308;

Conner v. State, 34 Tex. 659.

⁸ *R. v. Jones*, 2 C. & P. 620.

to the principal, if his agency involves the making such admissions.¹ Hence the declarations of a messenger sent to a third party by the prisoner, if made with reference to the object of the mission, are admissible in evidence against him, where the evidence shows they were made by his authority.² But it should be remembered that before the admissions of the agent can be proved, the fact of agency should first be established *aliunde*.³ And it has been questioned whether the admissions of an agent, not a co-conspirator, unless part of the *res gestae*, can be put in evidence if the agent himself could be called to substantiate the facts admitted.⁴

¹ Whart. on Ev. § 1170; *R. v. Downer*, 14 Cox C. C. 480; 43 L. T. N. S. 445; *Cliquot's Champagne*, 3 Wall. 114; *Com. v. Boott*, Thach. C. C. 390; *State v. Taylor*, 3 Brev. 243.

² *Browning v. State*, 33 Miss. 48.

The statements as well as the conduct of an agent, during the performance of a tort, are imputable to the principal, as part of the *res gestae*, whenever the tort itself is so imputable. Thus the admission of the captain of a steamer, as to damage to crops on shore by fire from the steamer, made while she was running under his command, and at the time the fire was communicated, are evidence against the owners who employed him; *Gerke v. Steam Nav. Co.*, 9 Cal. 251; and so of the admissions of a captain of a vessel at the time of carrying off a slave; *Price v. Thornton*, 10 Mo. 135; and of the declarations of the servants of a railroad company at the time of a collision; *Toledo R. R. v. Goddard*, 25 Ind. 185; and of the admissions of the servant of a common carrier during the period of the carrying, if such admissions are not narratives of a past act. *Packet Co. v. Clough*, 20 Wall. 528; *Burnside v. R. R.*, 47 N. H. 554. But if made after there has been an interval giving time for reflection, then, unless the agent be empowered

to speak for the company at such time, statements of the agent, explaining or even admitting the act, cannot be received, though he continues in the principal's employment.

³ Whart. on Ev. § 1183; *U. S. v. Morrow*, 4 Wash. C. C. 733; *Lambert v. People*, 76 N. Y. 220; *Russell v. State*, 71 Ala. 348.

⁴ "An admission by the party himself is in all cases the best evidence which can be produced, and supercedes the necessity of all further proof; and in civil cases the rule is carried still further, for the admission of an agent made in the course of his employment, and in accordance with his duty, is as binding upon the principal as an admission made by himself. But this has never been extended to criminal cases. Where a party is charged with the commission of an offence through the instrumentality of an agent, then it becomes necessary to prove the *acts* of the agent; and, in some cases, as where the agent is dead, the agent's admission is the best evidence of those acts which can be produced. Thus, on the impeachment of Lord Melville by the House of Lords, it was decided that a receipt given in the regular and official form by Mr. Douglas, who was proved to have been appointed by Lord Melville to be his

§ 696. It has been argued that, to impute the agent's act to the principal, a criminal design must be brought home to the principal.¹

attorney to transact the business of his office as treasurer of the navy, and to receive all necessary sums of money, and to give receipts for the same, *and who was dead*, was admissible in evidence against Lord Melville, to establish the single fact, that a person appointed by him as his paymaster did receive from the exchequer a certain sum of money in the ordinary course of business. 29 How. St. Tr. 746. Had, however, Mr. Douglas been alive at the time, there can be no doubt that he must have been called; and that he might have been called to prove the receipt of the money would probably not have been questioned. This case does not, therefore, as sometimes appears to have been thought, in any way touch upon the rule that the admission of an agent *does not* bind his principal in criminal cases, but merely shows that, where the acts of the agent have to be proved, those acts may be proved in the usual way." Roscoe's Cr. Ev. 8th ed. 52. See as to agency *R. v. Cooper*, L. R. 1 Q. B. D. 19; quoted *supra*, § 682.

¹ See *Cooper v. Slade*, 6 H. L. C. 746.

"The act of the agent or servant," says Mr. Taylor, commenting on this case, "may be shown in evidence, as proof that such an act was done; for a fact must be established by the same evidence, whether it is followed by a criminal or civil consequence; but it is a totally different question, in the consideration of criminal as distinguished from civil justice, how the principal may be affected by the fact, when so established. For though the wrongful or fraudulent act of the agent may involve his principal civilly (*Taylor's Ev.* § 827, citing *Barwick v.*

Eng. Jr. Stook Bk. 2 L. R. Ex. 259, per Ex. Ch.; 36 L. J. Ex. 174, S. C.; *Proudfoot v. Montefiore*, 2 L. R. Q. B. 511; 8 B. & S. 510, S. C.), it cannot convict him of a crime, unless further proof be given that the principal has directed, or, at least, assented to such act. *Ld. Melville's Case*, 29 How. St. Tr. 764; the *Queen's Case*, 2 B. & B. 306, 307. Where it was proposed to show that an agent of the prosecutor, not called as a witness, had offered a bribe to a witness, who also was not called, the evidence was held inadmissible; though the general doctrine, as above stated, was recognized. The *Queen's Case*, 2 B. & B. 302, 306-9. The rule thus generally laid down is open to an apparent exception in the case of the proprietor of a newspaper, who is, *prima facie*, criminally responsible for any libel it contains, though inserted by his agent or servant without his knowledge. But Lord Tenterden considered this case as falling strictly within the principle of the rule; for 'surely,' said he, 'a person who derives profit from, and furnishes means for carrying on, the concern, and intrusts the conduct of the publication to one whom he selects, and in whom he confides, may be said to cause to be published what actually appears, and ought to be answerable, though you cannot show that he was individually concerned in the particular publication.' *R. v. Gutch*, M. & M. 433, 437. Yet even here the defendant may prove, if he can, that the publication was made by his servant without his authority, consent, or knowledge, and that it did not arise from want of due care or caution on his part." 6 & 7 Vict. c. 96, s. 7.

But proof that a guilty intent existed on the part of the principal cannot be necessary in cases where the principal (*e. g.*, a corporation) is indicted for negligence, and the acts or declarations of the negligent agent are offered to prove the negligence.¹

Wrongful
act of
agent when
imputable
without
proof of
criminal
design in
principal.

We have already seen that an allegation that an act was done by a principal may be sustained by proof that it was done by an agent.²

§ 697. In another volume⁴ will be found a discussion of the cases in which irregularities are held curable by waiver ; and in most of these cases it will be found, on examination, that the waiver was by attorney. As a matter of practice, subject to exceptions in those cases in which a defendant is required to plead or otherwise answer in person, an attorney, by admissions made during the trial of a case, or in correspondence relating to such trial, may bind his client, in criminal as well as in civil issues ; and such admissions, part of a mutual plan for the trial of the case, are irrevocable by the client, except in cases of fraud or of gross mistake.⁵

So of ad-
mission of
attorney
or referee.³

The admissions of a referee are to be in like manner limited. Thus, when the president of an insurance company refers an inquirer as to insurance to a third person, who he said was chief man, for information, this does not make admissible against the president, on an indictment against him, statements made in his absence by the book-keeper as to the assets of the company.⁶

XIV. CO-CONSPIRATORS.

§ 698. In cases of crimes perpetrated by several persons, when once the conspiracy or combination is established, the act or declaration of one conspirator, or accomplice in the prosecution of the enterprise, is considered the act or declaration of all, and therefore imputable to all. All are deemed to assent to, or command, what is said or done by any one in furtherance of the common object.⁷ A foundation, however,

Declara-
tions of,
admissible
against
each other.

¹ Whart. on Ev. § 1174.

² *Supra*, § 102.

³ Whart. on Ev. § 1190.

⁴ Whart. Cr. Pl. & Pr. § 733.

⁵ Whart. on Ev. § 1184.

⁶ *Lambert v. People*, 6 Abb. New Cas. 181 ; S. C., 76 N. Y. 220.

⁷ *R. v. Kerrigan*, 9 Cox C. C. 441 ; *U. S. v. Gooding*, 12 Wheat. 469 ; *U. S. v. Hinman*, 1 Bald. 232 ; *U. S. v. Mo-*

must first be laid *aliunde*,¹ by proof sufficient, in the opinion of the court, to establish *prima facie* the fact of conspiracy between the parties; the question of such conspiracy being ultimately for the jury.²

Kee, 3 Dill. 546; Lincoln v. Claflin, 7 Wall. 132; Jacobs v. Shorey, 48 N. H. 100; State v. Larkin, 49 N. H. 139; Jenne v. Joslyn, 41 Vt. 478; Bridge v. Eggleston, 14 Mass. 250; Wiggins v. Day, 9 Gray, 97; State v. Grady, 34 Conn. 118; Waterbury v. Sturdevant, 18 Wend. 353; Dart v. Walker, 3 Daly, 138; Farrell v. People, 21 Hun, 485; Scott v. Baker, 37 Penn. St. 330; McCabe v. Burns, 66 Penn. St. 356; Keho v. Com., 85 Penn. St. 127; Brandt v. Com., 94 Penn. St. 290; Duffy v. Com., 6 Weekly Notes, 311; Donnelly v. Com., 6 Weekly Notes, 104; Claytor v. Anthony, 6 Rand. 285; Martin v. Com., 2 Leigh, 745; State v. Poll, 1 Hawks, 442; State v. George, 1 Ired. 321; Malone v. State, 8 Ga. 408; Byrd v. State, 68 Ga. 66; Ferguson v. State, 32 Ga. 658; Horton v. State, 66 Ga. 690; Ellis v. Dempsey, 4 W. Va. 126; Snyder v. Laframboise, Breese, 268; Williams v. People, 54 Ill. 425; Wilson v. People, 94 Ill. 299; Williams v. State, 47 Ind. 568; Walton v. State, 88 Ind. 9; People v. Pitcher, 15 Mich. 397; People v. Whitson, 43 Mich. 419; Miller v. Sweitzer, 22 Mich. 391; State v. Davis, 89 N. C. 514; Raisler v. Springer, 38 Ala. 703; Mason v. State, 42 Ala. 532; Blount v. State, 49 Ala. 381; Smith v. State, 52 Ala. 407; Ross v. State, 62 Ala. 224; Browning v. State, 30 Miss. 656; Street v. State, 43 Miss. 1; State v. Greenwade, 72 Mo. 298; Cornelius v. Com., 15 B. Mon. 539; Harrison v. Wisdom, 7 Heisk. 99; Gray v. Nations, 1 Ark. 557; Glory v. State, 13 Ark. 236; People v. Trim, 39 Cal. 75; People v. Cotta, 49 Cal. 167;

People v. Estrada, 49 Cal. 171; People v. Brown, 59 Cal. 345; Hightower v. State, 22 Tex. 605; Cox v. State, 8 Tex. App. 254; Post v. State, 10 Tex. Ap. 598. The testimony of co-conspirators may be corroborated by contemporaneous entries in their books. State v. Cardosa, 11 S. C. 196.

¹ See Com. v. Crowninshield, 10 Pick. 497; Com. v. Ingraham, 7 Gray, 46; Clawson v. State, 14 Oh. St. 234; State v. Kain, 20 W. Va. 679; State v. Daubert, 42 Mo. 239; Browning v. State, 30 Miss. 656; Jones v. Com., 2 Duv. 554; Bowling v. Com., 74 Ky. 604; Hightower v. State, 22 Tex. 605; Myers v. State, 6 Tex. Ap. 1; Avery v. State, 10 Tex. Ap. 199; Casey v. State, 37 Ark. 67.

² 1 East P. C. c. 2, s. 37, p. 96; 2 Stark. Ev. 326; 1 Phil. Ev. 447, citing the Queen's Case, 2 B. & B. 302; 2 Russ. on Cr. 697; U. S. v. Hartwell, 3 Cliff. 221; U. S. v. McKee, 3 Dill. 546; U. S. v. Cole, 5 McLean C. C. 513; American Fur Co. v. U. S., 2 Pet. 365; Com. v. Brown, 14 Gray, 419; Ormsby v. People, 53 N. Y. 472; Danville Bank v. Waddill, 31 Gratt. 469; State v. Nash, 7 Iowa, 347; Hamilton v. People, 29 Mich. 195; State v. George, 7 Ired. 321; Garrard v. State, 50 Miss. 147; State v. Ross, 29 Mo. 32; Matthews v. State, 6 Tex. Ap. 23.

The proof of mere cognizance, without active coöperation, is not enough to prove a conspiracy, see Evans v. People, 90 Ill. 384; Whart. Cr. Law, 8th ed. § 211 a. But presence in an illegal meeting may be ground to infer complicity. R. v. Coney, 8 Q. B. D.

Assuming such a conspiracy to exist (which is to be inferred from circumstances),¹ the declarations of one co-conspirator, in furtherance of the common design, as long as the conspiracy continues, are admissible against his associates, though made in the absence of the latter.² Thus, where two persons are proved to have

534; 15 Cox C. C. 46. But see *R. v. Hargrave*, 5 C. & P. 170, cited *supra*, § 440.

That a *prima facie* case of conspiracy, based on a single witness, is enough (the court reserving the actual fact of conspiracy for the final determination of the jury), see *Com. v. Crowninshield*, 10 Pick. 497; *Com. v. Waterman*, 122 Mass. 43; *Com. v. Scott*, 123 Mass. 222; *Com. v. Ratcliffe*, 130 Mass. 36.

The law on this subject was thus stated by Mr. Starkie: "It seems that mere detached declarations and confessions of persons not defendants, not made in the prosecution of the object of the conspiracy, are not evidence even to prove the existence of a conspiracy; though consultations for that purpose, and letters written in prosecution of the design, even if not sent, are admissible. The existence of a conspiracy is a *fact*, and the declaration of a stranger is but hearsay, unsanctioned by either of the two great tests of truth. The mere assertion of a stranger, that a conspiracy existed amongst others to which he was not a party, would clearly be admissible; and although the person making the assertion confessed that he was a party to it, this, on principle fully established, would not make the assertion evidence of the fact against strangers." 3 Stark. Ev. 235. And this doctrine has been recognized by Mr. Serjeant Russell, 2 Russ. by Greav. 697, and by Sir J. Stephen in *Roscoe's Cr. Ev.* pp. 417-8. As to admissibility of acts of co-conspirators, see Whart. Crim. Law, 8th ed. § 1404.

¹ *Supra*, § 32; and see, for cases, Whart. Cr. Law, 8th ed. § 1398.

² *R. v. Stone*, 6 T. R. 528; *R. v. Kerrigan*, 9 Cox C. C. 441; *Nudd v. Burrows*, 91 U. S. 426; *U. S. v. Hinman*, 1 Bald. 292; *U. S. v. Gooding*, 12 Wheat. 467; *U. S. v. Graff*, 14 Blatch. 381; *Lee v. Lamprey*, 43 N. H. 13; *Com. v. Crowninshield*, 10 Pick. 497; *Com. v. Waterman*, 122 Mass. 43; *State v. Grady*, 34 Conn. 18; *State v. Soper*, 4 Shepley, 293; *Apthorp v. Comstock*, 2 Paige, 482; *Ormsby v. People*, 53 N. Y. 472; *Burns v. McCabe*, 72 Penn. St. 309; *Confer v. McNeal*, 74 Penn. St. 112; *Clawson v. State*, 14 Oh. St. 234; *People v. Pitcher*, 15 Mich. 397; *Williams v. State*, 54 Ill. 423; *Chicago R. R. v. Collins*, 56 Ill. 212; *Philpot v. Taylor*, 75 Ill. 309; *Jones v. State*, 64 Ind. 473; *Martin v. Com.*, 2 Leigh, 745; *State v. George*, 8 Ired. 321; *Bryce v. Butler*, 70 N. C. 585; *State v. Davis*, 87 N. C. 514; *Stewart v. State*, 26 Ala. 44; *Marler v. State*, 67 Ala. 55; *Bushnell v. Bank*, 20 La. An. 464; *State v. Jackson*, 29 La. An. 354; *State v. Clark*, 32 Ark. 231; *State v. Adams*, 20 Kans. 311; *State v. Cole*, 22 Kans. 474; *People v. Geiger*, 49 Cal. 643. That they do not require corroboration, see *Cohes v. State*, 11 Tex. Ap. 153. That the admission must be in pursuance of the common design, see *People v. Martin*, 47 Cal. 114.

"The declarations of each defendant, relating to the transaction under consideration, were evidence against the other, though made in the latter's absence, if the two were engaged at the time in the furtherance of a common design to defraud the plaintiffs."

obtained goods by false pretences, evidence that one of them, in pursuit of the common aim, made the false pretences charged, warrants the conviction of both.¹ So if there is concert between two or more to pass counterfeit notes, or any concurrent action in passing them, the declaration of one is evidence against the other; and the possession of counterfeit notes by one is possession by the other.² And this co-responsibility holds good without regard to the time when the party entered the combination. He becomes subsequently responsible for everything which may be done or said by any one of the others, in furtherance of such common design.³ Thus, on an indictment against the owner of a ship for violation of the statutes against the slave-trade, evidence of the declarations of the master, connected with acts in furtherance of the voyage, and within the scope of his authority, as agent of the owner in the conduct of the guilty enterprise, is admissible against the owner, irrespective of the question of the time of entrance of the several parties into the plot.⁴

§ 698 *a*. As it sometimes may interfere with the proper development of the case to require the trial to begin with proof of the conspiracy, in such case the prosecution may, on the trial, prove the declarations and acts of one made and done in the absence of the others, before proving the conspiracy between the defendants, though such proof will be treated as nugatory unless the conspiracy be afterwards independently established.⁵

The court placed their admissibility on that ground, and instructed the jury that if they were made after the consummation of the enterprise, they should not be regarded." Field, J., *Lincoln v. Claffin*, 7 Wall. 138, 139.

¹ *Com. v. Harley*, 7 Met. 462.

² *U. S. v. Hinman*, 1 Bald. 292.

³ *R. v. Watson*, 32 How. State Tr. 7, per Bayley, J.; *R. v. Brandreth*, 32 How. St. Tr. 857, 858; *R. v. Hardy*, 24 How. St. Tr. 451-453, 475; *R. v. Hunt*, 3 B. & Ald. 566; 1 East, P. C. 97, s. 38; *Nichols v. Dowding*, 1 Stark. 81; *American Fur Company v. U. S.*, 2 Pet. 358, 365; *U. S. v. Hinman*, 1 Bald.

292; *Crowninshield's Case*, 10 Pick. 497; *Gardner v. People*, 3 Scam. 90; *State v. Haney*, 2 Dev. & Bat. 390; *Martin v. Com.*, 2 Leigh, 745; *Kirby v. State*, 7 Yerg. 259; *Frank v. State*, 27 Ala. 38; *People v. Uwahah*, 61 Cal. 142.

⁴ *U. S. v. Gooding*, 12 Wheat. 460.

⁵ Whart. Crim. Law, 8th ed. § 1401; *State v. Cardosa*, 11 S. C. 195; *Avery v. State*, 10 Tex. Ap. 199; *People v. Brotherton*, 8 Cal. 444. In *Bloomer v. State*, 48 Md. 321, it was said that this mode of proceeding rests in the discretion of the judge, and in seditious or other political conspiracies is seldom

§ 699. When the common enterprise is at an end, whether by accomplishment or abandonment, no one of the conspirators is permitted, by any subsequent act or declaration of his own, to affect the others.¹ His confession, therefore, subsequently made, even though by the plea of guilty, is not admissible in evidence, as such, against any but himself.² Even the most solemn admission made by him after the conspiracy is at an end is not evidence against accomplices.³ Nor can the flight of one conspirator after such time be put in evidence against the others;⁴ and what one of the party has been heard to say at a time other than that of the conspiracy, as to the share which the others had in the execution of the common design, or as to the object of the conspiracy, cannot be admitted as evidence against them.⁵ But the mere flight of a conspirator, after perform-

permitted; but that the admission of such testimony is not error. See *Baker v. State*, 7 Tex. App. 612.

¹ 1 Phil. & Am. on Ev. 215, n.; Whart. on Ev. § 1206; U. S. v. White, 5 Cranch C. C. 38; *State v. Pike*, 51 N. H. 105; *Heine v. Com.*, 91 Penn. St. 145; *State v. Kain*, 20 W. Va. 679; *Baker v. People*, 105 Ill. 452; *Danville Bank v. Waddell*, 31 Gratt. 469; *Miller v. Com.*, 78 Ky. 15; *State v. Westfall*, 49 Iowa, 328; *Lynes v. State*, 36 Miss. 317; *State v. Duncan*, 64 Mo. 262; *Snowden v. State*, 7 Baxt. 482; *Strady v. State*, 5 Cold. 300; *Clinton v. State*, 20 Ark. 216; *People v. Collins*, 48 Cal. 277; *People v. English*, 55 Cal. 212; *People v. Stanley*, 47 Cal. 113; *People v. Aleck*, 61 Cal. 142; *State v. Soule*, 14 Nev. 453. Hence, as to a past act of adultery, the admission of one defendant cannot charge the other. *State v. McGuire*, 50 Iowa, 53.

² *R. v. Stone*, 6 T. R. 528; *R. v. Turner*, 1 Mood. C. C. 347; *R. v. Appleby*, 3 Stark. 33; and see *Melen v. Andrews*, 1 M. & M. 336, per Parke, J.; *State v. Fuller*, 39 Vt. 74; *Com. v. Thompson*, 99 Mass. 444; *Hunter v.*

Com., 7 Grat. 641; *Hudson v. Com.*, 2 Duv. 531; *Rufus v. State*, 25 Oh. St. 464; *People v. Stevens*, 47 Mich. 411; *People v. Arnold*, 46 Mich. 268; *State v. Hickman*, 75 Mo. 416; *Spencer v. State*, 31 Tex. 64; *Ake v. State*, 31 Tex. 416.

³ *R. v. Hearne*, 4 C. & P. 215; *R. v. Fletcher*, 4 C. & P. 250; *R. v. Hall*, Lew. C. C. 110; *R. v. Walkley*, 6 C. & P. 175; *Com. v. Ingraham*, 7 Gray, 48; *Ormsby v. People*, 53 N. Y. 472; *Hook v. Boteler*, 4 Har. & McH. 349; *Morrison v. State*, 5 Ohio, 439; *State v. Arnold*, 48 Iowa, 566; *State v. Poll*, 1 Hawks, 442; *State v. Haney*, 2 Dev. & Bat. 390; *State v. Rawles*, 65 N. C. 334; *Kirby v. State*, 7 Yerg. 259; *Jones v. Com.*, 2 Duv. 554; *Lawson v. State*, 20 Ala. 66; *Gore v. State*, 58 Ala. 391; *State v. Weasel*, 30 La. An. Pt. ii. 919; *Brown v. State*, 57 Miss. 474; *People v. Moore*, 45 Cal. 19; *Phillips v. State*, 6 Tex. Ap. 314.

⁴ *People v. Stanley*, 47 Cal. 112.

⁵ 1 Phil. Ev. 94; *R. v. Salter*, 5 Esp. 125; 2 Stark. 141; *R. v. Roberts*, 1 Camp. 399; *State v. Poll*, 1 Hawks, 442; *State v. Haney*, 2 Dev. & Bat.

ance of an overt act, does not preclude the declarations of his co-conspirators, immediately after the act, from being put in evidence against him.¹ Nor is a confederacy in larceny terminated by the mere taking. It continues until the articles are distributed.²

§ 700. It makes no difference as to the admissibility of the act or declaration of a conspirator against a defendant, whether the former be indicted or not, or tried or not, with the latter; for the making one a co-defendant does not make his acts or declarations any more evidence against another than they were before; the principle upon which they are admissible at all being that the act or declaration of one is the act or declaration of all united in one common design, a principle which is wholly unaffected by the consideration of their being jointly indicted.³

Rule not affected by the parties being co-defendants.

390; Kirby v. State, 7 Yerg. 259; and see R. v. Hunt, 3 B. & Ald. 566; Wright v. State, 43 Tex. 170.

If on a charge of a conspiracy to annoy a broker who distrained for church-rates, it be proved that one of the defendants (the other being present) excited the persons assembled at a public meeting to go in a body to the broker's house, evidence that they did so go is receivable, although neither of the defendants went with them; but what a person who was at the meeting said some time after, when he was himself distrained upon for church-rates, is not receivable in evidence. R. v. Murphy, 8 C. & P. 297.

Where A. was charged with having conspired with W. I., and others unknown, to raise insurrections and obstruct the laws, and it was proved that A. and W. I. were members of a Chartist Lodge, and that A. and W. I. were at the house of the latter on a certain day, on the evening of which A. directed people assembled at the house of W. I. to go to the race-course at P., whither W. I. and other persons had gone; it was held, that on the trial

of A. evidence was receivable that W. I. had at an earlier part of the same day directed other persons to go to the race-course; and it being proved that W. I. and an armed party of the persons assembled went from the New Inn, it was ruled that evidence might be given of what W. I. said at the New Inn, it being all one transaction. R. v. Shellard, 9 C. & P. 277.

¹ State v. Shields, 45 Conn. 266.

² Scott v. State, 30 Ala. 503; O'Neal v. State, Tex. 1884, 17 Rep. 285.

³ R. v. Stone, 6 T. R. 528; R. v. Hearne, 4 C. & P. 215; R. v. Fletcher, 4 C. & P. 250; R. v. Hall, 1 Lew. C. C. 110; R. v. Walkley, 6 C. & P. 175; Com. v. Ingraham, 7 Gray, 46; People v. Stevens, 47 Mich. 411; Lawson v. State, 20 Ala. 66; State v. Weasel, 30 La. An. 919; State v. Carroll, 31 Ib. 860. See Banks v. State, 13 Tex. Ap. 182. The financial condition of one co-conspirator has been held proper as evidence on an indictment for murder and robbery, as also other damaging circumstances affecting that one as against the others. Avery v. State, 10 Tex. Ap. 199. And see *supra*, § 37.

Decoy not
a co-con-
spirator.

§ 700 *a*. A person acting as a decoy is not in law a confederate so that his acts may be imputable to the principal.¹

Form of
prosecu-
tion not
material.

§ 701. It is not material what the nature of the indictment is, provided the offence involve a conspiracy. Upon an indictment for murder, for instance, if it appear that others, together with the prisoner, conspired to perpetrate the crime, the act of one, done in pursuance of that intention, would be evidence against the rest.² But there must be such a conspiracy as would make the one party the agent of the other. Hence the admissions of A., charged with adultery with B., are not, without showing conspiracy, admissible against B.³

Principal's
acts ad-
missible
against
accessary;
and the
converse.

§ 702. Where the accessary is tried alone before conviction of the principal, and when confederacy between the two has been shown, acts and conduct of the principal, immediately following the commission of the offence, and tending to show that he committed it, are competent evidence to prove their common guilt.⁴ And generally, as soon as the confederacy is proved, the acts and declarations of the one are admissible against the other.⁵

Declara-
tions of
co-conspir-
ators in
each
other's
favor.

§ 703. A declaration of a conspirator in favor of a fellow-conspirator cannot, from the nature of things, be put in evidence, unless part of the *res gestae*, or part of a conversation introduced by the prosecution.⁶ Such evidence, if not inadmissible on other grounds, is inadmissible as hearsay.⁷

¹ Williams v. State, 55 Ga. 391. As to decoy, see *supra*, § 440; see Price v. People, 109 Ill. 109.

² R. v. Stone, 6 T. R. 528. So as to forgery, Heard v. State, 9 Tex. Ap. 1.

³ State v. McGuire, 50 Iowa, 153.

⁴ State v. Rand, 33 N. H. 216. See Baker v. State, 7 Tex. App. 612, as showing when the acts of one confederate will be admitted before the common act is proved. See more fully *supra*, § 689; Levy v. People, 80 N. Y. 329.

⁵ R. v. Pym, 1 Cox C. C. 340; U. S. v. Hartwell, 3 Cliff. 233; State v. Hudson, 50 Iowa, 157. *Supra*, § 237. As to admission of record of conviction of principal against accessary, see *supra*, § 602.

⁶ U. S. v. Douglass, 2 Blatch. 207; Lyon v. State, 22 Ga. 399; Taylor v. State, 11 Lea, 708; Edwards v. State, 27 Ark. 493; Draper v. State, 22 Tex. 400; Wright v. State, 10 Tex. Ap. 476; State v. McNamara, 3 Nev. 70.

⁷ *Supra*, § 225.

CHAPTER XIV.

PRESUMPTIONS.

I. GENERAL CONSIDERATIONS.

A presumption of law is a postulate; a presumption of fact is an argument from a fact to a fact, § 707.

Prevalent classification of presumptions, § 708.

Presumptions of law unknown to classical Romans, § 709.

Such distinctions of scholastic origin, § 710.

Gradual reduction of irrebuttable presumptions, § 711.

In modern Roman law they are denied, § 712.

In our own law they are unnecessary, § 713.

Presumptions of law as distinguishable from presumptions of fact, § 714.

Presumptions of fact may by statute be made presumptions of law, § 715.

Constitutionality of statutory presumptions, § 715 a.

Fallacy arising from ambiguity of terms "law," "legal," and "presumption," § 716.

II. PSYCHOLOGICAL PRESUMPTIONS, § 717.

Of innocence—Defendant to have the benefit of reasonable doubt, § 718.

Presumption applicable to matters of defence, § 719.

Rule only operates in favor of defendant as to guilt charged, § 719 a.

Extrinsic defence to be made out by preponderance of proof, § 720.

When there is doubt as to major offence defendant may be convicted of minor, § 721.

Inference to be from all the facts, § 722.

Of knowledge of law.

Such knowledge always presumed, § 723.

Ignorance admissible to disprove malice, § 724.

Of knowledge of fact, § 725.

Of love of life, § 726.

Of good faith, § 727.

A genuine document is presumed to be true, § 728.

Sanity is presumed until the contrary appear, § 729.

Insanity once established is presumed to continue, § 730.

To be inferred from facts, § 731.

Prudence in avoiding danger presumed, § 732.

Supremacy of husband is presumed, § 733.

Of intent, § 734.

Probable consequences presumed to have been intended, § 734.

Process is one of logic, § 735.

Illustrations of rule, § 736.

Roman law to the same effect, § 737.

Malice not to be arbitrarily inferred from killing, § 738.

Nor from other hurtful act, § 739.

Combination of other intents no defence, § 740.

Against spoliator, § 741.

Forgery of evidence for self-exculpation, § 742.

Not conclusive of guilt, § 743.

Presumption varies with case, § 744.

With intent of injuring others, § 745.

By force, § 746.

For speculative or moral end, § 747.

Suppression or destruction of evidence, § 748.

Holding back evidence, § 749.

Inference from attempt to evade justice, § 750.

Prevarication and embarrassment may be proved, § 751.

Evidence to explain flight admissible, § 752.

Preparations and attempts, § 753.

Such proofs admissible for prosecution, § 753.

Acts to ward off suspicion, § 754.

Such proof is open to rebuttal, § 755.

Defendant's declarations of intent and threats admissible for prosecution, § 756.

Deceased's threats admissible for defence, § 757.

Possession of stolen goods or of other fruits of crime is an inference of guilt, § 758.

Possession must be recent, § 759.

Ear-marks to be proved, § 760.

Defendant's explanation to be considered, § 761.

Similar inferences in embezzlement and murder, § 762.

In burglary, § 763.

III. INFERENCES FROM MECHANISM OF CRIME.

Inference from instrument used, § 764.

Condition of weapon, § 765.

Position of weapon, § 766.

Condition of dress, § 767.

Ownership of weapon, § 768.

Wound, § 769.

Marks of powder on person, § 770.

Direction of wound, § 771.

Skill in wound, § 772.

Left-handedness, § 773.

Adaptation of instrument to wound, § 774.

Number of wounds, § 775.

Other indications on injured person, § 776.

Blood-stains, § 777.

Such stains cannot be determined to be human beyond reasonable doubt, § 777 a.

Collateral inferences, § 778.

Things adhering to weapon, § 779.

Indications as to whether marks on body were made after death, § 780.

Whether wounds were homicidal or suicidal, § 781.

Inferences in hanging, § 782.

Drowning, § 783.

IV. INFERENCES FROM LIABILITY TO ATTACK, § 784.

Rapacity, old grudge, jealousy, § 784.

V. DISTINCTIVE INFERENCES IN MARITAL HOMICIDES, § 785.

Adultery, § 785.

Old quarrels, § 786.

VI. DISTINCTIVE INFERENCES IN POISONING.

Exact demonstration not required, § 787.

Body must be identified, § 788.

Possession of poison by defendant, § 789.

Position of deceased, § 790.

Conduct of suspected parties, § 791.

Duration of working of poison, § 792.

Sickness, § 793.

Inference of malice, § 794.

VII. INFERENCES FROM EXTRINSIC INDICATORY PROOF, § 795.

Inference from foot-prints and other marks on soil, § 796.

Scene of guilt and view by jury, § 797.

Similar inferences in other cases, § 798.

Inferences from inculpatory instruments, § 799.

VIII. PHYSICAL PRESUMPTIONS:

Of incompetency through infancy, § 800.

Infants incapable of matrimony, § 800.

And of crime, § 801.

Of identity, § 802.

Identity inferable from name, § 802.

From continuousness of appearances and voice, § 803.

Cautions in applying this inference to deceased persons, § 804.

Inference from photographs, § 805.

Identification dependent upon opportunities of observation and accuracy of narration, § 806.

Comparative weight of opinions, § 807.

Witness's memory may be tested, § 808.

Of death, § 809.

From lapse of years, § 809.

Continuance of life presumed, § 810.

Period of death to be inferred from facts of case, § 811.

Fact of death presumed from other facts, § 812.

Letters testamentary not collateral proof, § 813.

Of death without issue, § 814.

Of loss of ship from lapse of time, § 815.

IX. PRESUMPTIONS OF UNIFORMITY AND CONTINUANCE, § 816.

Burden on party seeking to prove change in existing conditions, § 816.

Residence, § 817.

Occupancy, § 818.

Habit, § 819.

Coverture, § 820.

Solvency, § 821.

Foreign law is presumed to be same as our own, § 822.

Constancy of nature presumed, § 823.

Of physical sequences, § 824.

Of animal habits, § 825.

Of conduct of men in masses, § 826.

X. PRESUMPTIONS OF REGULARITY.

Marriage presumed to be regular, § 827.

Presumption as to concubinage, § 827 a.

Legitimacy as a rule presumed, § 828.

Regularity of judicial proceedings, § 829.

In error necessary facts will be presumed, § 830.

Legislative proceedings, § 831.

Formalities of document presumed, § 832.

Officer and agent presumed to be regularly appointed, § 833.

So of persons exercising profession or business, § 834.

Acts of public officer presumed to be regular, § 835.

Burden of party assailing public officer, § 836.

Due authority in official or corporate act presumed, § 836 a.

Due delivery of letters presumed, § 837.

Delivery to be inferred from mailing, § 837.

And at usual period, § 838.

Post-mark *prima facie* proof, § 839.

Presumption from ordinary habits of forwarding, § 840.

Letters in answer to one mailed presumed to be genuine, § 841.

But not so as to telegrams, § 842.

Presumptions from habits of forwarding letters, § 843.

XI. DISTINCTIVE INFERENCES IN FORGERY, § 844.

Opinion of alleged writer himself, § 845.

Those who know his hand, § 846.

Experts, § 847.

Chemical and microscopic tests, § 848.

Circumjacent tests, § 849.

Falsity of contents, § 850.

Proof of writing by third party, § 851.

I. GENERAL CONSIDERATIONS.

§ 707. A PRESUMPTION of law is a juridical postulate that a particular predicate is universally assignable to a particular subject.¹ A presumption of fact is a logical argument from a fact to a fact; or, as the distinction is sometimes put, it is an argument which infers a fact otherwise doubtful from a fact which is proved.² Hence, a presumption of fact, to be valid, must rest on a fact in proof.³

Presumption of law is a juridical postulate; presumption of fact is an argument from fact to fact.

¹ See this illustrated *infra*, § 714.

² Windscheid's Pandekt. i. § 138.

³ "No inference of fact or of law," says a learned judge of the Supreme Court of the United States, "is reliable drawn from premises which are uncertain. Whenever circumstantial evidence is relied upon to prove a fact, the circumstance must be proved, and not themselves presumed. Stark. on Evid. p. 80, lays down the rule thus: 'In the first place, as the very foundation of indirect evidence is the establishment of one or more facts from which the inference is sought to be made, the law requires that the latter should be established by direct evidence, as if they were the very facts in issue.' It is upon this principle that courts are daily called upon to exclude evidence as too remote for the consideration of the jury. The law requires an open, visible connection between the principal and evidentiary facts and the deductions from them, and does not permit a decision to be made on remote

inferences. Best on Evid. 95. A presumption which the jury is to make is not a circumstance in proof; and it is not, therefore, a legitimate foundation for a presumption. There is no open or visible connection between the fact out of which the first presumption arises and the fact sought to be established by the dependent presumption. *Douglas v. Mitchell*, 35 Penn. St. 440." . . . Strong, J., U. S. v. Ross, 92 U. S. 284; *aff. in Manning v. Ins. Co.*, U. S. Sup. Ct. 1880. In *R. v. Burdett*, 4 B. & Ald. 161, Abbott, C. J., said: "A presumption of any fact is properly an inference of that fact from other facts that are known; it is an act of reasoning, and much of human knowledge on all subjects is derived from this source. A fact must not be inferred without premises that will warrant the inference; but if no fact could thus be ascertained by inference in a court of law, very few offenders could be brought to punishment." . . .

That presumptions of fact are infer-

§ 708 Presumptions are usually classified as follows:—

1. Irrebuttable or absolute presumptions of law, *præsumtiones juris et de jure*;
2. Rebuttable or provisional presumptions of law, *præsumtiones juris*;
3. Presumptions of fact, *præsumtiones hominis*; which presumptions are always rebuttable, and are determinable by free logic.

Prevalent
classifica-
tion.

§ 709. The classical Roman law recognized only two kinds of evidence: (1) persons (*testes*), and (2) things (*instrumenta*). Both *testes* and *instrumenta* were to be weighed by the standard of logic applied to the case as it comes up, and not by that of technical jurisprudence announced before the case is heard.¹ In the whole of the Corpus Juris we meet with no such expressions as *præsumtio juris* and *præsumtio hominis*.² By the classical Roman law, what we now call presumptions were at the highest only inferences from facts in proof.³ The question of the force of such inference was for the logician; and though they are noticed frequently by the jurists, they are styled not *præsumtiones*, but *signa, argumenta, or exempla*.⁴

Presump-
tions of
law un-
known to
classical
Romans.

ences from fact to fact, and not legal postulates, see Manning v. Ins. Co., 100 U. S. 693; Richmond v. Aiken, 25 Vt. 324; Tanner v. Hughes, 53 Penn. St. 289; McAleer v. McMurray, 58 Penn. St. 126; Justice v. Lang, 52 N. Y. 323; O'Gara v. Eisenlohr, 38 N. Y. 26; People v. Hessing, 28 Ill. 410; Graves v. Colwell, 90 Ill. 268; Allison v. State, 42 Ind. 354; Hamilton v. People, 29 Mich. 193; Frost v. Brown, 2 Bay (S. C.), 133; Bach v. Cohn, 3 La. An. 103; Pennington v. Yell, 11 Ark. 212; Lawhorn v. Carter, 11 Bush, 7; People v. Carillo, 54 Cal. 68. To the same effect is Bonnier, *Traité des Preuves*, ii. 387, 420.

For other points bearing on presumptions of fact, see Mead v. Parker,

115 Mass. 413; Hamilton v. People, 29 Mich. 193.

Sir J. Stephen (Ev. p. 2) defines a "presumption" "as a rule of law that courts and judges (juries?) shall draw a particular inference from a particular fact, or from particular evidence, unless and until the truth of such inference is disproved." This excludes presumptions *juris et de jure*.

¹ Whart. on Ev. § 1228.

² Bonnier (*Traité des Preuves*, ii. 417) throws overboard the scholastic terms of a body, styling them "ces expressions barbares."

³ See Durant, i. c. nr. 19; Endemann, *Beweislehre*, § 19.

⁴ See Quinct. v. c. 8.

§ 710. Under the schoolmen, however, to whom we owe several ponderous treatises on presumptions and proofs still cited as authoritative, a new era came in. There was no such thing, when the schoolmen wrote, as a practical jurisprudence, with its two distinctly marked provinces of law and fact. There were no juries, and but few competent judges; and the object of those who then wrote law books was to deprive those to whom the trial of cases was to be committed of any discretion as to the value they were to attach to evidence produced before them. Hence the scholastic jurists devoted themselves to constructing a series of maxims by which every case they could conceive of was to be ruled. We may take as an illustration the maxim, so frequently adopted in our own books, that an old grudge, when proved, is presumed to continue, so that a homicide committed by a person who is shown to have previously harbored a grudge against the deceased is to be considered malicious. As a general psychological proposition, we might be ready to assert the same principle even now; yet who would now undertake to say that this proposition is to rule every case of homicide in which an old grudge is proved? "Do we not know," so one familiar with human nature would argue, "that there are no two persons in whom an old grudge operates precisely in the same way? Do not some persons harbor old grudges tenaciously for years, while others speedily forget them? Do not soldiers, for instance, whose warfare is open and direct, whose enemies are impersonal rather than personal, whose scenes of action frequently change, and who are fully absorbed in each new event as it rushes in, rapidly forget old grudges; and do not, on the other hand, secluded men, in the habit of nursing single passions in solitude, nourish old grudges for years?" "Yes, indeed," so would answer the casuist, "this is all true, so I will provide some additional rules." "A soldier," so the proviso would run, "is presumed to hold to an old grudge only until he engages in some new absorbing enterprise." "But suppose your soldier to be a man of dark purposes, who has been concerned continuously in bitter feuds of which the homicide with which he is charged is part." "For this case, also," answers the casuist, "we will provide a rule. With such persons old grudges are presumed to continue indefinitely." It is in this way the old scholastic books on presumptions were made up. Certain psychological rules, reached by an induc-

tion sometimes very imperfect, were announced as exhaustively covering the whole sphere of crime. A soldier, for instance, to take the modification of the doctrine of old grudge given above, is shown to have been involved for years in a private feud, and in apparent pursuance of this feud he commits a homicide. If so, the homicide is presumed to be malicious; and it does not avail him to show that the old grudge was really at the time of the encounter dormant in his breast, and was suddenly stung into unrestrainable fury by an atrocious attack. Nor was it only the domain of psychology that these presumptions seized. They took equal possession, and with greater plausibility, of the realms of physical science. Conclusions which the science of the day regarded as established, the jurisprudence of the day treated as absolute and irrebuttable. Hence the books were filled with rules, called irrebuttable presumptions of law, many of which were false in fact, and others subject to such numerous exceptions that at the best they are only *prima facie* authoritative.

§ 711. The assignment of irrebuttability to presumptions, however, is as repugnant to the practical jurisprudence of common life as it is to the philosophical jurisprudence of classical Rome. There is no such thing, so we learn Gradual reduction of irrebuttable presumptions. when we compare criminal trials, as either an old grudge, or an evil intent, or a negligence, which reproduces itself without variation. Every new trial presents some new combinations which require independent induction. And when we come to physical laws, the impossibility of establishing irrebuttable presumptions, as rules to determine each case in advance, becomes still more manifest. Human nature as an aggregate may be the same now as it was in the days of the schoolmen, though in no two persons do the same phases of human nature present themselves. But physical nature is now very different from what it was in the days of the schoolmen, or even from what it was fifty years ago.¹ That a man cannot be, in the same week, in Rome and in London, was not long since an irrebuttable presumption; it is no presumption at all at present. That information cannot be passed instantaneously from one business centre to another was, in the twelfth century, irrebutably presumed; in the nineteenth century most of our important

¹ See Mill's *Logic*, i. 389.

contracts are based on telegrams. That the human voice cannot be heard a mile off, so as to distinguish words, might have been irrebuttably presumed ten years ago; at present, in all our great commercial marts, persons may converse by telephone at a distance of several miles. And under no conditions can a particular state of mind be irrebuttably assigned to any particular person. That an appropriate intent is assignable to an ideal man doing an ideal act, may be speculatively true; that such an intent is to be assumed in advance of a trial cannot be practically accepted by courts having to do with real men, put on trial for acts, many of which were without motive (*e. g.*, in issues of negligence), and many of which were done suddenly, in heedlessness, in passion, in self-defence, or through necessity. Hence it is that the old presumptions *juris et de jure* are gradually disappearing. This, indeed, is admitted by Mr. Best,¹ when he tells us that certain presumptions, which in earlier times were deemed absolute and irrebuttable, have, by the opinion of later judges, acting on more enlarged experience, either been ranged among *praesumptiones juris tantum*, or considered as presumptions of fact to be made at the discretion of a jury.² The consequence is that our courts, even while holding to the old phraseology, are so far contracting the range of presumptions *juris et de jure* that while the class is still said to exist, no perfect individuals of the class can be found. The unimpeachability of records is one of the last survivors of these presumptions, and the unimpeachability of records is still spoken of as a presumption *juris et de jure*; but whatever may be the name given to this presumption, it vanishes when it is confronted by proof of fraud or oppression.³

§ 712. While in our own law *praesumptiones juris et de jure* preserve an existence which is now merely titular, in the modern Roman law distinction is denied. modern Roman law, as taught by its most authoritative commentators, even this titular recognition is refused. The scholastic *praesumptiones juris et de jure*, it is held by the best French and German commentators on this particular topic,⁴ are resolvable into the following classes:—

¹ Best's Ev. § 307.

² He cites to this Ph. & Am. Ev. 460; 1 Ph. Ev. 10th ed.

³ *Supra*, § 595. See Whart. on Ev. § 790.

⁴ See Endemann's Beweislehre, 85—

94; Burokhard, Civilistische Praesumptionen, 369 *et seq.*; 11 Vierteljahrschrift für Gesetzgebung, 801; Bonnier, Traité des Preuves, ii. 387—414 *et seq.* *Supra*, notes to § 708.

1. Conclusions from natural laws, the disproval of which is impossible.

2. Processual rules, enacted to facilitate litigation that in the long run is just, or to check litigation that in the long run is vexatious.

3. Fictions, which, though false, are assumed by the policy of the law.

4. Statutory presumptions, such as those introduced, by way of limitation, to quiet titles, or (as in the case of the statute of frauds) to exclude inferior and unreliable proof.¹

§ 713. The modification, just noticed, of the old classification of presumptions, avoids what is evil in that classification and retains what is good. By getting rid of the term "irrebuttable presumptions" we not only remove a series of presumptions, really rebuttable, from a category to which they do not belong, but we relieve the practical administration of justice from the embarrassments which are produced by judges applying, in their charges to juries, the term irrebuttable to presumptions which are open to disproof.² On the other hand, we retain, restoring them to their proper place, those leading axioms of law (*e. g.*, the postulates that all persons are cognizant of the law to which they are subject, and that all sane persons are responsible for their acts) which were once called presumptions *juris et de jure*, but which are really among the necessary principles from which jurisprudence starts.

In our own law unnecessary.

§ 714. Dropping, therefore, the term *praesumptiones juris et de jure*, as unnecessary as well as unphilosophical, we proceed to discuss, as the subject of the present chapter, presumptions of law, in their general sense, and presumptions of fact. Our first duty will be to inquire in what these presumptions differ. And on examination, the points of difference will be found to be as follows:—

1. A presumption of law derives its force from *jurisprudence* as distinguished from *logic*. A statute, for instance, may say, that a mother who conceals the death of her bastard child is to be presumed to have been concerned in its destruction. This is a presumption of law, and is arbitrarily to be applied wherever such concealment is proved.

Presumptions of law distinguishable from presumptions of fact.

¹ *Infra*, §§ 715, 716 *a*.

² See Whart. Cr. Pl. & Pr. § 794.

If there be no such statute, then logic, acting inductively, will have to establish a conclusion to be drawn from all the circumstances of the particular case. Or a statute may prescribe that all persons wearing concealed weapons are to be presumed to wear them with an evil intent. This would be a presumption of law, with which logic would have nothing to do. On the other hand, whether a particular person, who carries a concealed weapon, there being no such statute, does so with an evil intent, is a question of logic (*i. e.*, probable reasoning, acting on all the circumstances of the case) with which technical jurisprudence has no concern. It is not necessary, however, to a presumption of law, that it should be established by statute, in our popular sense of that term. Statute, in its broad sense, includes juridical maxims established by the courts as well as juridical maxims established by the legislature. The prominent maxims of this kind are the presumptions of innocence, of knowledge of the law, and of sanity. Presumptions of law, therefore, are uniform and constant rules, applicable only generically. Presumptions of fact, on the other hand, are conclusions drawn by free logic, applicable only specifically.¹

2. To a presumption of law probability is not necessary; but probability is necessary to a presumption of fact. Nothing, for instance, can be more improbable than that all law-breakers know the law which they break; yet there is no person to whom this presumption is not applied. Nor is there even a faint probability that all the persons in prison at a particular time are innocent; yet, no matter how overpowering may have been the evidence adduced against him, there is no one of them who is not presumed to be innocent when he goes to his trial. On the other hand, without probability, there can be no presumption of fact. A man is not presumed to have intended an act, for instance, unless it is probable he intended it.

3. Presumptions of law relieve either provisionally or absolutely the party invoking them from producing evidence; presumptions of fact require the production of evidence as a preliminary. The presumption of innocence, for instance, makes it provisionally unnecessary for me to adduce evidence of my innocence. On the other hand, until I am proved to have done a thing, there can be

¹ See *Hamilton v. People*, 29 Mich. 193; *People v. Messersmith*, 61 Cal. 646.

no presumption against me of intent. Evidence, therefore, which is the necessary antecedent to presumptions of fact, is attached to presumptions of law only as a consequent. Presumptions of law stand at the gate of entrance, prescribing the terms on which evidence is to be received. Presumptions of fact stand at the gate of exit, determining the effect to be assigned to each fact which passes the ordeal of admissibility.

4. The conditions to which are attached presumptions of law are fixed and uniform; those which give rise to presumptions of fact are inconstant and fluctuating. For instance: all persons charged with crime are presumed to be innocent. Here the condition is fixed and uniform; it involves but a single, incomplex, unvarying feature, *charged with crime*; it is true as to all persons embraced in the category. On the other hand, the presumption of fact, that *doing* involves *intending*, varies with each particular case, and there are no two cases which present the same features. Persons charged with crime may be sane or insane; may be adults or infants; may be at liberty or under coercion; in each case, so far as concerns the presumption of law, they are persons charged with crime, and the presumption applies equally to each. But whether a person doing an act is sane or insane, is an adult or an infant, is at liberty or under coercion, is essential in determining intent. Presumptions of fact, in other words, relate to unique conditions, peculiar to each case, incapable of exact reproduction in other cases; and a presumption of fact applicable to one case, therefore, is inapplicable, in the same force and intensity, to any other case. But a presumption of law relates to whole categories of cases, to each one of which it is uniformly applicable, in anticipation of the facts developed on trial. Thus it is a presumption of law that all persons are sane; and this presumption applies in advance, before any special facts are known to us, to all persons. But whether the defence of insanity is made out as to any particular person is an inference of fact, which we cannot safely determine until we have heard all the evidence admitted as bearing on the issue.

§ 715. Reference has been already made to the circumstance that the law-making power may attach to any particular fact or chain of facts certain legal consequences, and in this way turn a presumption of fact into a presumption of law. We may again recall, as illus-

Presumptions of fact may be by statute made presumptions of law.

trating this, the old English statutes, by which it was provided that concealment by a mother of the death of her bastard child is to be deemed proof that she was concerned in producing its unlawful death. By statutes, also, now existing in several States, it is prescribed that a person who has been absent without being heard from for a given period shall be presumed to be dead. And as an illustration of the converse process, by which presumptions of fact are, by the law-making power, cancelled, may be mentioned the legislation by which, in most of our States, the logical presumption of guilt arising from silence when accused, is excluded from cases on trial where a defendant declines to testify in his own behalf.

§ 715 a. As we have seen in another work, statutes have been adopted providing that certain proof, admissible at common law, shall be excluded, as is the case with the statute of frauds and with stamp acts, and that certain proof, inadmissible at common law shall be received, *e. g.*, certified copies, and books sanctioned by public authority.¹ Under the same category fall statutes providing that certain facts stated by the plaintiff on record at the beginning of a case shall be presumed to be true unless denied by the defendant in affidavit. Statutes of this class may operate in criminal as well as in civil issues. The courts, in a criminal case, would be bound to exclude evidence not proved in the way the legislature prescribes, and to admit evidence which the legislature declares admissible. As illustrations of the latter class may be mentioned depositions and copies of public documents which, though inadmissible at common law, are made admissible by statute. Whether statutes assigning *prima facie* force to certain proof are constitutional has been questioned. It has been held that a statute providing that drinking spirituous liquors at a place shall be *prima facie* proof that such liquors were sold by the occupant, with intent they should be drunk on the premises, is unconstitutional;² and so of a statute declaring that notoriety may be *prima facie* proof of liquor selling.³ On the other hand, the constitutionality of a statute making delivery of liquor *prima facie* proof

¹ See Wh. on Ev. § 1239 a; Whart. Com. Am. Law, § 494.

² *People v. Lyon*, 27 Hun, 180; S. C., 1 N. Y. Rep. 400.

³ *State v. Beswick*, 13 R. I. 211.

of selling has been affirmed;¹ and so of a statute declaring sale is *prima facie* proof of illegality.² And there is no question that it is within the power of the legislature, at least as to future cases, to say that certain acts shall be penal unless innocence is affirmatively shown by the defendant, as is the case with statutes making concealment of the death of a bastard child proof of killing unless innocence is shown by the defence. The same rule is applied to statutes making it an indictable offence to carry concealed weapons, and to statutes throwing the burden of exculpation on persons keeping a house where it is reported spirituous liquors are sold.³ These statutes are virtually statutes determining questions of evidence. If constitutional, they cannot become unconstitutional when they are put in the shape of rules of evidence.⁴

§ 716. As is elsewhere more fully shown, much of the difficulty attending the consideration of this branch of evidence arises from the ambiguity of the terms employed.⁵ It is a "presumption of law," so we are told, that the sun will rise to-morrow; and this is true, if by "law" we mean "physical law." It is a "presumption of law," we are also told, that flight is prompted by fear; and this also is true, if we mean by "law," "psychological law." The mistake is that in one premise the term "law" is used in the sense of "physical" or "psychological law," and in the other premise in the sense of "juridical law," and thus an erroneous conclusion is reached.⁶ "All presumptions of law," it is argued, "bind juries; that concealment argues consciousness of guilt is a presumption of law; therefore juries are bound to find that if there is concealment there is guilt." The fallacy here is the use in one premise of the word "law" in the sense of juridical law, and in the other premise, in the sense of psychological law. Again, to take an illustration to be hereafter more fully expanded, we presume, as a mere matter of

Fallacy
from am-
biguity of
terms.

¹ *Com. v. Wallace*, 7 Gray, 15. See *Hoense* are constitutional, see *Com. v. Kelly*, 10 Cush. 69.

² *State v. Mellor*, 13 R. I. 667.

³ *Whart. on Ev.* § 1239.

⁴ *State v. Thomas*, 47 Conn. 546.

⁵ As illustrating this, see *Gordon v.*

⁶ See, however, article in 26 Alb. L. J. 63. As to constitutionality of laws and as to pleading *hoense*, see *Wh. Cr. L.* 8th ed. § 1530. That statutes imposing on defendant duty of proving

People, 33 N. Y. 501, where a case was reversed by the Court of Appeals, because the judge below told the jury that an inference of fact was a presumption of law. See *supra*, § 341.

logical inference, that intelligent persons intend what they do. This, we may say, is in obedience to a "law;" and this is true if by "law" we mean "psychological law." But the proposition is untrue if by "law" we mean "juridical law," since there are multitudes of cases in which intelligent persons do things unintentionally.¹

II. PSYCHOLOGICAL PRESUMPTIONS.

§ 717. Psychological presumptions are those which relate to the character and motives of men. They may be grouped in two general classes: (1) Those of law, which the policy of the law attaches to all men generically; (2) Those of fact, which our knowledge of human nature leads us to draw from a particular range of facts produced in a specific case. These presumptions will now be considered in order.

§ 718. Every man is presumed to be innocent until the contrary be proved, and if there be reasonable doubt as to his guilt, the jury are to give him the benefit of such doubt.² This is a presumption of law (*praesumptio juris*), which the law makes arbitrarily in all cases, but which, unlike the *praesumptiones juris et de jure*, may be rebutted by

Of inno-
cence. De-
fendant to
have the
benefit of
reasonable
doubt.

¹ "Unfortunately, however," says Mr. Best (Ev. § 322), "the line of demarcation between the different species of presumptions has not always been observed with the requisite precision. We find the same presumption spoken of by judges, sometimes as a presumption of law, sometimes as a presumption of fact, sometimes as a presumption which juries should be advised to make, sometimes as one which it was obligatory on them to make," etc. Best's Ev. § 323, citing Phill. & Am. Ev. 460, 461; 1 Phill. Ev. 470, 10th ed. "When such language," says Mr. Best, "is found in the judgments of the superior courts, it is not surprising that the proceedings of inferior ones should exhibit even greater inaccuracy and confusion. Nothing, for instance, is more common

than to hear a jury told from the bench, that when stolen property is found in the possession of a party shortly after a theft, *the law presumes him to be the thief*,—a direction both wrong and mischievous,—as calculated to convey to the minds of the jury the false impression, that when the possession of the stolen property has been traced to the accused, their discretionary functions are at an end. Our ablest judges tell juries in such cases that they ought, as men of common sense, to make the presumption, and act upon it, unless it be rebutted, either by the facts as they appear in the evidence for the prosecution, or by the evidence or explanation of the accused."

² See *supra*, §§ 1-15, for a full discussion of this topic.

evidence. Between civil and criminal cases there is in this respect an important distinction; in the former, the jury weigh the testimony, and after striking a fair balance, decide accordingly; but in criminal cases, as we have had occasion to exhibit more fully in a prior chapter,¹ the testimony, in order to sustain a conviction, must be such as to satisfy the jury beyond a reasonable doubt that the prisoner is guilty of the charge alleged against him in the indictment.²

§ 719. A difficult question arises when the case of the prosecution is made out beyond reasonable doubt, and the defendant sets up matter of confession and avoidance. If there be a reasonable doubt as to the defence thus set up, is there to be an acquittal? Or must the defence, to avail, be sustained by a preponderance of proof? This topic is noticed in another chapter,³ to which reference is now made.⁴

Presumption applicable to matters of defence.

§ 719 a. The rule, it is to be remembered, so far as it requires guilt to be made out beyond reasonable doubt, is limited to the single issue of guilt when charged in a criminal trial. It does not obtain in civil issues, in which a party, the object being to obtain redress in the way of damages, may be found responsible for heinous crimes on a bare preponderance of proof.⁵ Nor does the rule apply to cases in which charges of crime come up collaterally on a criminal trial. A defendant, for instance, may impute contributory negligence to the prosecutor; and so far from it being requisite to this defence for such contributory negligence to be made out beyond reasonable doubt, it will be sufficient if there be such a case of contributory negligence proved as will throw reasonable doubt on

Rule operates only in favor of defendant as to guilt charged.

¹ *Supra*, § 1.

² As to burden of proof, see *supra*, § 319. That burden is on prosecution to prove *corpus delicti*, see, also, *supra*, § 324.

That, in prosecutions for seduction, prior good character of the party seduced is presumed in cases where the statute does not make this a part of the case of the prosecution, see *Slocum v. People*, 90 Ill. 274. Compare *supra*, § 329. That all essential elements of the prosecution's case must

be proved, see *Feigel v. State*, 85 Ind. 580.

³ *Supra*, §§ 329-40.

⁴ In Ohio, on a prosecution for abortion, in which, under the statute, it is a defence that the act was pronounced necessary by two physicians, it has been held that this defence, if set up by the defendant, must be affirmatively proved. *Moody v. State*, 17 Oh. St. 110.

⁵ *Whart. on Ev.* § 1245.

the defendant's guilt. Or, on an indictment for homicide, the defendant sets up a killing by a third party. In this case, also, it is not necessary for the guilt of such third party to be made out beyond reasonable doubt. It is sufficient if there is such proof presented as will throw reasonable doubt on the defendant's guilt.

§ 720. But when a defence in itself purely extrinsic and independent is set up, all the allegations of the indictment being admitted, then, as we have seen, it is necessary that the defence should be sustained by a preponderance of proof. The principal defences of this class that have come before the courts are: (1) License, or authority from the State; (2) *Autrefois acquit* or *convict*; and (3) Insanity, when the object is to obtain a verdict of lunacy.¹ On the other hand, when this defence traverses any essential allegation of the indictment, then, when the whole evidence is in, the jury, as we have seen, are to be told that to convict it is necessary that such allegation should be established beyond reasonable doubt.²

§ 721. When an offence charged in an indictment contains two degrees, malice being an ingredient of the major degree, but not of the minor, then if the offence be proved to have been committed by the defendant, but there is reasonable doubt as to the malice, the defendant is to be acquitted of the major offence and may be convicted of the minor.³ If, in other words, on an indictment for an offence con-

¹ See *supra*, §§ 331-40.

² *Ibid.* See *Chaffee v. U. S.*, 18 Wall. 516; *Maher v. People*, 10 Mich. 262.

³ *Supra*, §§ 1, 334; *Com. v. York*, 9 Met. 93; *Com. v. Drum*, 54 Penn. St. 9; *Staup v. Com.*, 74 Penn. St. 458; *O'Mara v. Com.*, 75 Penn. St. 424; *State v. Anderson*, 1 Houst. C. C. 38; *State v. Turner*, Wright, Ohio, 29; *Com. v. Hill*, 2 Grat. 594; *Willis v. Com.*, 32 Grat. 929; *State v. Walters*, 45 Iowa, 389; *State v. Laliyer*, 4 Minn. 368; *Milton v. State*, 6 Neb. 136; *Mitchell v. State*, 9 Yerg. 340; *Witt v. State*, 6 Cold. 5; *State v. Hildreth*, 9 Ired. 429; *Davis v. State*, 10 Ga. 101; *Daniel v. State*, 8 S. & M. 401; *State v. Holmes*, 54 Mo. 153; *State v. Gassert*, 65 Mo. 372; *State v. Evans*, 65 Mo. 574; *State v. Hill*, 69 Mo. 451; *State v. Brown*, 7 Or. 186; *Hamby v. State*, 36 Tex. 523; *People v. Milgate*, 5 Cal. 127.

Thus where, in Tennessee, the trial court ruled that when the fact of homicide was made out, and evidence produced in mitigation led the jury to doubt whether the offence was murder or manslaughter, they were bound to find murder, the judgment was reversed, the Supreme Court holding: "The judge should have told the jury, that if, upon the whole circumstances of the case, they were satisfied of his (the prisoner's) guilt, they ought to find him guilty; but if their minds,

taining several grades, the jury have reasonable doubts as to the higher grade, they must acquit of the higher grade; and if they have reasonable doubts as to the lower grade, they must acquit of the lower grade. They can convict of no grade whatever, if they have reasonable doubt as to the defendant's guilt of such grade.¹

§ 722. No doubt it is sometimes said that from proof of a mere killing with a deadly instrument only murder in the second degree can be inferred.² But, as is elsewhere shown, no such case as that of "A. killing B. with a deadly weapon," viewing it simply in this meagre outline, ever arose, or can arise, in a court of justice.³ In the first place, we at least may know what kind of instrument was used. Was it poison? Undoubtedly if the poisoning were malicious, we cannot withdraw the case from the category of murder in the first degree. But are not poisonous drugs frequently administered without malicious intent? Are not most medicines more or less poisonous? Hence, if we say, "Whoever deliberately administers poison acts maliciously," we state an untruth. If we say, "Whoever maliciously administers poison acts maliciously," this is a *petitio principii*. But in practical jurisprudence we are presented with no such alternative. We generally know what kind of poison is administered. We almost always know whether it was administered openly or stealthily; and there is no case that comes up for trial in which there is not a group of other circumstances each adding a new qualifying power to the reasoning by which the case is to be ruled. So it is with all other modes of killing; and hence we must conclude that the question whether an abstract killing with a deadly weapon is murder in the first or murder in the second degree is one

Inference
to be from
all the
facts.

taking all the evidence together, could not come to any satisfactory conclusion as to whether the act amounted to murder or manslaughter, they ought to find him guilty of manslaughter only." *State v. Coffee*, 3 Yerg. 283. See *Dove v. State*, 3 Heisk. 348.

The same rule applies where there is a reasonable doubt as to the specific intention to take life. In such case, there must be an acquittal of murder in the first degree; though, if a mali-

cious homicide be proved, a conviction of murder in the second degree would, on the evidence, be sustained. See *State v. Anderson*, 1 Houst. C. C. 38; Whart. on Hom. §§ 34, 194; Whart. Crim. Law, 8th ed. § 392.

¹ See *supra*, § 1.

² *Infra*, § 764. See *State v. Gassert*, 65 Mo. 352; *State v. Evans*, 65 Mo. 574.

³ See *supra*, §§ 11-29; *infra*, § 738.

which does not belong to practical jurisprudence, and the presentation of which to a jury can only mislead. No case can arise in which there is not some distinctive incident capable of either strengthening or weakening the proof of malicious intent. When facts exist which are consistent only with the hypothesis of murder in the first degree, then murder in the first degree is to be inferred. When facts exist which are consistent only with the hypothesis of murder in the second degree, then murder in the second degree is to be inferred. And this is entirely consistent with the proposition just stated, and when there are doubts as to whether a case falls within a higher or a lower grade, the jury as a matter of law are to incline to the merciful side, and find for the lower grade.¹

§ 723. That knowledge of the law, on the part of all persons charged with crime, is so far presumed that they cannot set up ignorance of the law as a defence, is an axiom of jurisprudence.² That the axiom contains an untruth is conceded. No man, in any community, knows the law either intensively or extensively; there is no thinker, no matter how profound, who has not left some depths unfathomed; no reader, no matter how omnivorous, who has not left some details untouched. To predicate that of the ignorant which cannot be predicated of the learned specialist is absurd;³ but predicated it is both of ignorant

¹ *Supra*, § 721. See Whart. Crim. Law, 8th ed. § 392; and see, as adopting the views of the text, *State v. Wingo*, 66 Mo. 181. As to inference to be drawn from deadly weapon see *infra*, §§ 734-37, 764.

² Whart. Crim. Law, 8th ed. § 84; 1 Hale, 42; *R. v. Price*, 3 P. & D. 421; S. C., 11 A. & E. 727; *Middleton v. Croft*, Str. 1056; *R. v. Esop*, 7 C. & P. 456; *R. v. Good*, 1 C. & K. 185; *Stokes v. Salomons*, 9 Hare, 79; *R. v. Hoatson*, 2 C. & K. 777; *R. v. Bailey*, R. & R. 1; *Stockdale v. Hansard*, 9 A. & E. 131; *Barronet's Case*, 1 E. & B. 1; P. & D. 51; *U. S. v. Learned*, 11 Int. Rev. Rep. 149; *The Ann*, 1 Gallis. 62; *U. S. v. Anthony*, 11 Blatch. 200; *Cambioso v. Maffett*, 2 Wash. C. C. 98; *Com. v. Bagley*, 7 Pick. 279; *Hamilton v. Peo-*

ple, 57 Barb. 625; *State v. Hart*, 6 Jones (N. C.), 389; *McGuire v. State*, 7 Humph. 54; *Winehart v. State*, 6 Ind. 30; *Black v. Ward*, 27 Mich. 191; *Whitton v. State*, 37 Miss. 379; *Chaplin v. State*, 7 Tex. Ap. 87.

³ "Besides," objects Mr. Livingston, in his Report on the Louisiana Penal Code, "is it not a mockery to refer me to the common law of England? Where am I to find it? Who is to interpret it for me? If I should apply to a lawyer for the book that contained it, he would smile at my ignorance, and, pointing to about five hundred volumes on his shelves, would tell me those contained a small part of it; that the rest was either unwritten, or might be found in books that were in London or New York, or that it was shut up in

and learned, so far as to establish the conclusion that no one is allowed to set up ignorance of law as an excuse for wrong.¹ Were it otherwise, government would be trampled under foot. All that would be necessary to secure perfect irresponsibility would be to lapse into perfect ignorance. The more brutal becomes the criminal, the more completely will he be relieved from punishment for crime.

§ 724. The knowledge of law, however, which is here assumed is practical knowledge commensurate with the duties whose non-discharge, the law, in the concrete case, condemns. A sane person who commits a wrong, for instance, is bound to know that the wrong is subject to penal consequences; if it is *malum in se*, his natural consciousness points to this, and it would be fatal to government to allow want of such natural consciousness to be a defence; if it is *malum prohibitum*, it should be known by him, for it is his duty, when he undertakes to abide in a community, to know what it prohibits, for otherwise no police laws could be enforced. It is different when we undertake to determine the motives impelling a party to an illegal act. Hence ignorance of law may be proved, when on indictments for malicious offences such ignorance goes to negative malice,² as where a police officer honestly mistaking the law under which he acts, intentionally, but without warrant or authority, kills an escaped convict, in which case there could be a conviction for manslaughter, but not for murder. To larceny, also, it may be a defence that the defendant acted under an honest though erroneous belief that he had title.³ But except in such cases, when the object is to deter-

Admiss-
ible to dis-
prove in-
tent.

the breasts of the judges at Westminster Hall. If I should ask him to examine his books and give me the information which the law itself ought to have afforded, he would hint that he lived by his profession, and that the knowledge he had acquired by hard study for many years could not be gratuitously imparted. Your law, therefore, I repeat, is absurd in its consequences if taken literally, and mocks us by a reference to an inacces-

sible source for an explanation of its obscurities."

See, also, *Martindale v. Faulkner*, 2 C. B. 720, Maule, J.; *R. v. Mayor of Tewksbury*, L. R. 3 Q. B. 629; *Cutter v. State*, 36 N. J. L. 125. See Whart. on Ev. § 1029.

¹ Knowledge, however, is not presumed of an unpublished statute. Whart. Crim. Law, 8th ed. § 86.

² See *R. v. Reed*, C. & M. 306; Whart. Crim. Law, 8th ed. § 85 a.

³ Whart. Crim. Law, 8th ed. § 848.

mine the particular intent of the defendant when doing the act charged, ignorance of the law is no excuse. And even in cases of this class, the defendant, when the indictment permits it, may be convicted of a minor grade of the offence of which negligence is the *gravamen*. He ought to have known better, and though he cannot, to recur to homicide as an illustration, be convicted of murder, he may, on account of his negligence, be convicted of manslaughter.¹

§ 725. That a person knows what he does is also sometimes called a presumption of law. If we take presumption of law to mean something that the law declares to be universally true until rebutted, then it is not a presumption of law that all persons know what they are about; for there are many persons (*e. g.*, persons influenced by fraud or imposition) of whom the law declares just the contrary. But that a person who is *capax negotii* should set up ignorance of fact as ground of exculpation or of defence would be against the policy of the law; and hence, where there is no fraud or imposition, the law treats him as if he were cognizant of what he did. He is not supposed to have known facts of which it appears he was ignorant; but if his ignorance is negligent or culpable, or if the offence is one made by statute indictable irrespective of the perpetrator's intention at the time, then his ignorance is no defence. Hence ignorance of fact, while it may be admissible to disprove malice (*e. g.*, when a person assaults another erroneously believing the latter to be a burglar),² is not a defence to an indictment under a statute making the person doing a particular act indictable irrespective of his intention;³ or to an indictment for misconduct, when

¹ Ibid. §§ 329 *et seq.*

² *R. v. Levett*, Cro. Car. 538; *R. v. Reed, C. & M.* 306; *R. v. Sleep*, 8 Cox C. C. 472; *The Mariana Flora*, 11 Wheat. 11; *Yates v. People*, 32 N. Y. 509; *Com. v. Logue*, 38 Penn. St. 265. See Whart. Crim. Law, 8th ed. § 88.

³ Sedgwick on Stat. Law, 2d ed. p. 84; *R. v. Gibbons*, 12 Cox. C. C. 237; *R. v. Hicklin*, L. R. 3 Q. B. 360; *R. v. Smith*, 42 L. T. (N. S.) 160; *R. v. Prince*, L. R. 2 C. C. 154; *Hudson v.*

Rae, 4 B. & S. 585; *U. S. v. Leathers*, 6 Sawyer, C. C. 17; *Com. v. Mash*, 7 Met. (Mass.) 472; *Com. v. Thompson*, 11 Allen, 23; *Com. v. Emmons*, 98 Mass. 6; *Smith v. Brown*, 1 Wend. 231; *People v. Brooks*, 1 Denio, 457; *Morris v. People*, 3 Denio, 381; *Halsted v. State*, 41 N. J. L. 552; *aff. S. C.*, 39 N. J. L. 402; *State v. King*, 80 N. C. 603; *State v. Hartfel*, 24 Wis. 60; and other cases cited in Whart. Crim. Law, 8th ed. § 88.

the fact of which the party charged was ignorant was one which he ought to have known.¹

§ 726. All other things being equal, we are to presume, when a person is found dead, that he did not die by his own hand.² Yet this presumption yields at once to any inferences to be drawn from the facts of the particular case.³ Love of life presumed.

¹ *R. v. Robins*, 1 C. & K. 456; *R. v. Woodrow*, 15 M. & W. 404; *R. v. Ollifer*, 10 Cox C. C. 402; *Com. v. Farren*, 9 Allen, 489; *Com. v. Vialle*, 2 Allen, 512; *Com. v. Nichols*, 10 Allen, 199; *Com. v. Waite*, 11 Allen, 264; *Com. v. Raymond*, 97 Mass. 567; *Com. v. Smith*, 103 Mass. 444; *Com. v. Wentworth*, 118 Mass. 441; *State v. Smith*, 10 R. I. 258; *Barnes v. State*, 19 Conn. 398; *People v. Zeiger*, 6 Parker C. R. 355; *People v. Reed*, 47 Barb. 235; *State v. Ruhl*, 8 Iowa, 444; *State v. Hanse*, 71 N. C. 518. See Whart. Crim. Law, 8th ed. § 88, where the cases are collected and discussed.

² *Morrison v. R. R.*, 63 N. Y. 643; *Continental Ins. Co. v. Delpeuch*, 3 Weekly Notes, 277. See *Way v. R. R.*, 40 Iowa, 341; *Guardian Co. v. Hogan*, 80 Ill. 135.

³ See *Best's Evidence*, §§ 346, 347; *Bigelow v. Benedict*, 70 N. Y. 561; *Greenwood v. Lowe*, 7 La. An. 197; *Richards v. Kountze*, 4 Neb. 200; *Bumpus v. Fisher*, 21 Tex. 571. *Supra*, §§ 1 *et seq.*; *infra*, §§ 795-6.

"Men differ much in respect to the extent in which they will expose their lives. Men used to a wild career will take a chance at which those of quiet, secluded, cautious habits would shudder. To no two men can the same standard be applied; and, what is more, there are no two cases in which the dangers presented are precisely the same. Still more strikingly is this the case when we have to decide between suicide and homicide. Who

knows the secret burdens of the life of a man whom we see stretched dead before us, drowned or poisoned, or shot in a way that may be extrinsically as imputable to his own hand as to the hand of another? Who knows what terrible crisis may have appeared to have been impending to that eye now glazed in death? Who knows what discoveries of crime may have been threatened? Who knows how morally overwhelming may have been the insolvency in which he was immersed? Sometimes these problems become so intricate as to defy for months the sagacity of the most patient and intelligent investigators, though their solution may have burst with the clearness and precision of lightning upon the vision of the dead man himself just before the fatal result. On the evening of February 22d, 1878, which, as Washington's birthday, was a sort of half holiday, Mr. Barron, the cashier of a bank in the village of Dexter, in Maine, was found dying in his office. He was gagged, and so faint as to be unable to explain his condition. No wounds sufficient to have caused death were found on him; but there were symptoms which indicated that his condition might be traced to narcotic poison, as well as to the bruises on his person, and the compressions of the gag and cords by which he was bound. Whether this gag and these cords could have been self-imposed, and whether these wounds could have been self-inflicted, was a question about

§ 727. Good faith in business has been frequently declared to be a rebuttable presumption of law. This postulate, however, must be regarded as an assumption merely for the de
 Good faith presumed..

which medical experts differed. But what is still more strange, professional experts in accounting, for some time differed as to whether there was really a deficit in the deceased cashier's accounts, and there was an equal confusion of testimony as to whether persons likely to have committed such a crime were lurking about the village on that particular day. Who can decide what weight the 'presumption of the love of life' is to have in this particular case? Who can decide whether life was not peculiarly hateful to the dying man—a man whose whole long career had been marked by what appeared to have been an honest pride in modest integrity? Who can tell what might have been the strange temptations which led him to his defalcation, if defalcation there was; and what might have been the agony and self-execration with which he awaited its disclosure? Or, if there had been no defalcation, who can tell what perturbations of intellect there may have been in his case to make him imagine, as some men have insanely imagined, that he was a defaulter when he was really not? These questions, in this and similar cases, can never be fully solved. How can we talk of a 'presumption' of love of life in such cases, when the question depends upon the figuring up of a column of accounts, or the truth of a contested entry? How can we advance such a presumption seriously in cases in which a man, absorbed in a family of helpless children, whom he knows he cannot relieve by living, determines to relieve them by dying, and, after insuring his life, takes poison and dies? Is not the real question here whether there were cir-

cumstances which indicated an intention to kill himself by the poison, and can we do otherwise than say that on these circumstances this 'presumption,' or more properly, inference, depends? In other words, must we not arrive at the conclusion that here, as in other cases, there is no such thing as a presumption of law, but that the inference is one of logic, based upon a comparison of facts, and varying in force with each particular collocation of circumstances?" 1 Crim. Law. Mag. (Jan. 1880), 25-6.

It may be added that the auditors in the case of the Dexter Savings Bank against the estate of Barron, reported on October 2, 1883, that the balance due from the Barron estate to the bank is \$2011 including interest. The report concludes as follows:—

"We do not feel called upon to form any opinion upon the question of murder or suicide of Barron, because we are satisfied from the evidence that there was substantially no money in the bank at the time of Barron's death, and whether Barron came to his death by murder or otherwise, the amount of money in his possession in the bank at that time was so inadequate as not to materially affect the situation of the parties litigant or change the result of our conclusions." Of the amount which the auditors decide that the Barron estate is indebted to the Dexter Savings Bank, \$567.91 is for interest. Among the principal items is \$373 necessary to balance the account on the cash book; \$650 for five special deposits made at the bank, but not entered by Barron; \$520 charged for a U. S. bond just prior to Barron's death, and which the auditors decide was not purchased.

termination of the burden of proof. In criminal issues, when bad faith is one of the ingredients of the offence, it must be proved beyond reasonable doubt.¹

§ 728. It has been sometimes said that when a document is shown to be genuine, the law presumes that it is true. But genuineness and truthfulness are so far from being convertible, that documents prepared to effect any political, social, or ecclesiastical end, are from their nature *ex parte*, and are only to be received subject to such qualifications as may be supplied by a knowledge of the character and aims of their authors. It is true that if we could conceive of an ideal genuine document without any distinctive differentia of its own, we might speak of an ideal presumption of law that such a document is true. But there is no ideal genuine document; as soon as genuineness is established, it brings with it a series of incidents peculiar to itself, by which the inference of veracity is moulded. The documents, for instance, that may be published with regard to a homicide of one of the parties to a contested election may be all genuine, but we cannot determine as to the truth of any one of them without first taking into account the prejudices of its author, and the objects he may have had in view in making the publication, and then proceeding to compare it with whatever other relevant evidence we can collect. The Roman authorities on this point speak unhesitatingly. Truth and genuineness, they insist, are not equivalent, though genuineness or falsification affords inferences of truth or falsehood. But this conclusion is a *praesumptio hominis*, or logical conclusion, as distinguished from a *praesumptio legis*, or arbitrary legal conclusion.²

§ 729. All persons who have reached years of discretion are regarded *prima facie*, by a rebuttable presumption of law (*praesumptio juris*), to be sane.³ Hence the burden of proof, when a party sets up insanity as a defence, is

Genuine-
ness as
presump-
tion of
truth.

Sanity
generally
presumed.

¹ *Supra*, § 330. As to relevancy in such cases see *supra*, §§ 55-7.

² See *Quinet v. 5*; *L. 4. D. xxii. 4*; *L. 26. § 2. D. xvi. 3*; *Endemann. 258*. As to distinction between genuineness and authenticity see *Paley's Evidences*, *Introd. Chap.* As to proof of genuineness see *supra*, §§ 546 *et seq.*

³ *R. v. Stokes*, 3 C. & K. 188; *R. v. Taylor*, 4 Cox C. C. 155; *R. v. Layton*, 4 Cox C. C. 149; *U. S. v. Lawrence*, 4 Cranch C. C. 544; *U. S. v. McGlue*, 1 Curtis, 1; *State v. Lawrence*, 57 Me. 574; *Com. v. Eddy*, 7 Gray, 583; *State v. Spencer*, 1 Zab. (21 N. J. L.) 196; *Lynch v. Com.*, 77 Penn. St. 206; *Boswell v.*

on him to prove it.¹ In what way this burden is to be sustained is elsewhere discussed.²

§ 730. It has frequently been said to be a presumption of law that chronic insanity is continuous;³ but that such presumption does not exist as to fitful and exceptional attacks.⁴ This, however, is a mere *petitio principii*; it being tantamount to saying that chronic insanity is chronic, and transient insanity is transient. The presumption as to the continuance of insanity, such is the more correct statement, is one of fact, varying with the particular case.⁵ And it resolves itself into the conclusion that when insanity of a permanent type is shown to have existed, without proof of recovery, the burden is on the party setting up sanity to prove it,⁶ but that the mere fact that a party had years ago an attack of exceptional brain disease does not impose such a burden.

Com., 20 Grat. 860; *State v. Brandon*, 8 Jones (N. C.), 463; *Weed v. Ins. Co.*, 70 N. C. 566; *State v. Starke*, 1 Strobb. 479; *Loeffner v. State*, 10 Oh. St. 599; *People v. Myers*, 20 Cal. 518. As to conflicting views in case of insanity see *supra*, § 336.

¹ See *supra*, § 336.

² *Ibid.*

³ *R. v. Layton*, 4 Cox C. C. 149; *R. v. Stokes*, 3 C. & K. 188; *Cartwright v. Cartwright*, 1 Phillimore, 100; *Atty.-Gen. v. Parnther*, 3 Bro. C. C. 441; *White v. Wilson*, 13 Ves. 88; *Prinsop v. Dyce Sombre*, 10 Moo. P. C. 232; *Nichols v. Binns*, 1 Sw. & Tr. 243; *Smith v. Tebbitt*, L. R. 1 P. & D. 398; *Hoge v. Fisher*, 1 Pet. C. C. R. 163; *Breed v. Pratt*, 18 Pick. 115; *Hix v. Whittemore*, 4 Met. 545; *Sprague v. Duel*, 1 Clarke (N. Y.), 90; *Titlow v. Titlow*, 54 Penn. St. 216; *State v. Spencer*, 1 Zab. 196; *Carpenter v. Carpenter*, 8 Bush, 283; *Ballew v. Clark*, 2 Ired. L. 23; *State v. Bringer*, 5 Ala. 244; *Saxon v. Whittaker*, 30 Ala. 237; *Ripley v. Babcock*, 13 Wis. 425; *State v. Reddick*, 7 Kans. 143.

⁴ *Hall v. Warren*, 9 Ves. 605; *White v. Wilson*, 13 Ves. 87; *Lewis v. Baird*, 3 McLean, 56; *Hix v. Whittemore*, 4 Met. 545; *State v. Reddick*, 7 Kans. 143; *People v. Francis*, 38 Cal. 183.

⁵ *R. v. Stokes*, 3 C. & K. 188; *R. v. Layton*, 4 Cox C. C. 149; *Sadler v. Sadler*, 3 C. B. (N. S.) 87; *Smith v. Tebbitt*, L. R. 1 P. & D. 434; *Anderson v. Gill*, 3 Macqueen S. A. Cas. 197; *Staples v. Wellington*, 58 Me. 453; *State v. Spencer*, 1 Zab. 196; *State v. Starke*, 1 Strobb. 479; *State v. Bringer*, 5 Ala. 244. In *People v. Smith*, 57 Cal. 130, it was held not error to refuse to charge a jury that insanity was presumed to be continuous. See *State v. Vann*, 82 N. C. 631, where it was said that though the defendant was shown to be insane before the homicide, his insanity at the time of the homicide was an open question, to be established to the satisfaction of the jury. In *Ford v. State*, 71 Ala. 385, the distinction of the text was affirmed.

⁶ *State v. Wilner*, 40 Wis. 304. See *supra*, § 63.

§ 731. An inquisition of lunacy is, as to strangers, at the most only *prima facie* proof of business incompetency,¹ though it may conclude parties.² Hearsay in the neighborhood is inadmissible to prove insanity.³ The issue of insanity is to be determined by the facts proved in the particular case, such as prior insane conduct,⁴ physical peculiarities,⁵ and hereditary tendency.⁶ In arriving at a conclusion, the opinions of persons who have observed the alleged lunatic, whether such persons be experts or non-experts, are to be considered.⁷

Insanity may be inferred from circumstances.

The burden of proof in such cases is more fully discussed in a prior chapter.⁸

§ 732. Another psychological law, in obedience to which it may be *prima facie* inferred that men will act, is that persons when advised of danger will take ordinary care for self-preservation.⁹ Thus it has been held in Pennsylvania,¹⁰ that, in the absence of evidence to the contrary, a person who has been killed by a train, at a railway crossing, will be so far presumed to have observed the requisite precautions that the burden of proof is on the railway company to show the contrary.¹¹ Presump-

Prudence in avoiding danger will be presumed.

¹ See cases cited Wh. on Ev. § 1254.

² *Supra*, § 599.

³ Wright v. Tatham, 1 A. & E. 313; 7 A. & E. 313; 4 Bing. N. C. 489; Lancaster Bk. v. Moore, 78 Penn. St. 407, overruling Rogers v. Walker, 6 Barr, 371; Choise v. State, 31 Ga. 424. *Supra*, § 599.

When the insanity of the defendant is relied on in defence to an indictment for murder, evidence of the defendant's subsequent acts or conduct is not admissible to prove the existence of that condition at the time of the offence, except when so connected with evidence of a previous state of mental disorder as to strengthen the inference of its continuance at the time of the murder, or when they indicate unsoundness of so permanent a nature as necessarily to reach back beyond that time. Com. v. Pomeroy, 117 Mass. 143.

⁴ U. S. v. Sharp, 1 Pet. C. C. 118; Lake v. People, 1 Parker C. R. 495;

McLean v. State, 16 Ala. 672; People v. March, 6 Cal. 543.

⁵ 1 Wh. & St. Med. Jur. § 470.

⁶ R. v. Tuckett, 1 Cox C. C. 103; R. v. Oxford, 9 C. & P. 525; Smith v. Kramer, 1 Am. Law Reg. 353; Baxter v. Abbott, 7 Gray, 71; Com. v. Andrews, cited 1 Wh. & St. Med. Jur. 375. See State v. Christmas, 6 Jones (N. C.) 471; Whart. Crim. Law, 8th ed. §§ 64-5.

⁷ *Supra*, §§ 417 et seq.

⁸ *Supra*, § 336.

⁹ As to relevancy of such evidence, see *supra*, § 56.

¹⁰ Pennsylvania R. R. Co. v. Weber, 76 Penn. St. 157.

¹¹ Though, see, *contra*, Wilcox v. Rome, etc., R. R. Co., 39 N. Y. 358. In Weiss v. R. R., 79 Penn. St. 387, the court said: "When the plaintiffs below closed their evidence, they had a perfect *prima facie* case to go to the jury. They had given evidence of the

tions of this class are simply inferences of fact, varying in intensity with the capacity of the subject. To an infant, but a slight degree of prudence is imputed; the degree imputed increases with years.¹ Prudence is taught by experience, direct or indirect, and we cannot impute imprudence in avoiding danger, except to those who know what danger is.²

§ 733. Where, in the commission of a crime, the husband and wife are present, and coöperating in the criminal act, it is a presumption of law, capable of being rebutted by proof, that the wife is acting under coercion.³ In the old practice in criminal cases, treason and murder were excepted from the operation of this presumption;⁴ but this exception is no longer admitted.⁵ The presumption, in any case, may be rebutted by proof that she instigated the wrongful act, or by other proof showing her independent and free concurrence.⁶ The presumption does not apply to acts not done in the husband's immediate presence.⁷

§ 734. That a man intends the probable consequences of what he does is sometimes styled a presumption of law. This, however, is an error, if by presumption of law is meant a presumption to be imposed by the courts as universally applicable. It is not universally true that a man intends

negligence of the defendants, and no contributory negligence of the deceased appeared. The presumption of law (?) was that he had done all that a prudent man would do under the circumstances to preserve his own life, and that he had stopped, and looked, and listened." See *Whitford v. Southbridge*, 119 Mass. 564.

¹ See *Whart. on Negligence*, §§ 310, 315.

² See *Bain on Character*, 282.

³ See 1 *Hale*, 45, 47; *R. v. Manning*, 2 C. & K. 887; *R. v. Smith*, 8 Cox C. C. 27; *R. v. Stapleton*, 1 *Craw. & Dix*. 163; *R. v. Matthews*, 1 Den. C. C. 596; *R. v. Cohen*, 11 Cox C. C. 99; *State v. Cleaves*, 59 Me. 298; *State v. Harvey*, 3 N. H. 65; *State v. Potter*, 42 Vt. 495; *Com. v. Pratt*, 126 Mass. 462; *Com. v. Bagan*, 103 Mass. 71; *State v. Boyle*, 13 R. I. 537; *Goldstein v. People*, 81

N. Y. 231; *Quinlan v. People*, 6 Parker C. R. 9; *Uhl's Case*, 6 Grat. 711; *Davis v. State*, 15 Ohio, 72; *People v. Wright*, 38 Mich. 744; *Miller v. State*, 25 Wis. 384; *State v. Patterson*, 1 Strobh. 169; *Williamson v. State*, 16 Ala. 431; *Mulvey v. State*, 43 Ala. 316.

⁴ *Whart. Crim. Law*, 8th ed. §§ 78 & seq.

⁵ *R. v. Smith*, 8 Cox C. C. 27; *R. v. Wardroper*, 8 Cox C. C. 284; *R. v. Manning*, 2 C. & K. 903; *Com. v. Gannon*, 97 Mass. 547; *Com. v. Welch*, *ibid.* 593.

⁶ *Marshall v. Oakes*, 51 Me. 508; *Com. v. Gormley*, 133 Mass. 580; *State v. Shee*, 13 R. I. 535.

⁷ 1 *Hawk. c. 1, s. 9*; 1 *Hale*, 47; *Martin v. Com.*, 1 Mass. 347; *Com. v. Neal*, 10 Mass. 152; *Com. v. Butler*, 1 Allen, 4.

the probable consequences of his act. A manufacturer of pistols, for instance, knows that it is probable that some of the pistols he makes may be used to kill; but the killing that results he does not in the eye of the law intend. Probable consequences, also, may result from acts as to which the law, by pronouncing them to be negligent, expressly negatives intent. We are unable, therefore, to say of all the probable consequences of acts that they were intended by the authors of such acts. All that we can say is, that most of such probable consequences were intended; and that, judging from analogy or imperfect induction,¹ such is the case with the particular consequences we have to discuss. In this sense we may speak of such consequences as presumably intended.² In all departments of jurisprudence this line of reasoning is applied. We infer that he who breaks into a house at night and steals goods intends burglary,³ and that he who publishes a libel does so intentionally, though such inferences are open to rebuttal.⁴ We *infer*, in such and similar cases, intent; but we infer it (even when a party is examined as to his motives) from the facts of the particular case. The process is induction from facts, not deduction from arbitrary law.⁵

¹ See *supra*, §§ 5-17.

² *R. v. Brice*, R. & R. 450; *R. v. Cobden*, 3 F. & F. 833; *State v. Goodenow*, 65 Me. 30; *State v. Gilman*, 69 Me. 163; *Com. v. McGerty*, 114 Mass. 299; *Knapp v. White*, 23 Conn. 529; *Quinebaug Bk. v. Brewster*, 30 Conn. 559; *Thomas v. People*, 67 N. Y. 218; *People v. Majone*, 1 N. Y. Cr. Rep. 87-94; *Hackett v. Com.*, 15 Penn. St. 95; *Jones v. Ricketts*, 7 Md. 108; *State v. Robinson*, 20 W. Va. 713; *Ridenour v. State*, 38 Oh. St. 72; *Hart v. Roper*, 6 Ired. Eq. 349; *State v. Skidmore*, 87 N. C. 509; *Hayes v. State*, 58 Ga. 35; *Gauldin v. Shehee*, 20 Ga. 531; *Ware v. State*, 67 Ga. 349; *Phillips v. State*, 68 Ala. 469; *Burke v. State*, 71 Ala. 377; *Whinzenant v. State*, 71 Ala. 383; *State v. Redemeier*, 8 Mo. Ap. 1; *S. C.*, 71 Mo. 173; *Mears v. Graham*, 8 Blackf. 144; *State v. Lautenschlager*, 22 Minn.

514. That such inference may be rebutted, see *Filkins v. People*, 69 N. Y. 106. See 1 Steph. Cr. L. 112.

³ *R. v. Brice*, *supra*.

⁴ *Pontifex v. Bignold*, 3 M. & Gr. 63.

⁵ *Beyer v. People*, 86 N. Y. 369.

Where circumstances only raise a suspicion of the defendant's purpose, it is error to allow the jury to consider them. So held where the defendant was indicted for an assault with intent to commit rape, and the evidence was that the defendant seeing the prosecutrix on her way to her mother's house, called to her to stop, threatened her life, and gave chase to her until she arrived at the house. *State v. Massey*, 86 N. C. 658, overruling *State v. Neeley*, 74 N. C. 425. In accord with *State v. Massey* is *State v. Donovan*, Sup. Ct. Iowa, 1883, 16 N. W. Rep. 206, where the court say: "From the

§ 735. But, as has already been noticed, these inferences, though inferences of fact, varying in intensity with each particular case (not *prima facie* invariable as is the presumption of innocence), are not inferences to be arbitrarily applied. The jury in such matters is to accept certain general principles of probable reasoning, which it is the duty of the court to announce, not as binding rules of law, but as logical processes, of great value in all questions of evidential induction.¹

§ 736. The presumption (or inference, as it may more properly be called) immediately before us, that the natural and probable consequences of every act deliberately done were intended by its author,² may be copiously illustrated. Thus on a trial for forgery, where the forgery is proved, an intent to defraud the person who would have to pay the instrument if it were genuine may be inferred, even though the instrument be so framed as not to impose upon him, and the intent to defraud be general, and not confined, or in any way pointed to the person by whom, if genuine, the instrument would be paid.³ So the uttering of a forged stock receipt to a person who employed the prisoner to purchase stock to that amount, and advanced the money, is the basis from which may be inferred an intent to defraud, notwithstanding the belief of the party to whom it was uttered, that the prisoner had no such intent.⁴ Where a killing, also, is by a person

act" (chasing the prosecutrix), "and other facts of the case, the jury may have found such an intent; but the law raises no presumption of such an intent solely from the defendant's act in pursuing the prosecutrix. It surely does not follow, as a legal presumption, that any specific offence is intended by the simple act of a man chasing a woman. It may be done without the intention to injure her; but the act, with other circumstances, may be considered in order to find the intent." As to proving intent see *supra*, § 53; Trogon v. Com., 31 Grat. 862. See as to inferences of intent, 3 Whart. & St. Med. Jur. 4th ed. [1884] § 827.

¹ See Fulmer v. Com., 97 Penn. St. 503; Farris v. Com., 14 Bush, 362;

State v. Swayse, 30 La. An. Part II. 1323; Brown v. State, 4 Tex. Ap. 275; Parrish v. State, 14 Neb. 60.

² R. v. Price, 9 C. & P. 729; R. v. Holt, 7 C. & P. 518; R. v. Dixon, 3 M. & S. 15; R. v. Bailey, R. & R. 1; R. v. Harvey, 3 D. & R. 464; Com. v. Drew, 4 Mass. 391; Com. v. Snelling, 15 Pick. 337; People v. Cottrel, 18 Johns. 115; State v. Cooper, 1 Green (N. J.), 361; State v. Mitchell, 5 Ired. 350; State v. Jarrott, 1 Ired. 76; State v. Council, 1 Overt. 305.

³ Whart. Crim. Law, 8th ed. §§ 717 et seq.; R. v. Mazagora, R. & R. 291; Henderson v. State, 14 Tex. 503; Hoskins v. State, 11 Ga. 92; State v. Mix, 15 Mo. 153.

⁴ R. v. Sheppard, R. & R. 169.

without authority, and not in public war, by an instrument likely to cause death, with deliberate aim, malice is to be inferred from the act.¹ But the inference of intent, or of malice, is to be drawn from the whole case, varying in force as the case varies.² It is wrong to say in cases of homicide, for instance, that as a uniform presumption of law criminal intent and malice are to be presumed from the use of a deadly weapon, for there are cases when this is not true.³ Yet, in cases where the evidence shows the deliberate use by an intelligent person of a deadly weapon, in a private encounter, without authority of law, the jury may be told that malice is a proper logical inference.⁴

§ 737. The Roman common law is to the same effect. *Facta læsione præsumitur dolus, donec probetur contrarium.* This is based partially on the Code and opinions of the jurists, partially on philosophical grounds. But this is simply a "conclusio probationum," or inference of probable inductive reasoning from facts. And with peculiar caution do the jurists insist upon the inference being drawn from all the circumstances of the case. It is, they tell us, a process of free logic, in which we are not justified in arriving at an inference until we weigh every fact put in evidence, and as to which no pre-announced inflexible rule can be declared.⁵

Roman law
to the same
effect.

§ 738. We must keep in mind that the doctrine that malice and intent are presumptions of law, to be presumed from the mere act of killing, belongs, even if correct, to purely speculative jurisprudence, and cannot be applied to any case that can possibly arise before the courts. As we have just seen, in no case can the prosecution limit its proof to the mere act of killing. If killing be proved, the mode

Malice not
to be arbi-
trarily
presumed
from
killing.

¹ See *R. v. Ward*, L. R. 1 C. C. 356; *Thomas v. People*, 67 N. Y. 218; *Meyers v. Com.*, 83 Penn. St. 131; *State v. Zeibart*, 40 Iowa, 169; *State v. Lautenschlager*, 22 Minn. 514.

² *Filkens v. State*, 69 N. Y. 101; *State v. Painter*, 67 Mo. 84.

³ *Infra*, § 764. See *R. v. Welsh*, 11 Cox C. C. 336; *R. v. Selten*, 11 Cox C. C. 674; *Murray v. Com.*, 79 Penn. St. 311; *Kingen v. State*, 45 Ind. 519; *Bucker v. Com.*, 14 Bush, 60; *Ferris v.*

Com., 14 Bush, 362; *State v. Roane*, 2 Dev. 58; *State v. West*, 6 Jones (N. C.), 505; *State v. Coleman*, 6 Rich. (N. S.) 185; *Simpson v. State*, 59 Ala. 1; *State v. Swayse*, 30 La. An. 1323; *Palmore v. State*, 29 Ark. 248; *Skidmore v. State*, 43 Tex. 93; *Perry v. State*, 44 Tex. 473; *Murray v. State*, 1 Tex. Ap. 417.

⁴ *Infra*, § 764.

⁵ *Collat. legg. Mos. et Rom.* 1. 8.

must not merely be shown, but averred. It is not enough to aver in the indictment that "A. killed B." How the killing was done must be specified. Nor is it possible to eliminate from the proof the mode; for a statement by a witness, could we imagine such evidence to be offered, that "A. killed B.," would be inadmissible as matter of opinion; it would be necessary to state the facts, so as to show that the way of killing was one of which the law takes cognizance. It may be said, for instance, that A., a son, killed his mother by his misconduct breaking her heart; but this would not be the subject of a criminal prosecution. What the law punishes, is not *killing*, but *particular modes of killing*, and those must be averred and proved. Now, these modes, when proved, form facts from which intent is to be inferred or negatived. It is therefore announcing a proposition purely speculative and irrelevant to tell a jury that an abstract killing involves, as a matter of law, an abstract intent. It is perfectly proper, however, to tell a jury that from certain circumstances—*e. g.*, a deadly weapon, repeated and severe wounds, threats—intent and malice may be rightly inferred as inferences of fact.¹ These are inferences familiar in the operation of psychological and social law; inferences the jury are bound to weigh; but in weighing which it is proper that they should be advised by the court. When we apply this test, the apparent conflict of opinions vanishes. It is true that we hear occasional utterances, as in Massachusetts, of the old doctrine, that malice is to be inferred from the mere act of killing; but wherever this is done, it is followed by the admission that when the facts of killing are proved, then the malice is to be inferred from the facts. Now, as the facts of killing are always proved, the idea of abstract malice being presumed from abstract killing has no application to the cases before the court.² It is a speculation like the speculations of the old schoolmen, from which it is taken, based on the supposition that there are abstract generic phenomena (*e. g.*, an abstract horse with abstract predicates); speculations which roam over all creation, without ever touching any particular real case. Should, however, the judge

¹ See *State v. Gilman*, 69 Me. 163; *Roach v. State*, 8 Tex. Ap. 478; *Brown v. State*, 9 Neb. 157; *Hawthorne v. State*, 58 Miss. 778; *Lacefield v. State*, 34 Ark. 275. ² See this virtually admitted in *Com. v. Hawkins*, 3 Gray, 463, by Shaw, C. J., and by Curtis, J., in *U. S. v. Armstrong*, 2 Curtis C. C. 446.

make the proposition not speculative but regulative—should he direct the jury that logical inferences of this class are presumptions of law, and tell them to presume malice from the act of killing—then this would be error.¹

§ 739. The fallacy which has just been noticed pervades the civil as well as the criminal side of our law. Thus we are told by an authoritative writer, that “The *deliberate* publication of a calumny, *which the publisher knows to be false*, raises, under the plea of ‘Not guilty’ to an action for libel, a conclusive presumption of malice.”² Now, here again is either a mere *petitio principii*, being equivalent to saying, “A falsehood uttered deliberately and knowingly is a falsehood uttered deliberately and knowingly,” or we have exhibited to us, not a “conclusive” but a probable presumption of malice. Undoubtedly the fact that a document attacking the character of another is published by a mere volunteer, is ground from which malice may be inferred. But this fact is not always enough to make out malice, for when the publication is privileged, then, in order to show malice, facts inconsistent with *bona fides* must be proved.³ Whether there is malice, therefore, even by force of the very line of cases before us, is a question of fact, determined by the evidence in the particular case. Another illustration of the same error may be noticed in an English ruling, that fraud is to be inferred wherever one man tells an untruth to another for the purpose of obtaining the latter’s goods.⁴ Here, again, we have the same dilemma. Either the

Nor from
other hurt-
ful act.

¹ Whart. Cr. Pl. & Pr. § 794. Of the inferences to be drawn from the instrument see *infra*, § 768. As to rebuttal of malice in libel, see *R. v. Labouchere*, 14 Cox C. C. 419.

² Taylor’s Evidence, § 71, citing *Haire v. Wilson*, 9 B. & C. 643; *R. v. Shipley*, 4 Dougl. 73, 177; *Fisher v. Clement*, 10 B. & C. 475; *Baylis v. Lawrence*, 10 A. & E. 925. To the same effect is *Greenleaf on Ev.* § 18.

³ *Bromage v. Prosser*, 4 B. & C. 247; *Spill v. Maule*, L. R. 4 Ex. 232; *Whitefield v. R. R.*, 1 K., B. & E. 115; *Taylor v. Hawkins*, 16 Q. B. 308; *Cooke v. Wildes*, 5 E. & B. 328; *Toogood v.*

Spyring, 1 C., M. & R. 181, 193; 4 Tyr. 582, S. C.; *Coxhead v. Richards*, 2 C. B. 569; *Wright v. Woodgate*, 2 C., M. & R. 573; Tyr. & Gr. 12, S. C.; *Gilpin v. Fowler*, 9 Exch. 615; *Somerville v. Hawkins*, 10 C. B. 583; *Harris v. Thompson*, 13 C. B. 333; *R. v. Wallace*, 3 Ir. L. R. (N. S.) 38.

⁴ *Tapp v. Lee*, 3 B. & P. 371. See *Pontifex v. Bignold*, 3 M. & Gr. 63; *Com. v. Murphy*, 23 Grat. 960.

In *R. v. Noon*, 6 Cox C. C. 137, Cresswell, J., told the jury that the law infers malice from a *wilful* killing without provocation. But this also is a *petitio principii*, and is nothing more than

ruling, if it means that he who intends to cheat has the intention of cheating, is a bare *petitio principii*; or it rests on a false premise, namely, that a man who, by means of an untruth, obtains another's goods, intends to cheat, in teeth of the fact that there are innumerable cases in which untruths are uttered unconsciously, or as mere brag, or as matters of opinion, in which cases it is held that the intention to cheat is not proved. In this case, also, we have the process of deduction erroneously substituted for induction, by which alone, as we have seen, conclusions as to intent can be reached.

§ 740. When the proof indicates that there were other intentions beside that laid in the indictment (*e. g.*, in stealing, beside the intention to steal, an intention to help a third person, or in homicide, beside the intent to kill, an intent to vindicate an impaired right), the existence of such cumulative intention is no defence.¹ There is no good act that is not to some extent impelled by improper motives; there is no bad act which the perpetrator does not summon up good motives to excuse. An assassination, for instance, is rarely for the exclusive purpose of satiating private hate. A bad man is to be removed from the world, or some good deeds are to be aided by part of the plunder. If whenever good intentions are mingled with the bad intention there can be no conviction, there could be no conviction in any case.²

§ 741. From the vexed question of intent we proceed to another line of rulings, as to which variable logical inferences have been too often spoken of as constant presumptions of law. Where a document is shown to have been fraudulently altered, defaced, or destroyed, we may infer that this was done in the interests of the party to be benefited by the spoliation;³ and should he attempt to make use of the document in its corrupted state, or to offer parol proof of its con-

saying that a wilful killing is wilful. See *State v. Williams*, 69 Mo. 210.

¹ *R. v. Cox*, R. & R. 362; *R. v. Gil- low*, 1 Mood. C. C. 185; *R. v. Davis*, 1 C. & P. 306; *R. v. Bowen*, C. & M. 149; *R. v. Hill*, 2 Mood. C. C. 30; *R. v. Batt*, 6 C. & P. 329; *State v. Moore*, 12 N. H. 42; *Com. v. McPike*, 3 Cush.

181; *People v. Curling*, 1 Johns. 320; *State v. King*, 86 N. C. 603. See *supra*, § 135; and as to combination of intents, see *Whart. Crim. Law*, 8th ed. § 119. ² See *McLain v. Com.*, 99 Penn. St. 86.

³ *Aliter*, when accidental destruction is proved. *Bott v. Wood*, 56 Miss. 136.

tents when it has been destroyed, the evidence will be rejected until the destruction or mutilation be satisfactorily explained ;¹ or, should the document be received in evidence, then, among the several probable interpretations which might be admissible, that which is most unfavorable to him will be adopted.² So a spoliation of papers by a neutral vessel when captured has been held to give a strong inference of hostile purpose.³ And, as will soon be more fully seen, wherever evidence is intentionally suppressed, we have the right to suppose, as a matter of logic, that if produced it would tell against the party working the suppression.⁴ It may also be inferred that evidence which a defendant on trial refuses to permit to be introduced, on the ground of privilege, would not have told in his favor.⁵ But this is not to be permitted to conflict with statutes providing that there is to be no presumption against a defendant for not testifying ;⁶ nor should the rule be strained so as to include an inference that facts thus excluded are to be regarded as proved. And the question is one of logic, not of technical law.

§ 742. Forgery of evidence, to adopt, with a slight change, Mr. Bentham's classification, may be effected: (1) From a view of self-exculpation ; 2) Maliciously, with the intention of injuring the accused or others ; (3) In order to effect some speculative or moral end.⁷

Forgery of evidence for self-exculpation gives prejudicial inferences.

With a View to Self-exculpation.—A striking illustration of this is found in the trial of Dr. Webster, for the murder of Dr. Parkman, where letters were received by the police marshal of Boston, purporting to reveal the location of the body, which upon the trial were proved to have been written by the prisoner, in order to divert suspicion from himself, and to prevent a rigid examination of the premises where the murder was actually committed.⁸ The numerous fabrications of evidence in behalf of the claimant in the Tichborne case also had much influence in leading

¹ Ullman v. State, 13 Tex. Ap. 201. The burden of explaining mutilations is on the party offering the document. State v. Grant, 74 Mo. 33. See Lond. Law Times, June 30, 1881, p. 173.

² *Infra*, § 749 ; Wilson v. Fulliam, 50 Iowa, 123.

³ The Hunter, 1 Dods. Adm. 480 ; The Pizarro, 2 Wheat. 227.

⁴ *Infra*, § 748 ; Whart. on Ev. § 1264.

⁵ People v. Hovey, 92 N. Y. 555.

⁶ *Infra*, § 749.

⁷ See, on this point, Amos's Great Oyer, etc., 267.

⁸ Bemis's Rep. of Webster Case, 210. See, on same point, Gardiner v. People, 6 Parker C. R. 155 ; Edmund's Case, 1 Wh. & St. Med. J. § 167.

to the conclusion of his guilt. The same remarks apply to a forged defence of *alibi*. It is not an uncommon artifice to endeavor to give coherence and effect to a fabricated *alibi*, by assigning the events of another day to that on which the offence was committed, so that the events, being true in themselves, are necessarily consistent with each other, and false only in their assignment to the day in question.¹ And while an *alibi* is a defence which is a constant safeguard of innocence, it is peculiarly susceptible of being fabricated as a shelter for guilt.² It has hence been held that the getting up by the defendant of a fictitious *alibi* by false personation is admissible against him on trial,³ though such a defence must not be treated as necessarily involving guilt.⁴ The same may be said of an attempt to corrupt witnesses.⁵

§ 743. The fact of a forgery of evidence having taken place is, therefore, simply a circumstance from which, in connection with others (proof of the *corpus delicti* being essential), guilt may be inferred.⁶ Taken by itself, such

But not
conclusive
of guilt.

¹ Wills on Circumstantial Ev. 116. An illustration of this is given in 1 Crim. Law Mag. 8; 17 Alb. L. J. 40. As to *alibi*, see *supra*, § 333.

² See *supra*, § 333; *infra*, §§ 749-50.

³ State v. Williams, 1 Williams (Vt.), 724; Turner v. Com., 86 Penn. St. 54; and cases cited *supra*, § 334.

⁴ Toler v. State, 16 Oh. St. 583; State v. Brown, 25 Iowa, 561.

It is error to instruct the jury that an unsuccessful attempt to set up an *alibi* is always a circumstance of great weight against a prisoner. People v. Malaspina, 57 Cal. 628.

⁵ State v. Staples, 47 N. H. 113. *Infra*, § 749.

⁶ State v. Collins, 20 Iowa, 86; State v. Benner, 64 Me. 267; Walker v. State 49, Ala. 398.

On an ejectment involving large estates in Ireland, the question being whether the plaintiff was the legitimate son of Lord Altham, and therefore prior in right to the defendant, who was his uncle, it was proved that

the defendant had procured the plaintiff, when a boy, to be kidnapped and sent to America, and on his return, fifteen years afterwards, on occasion of an accidental homicide, had assisted in an unjust prosecution against him for murder; and it was held "that these circumstances created a violent presumption of the defendant's knowledge of title in the plaintiff; and the jury were directed that the suppresser and the destroyer were to be considered in the same light as the law considers a spoliator, as having destroyed the proper evidence; that against him, defective proof, so far as he had occasioned such defect, must be received, and everything presumed to make it effectual; and that if they thought the plaintiff had given probable evidence of his being the legitimate son of Lord Altham, the proof might be turned on the defendant, and they might expect satisfaction from him that his brother died without issue." Craig on dem. of Annesley v. Earl of Anglesea, 17 St.

proof is not inconsistent with innocence, since an innocent though weak and timid man, sensible that appearances are against him, and not duly weighing the danger of his being detected in clandestine attempts to stifle proof, may naturally resort to this mode of averting danger.¹ Mr. Bentham, in illustrating this point, refers to a story in the Arabian Nights, which may be thus amplified. A little hunchback is accidentally choked by swallowing a fish bone. His host, to get rid of him, places him at the door of a neighboring chamber. The inhabitant of this chamber, opening the door and seeing this unwelcome incumbrance deposited there, gives the body a kick, and is shocked, on returning to the spot a few minutes after, to find the hunchback dead. To ward off suspicion from himself, he takes up the body and places it in front of a second chamber, where a similar scene is shortly afterwards enacted. Quite a number of operations of this kind are gone through with, each successive occupant endeavoring to shift, in this way, suspicion from himself on his neighbor. It may be questioned whether many innocent men over whom suspicion lowers would not do very much the same thing. A man of sagacity and courage would undoubtedly say, "This thing implicates me. I will confront the difficulty at once. I will court investigation, and settle the matter right off." But not every one charged with crime has at his command sagacity and courage. A. is found dead, apparently murdered; and B. and C. are charged with killing him. B., who is a man of weak character, is innocent of the murder; but thinks that if he succeeds in destroying all the proof of the *corpus delicti* his acquittal will be sure. He attempts this (*e. g.*, attempts to burn up the dead body, or to make way with other indicatory proof of a violent homicide), and attempting it unsuccessfully, the attempt is a strong article of evidence against him. C., a shrewd villain, if he makes the attempt, makes it successfully.

§ 744. While, therefore, guilt may be inferred from fabrication of a false defence, the inference is not arbitrary, but varies with the circumstances of the case. Good as well as bad causes have in this way been supported. If a cause

Presump-
tion varies
with case.

Tr. 1416; and see the Tracy Peerage, 10 Cl. & F. 154; Clunnes v. Pezzy, 1 Camp. 8; Lawton v. Sweeny, 8 Jur. 967; Wills Circ. Ev. 72. ¹ See case given by Coke, 3d Inst. 104, p. 232, and remarks *infra*, § 749.

is to be condemned because its advocates have forged evidence in its support, Christianity would have to be condemned, for in behalf of Christianity innumerable writings have been forged. Given a true cause, a desperate assailant, and an advocate who believes the end justifies the means, and falsehood will be resorted to to prove the truth. In litigations in which high passions are excited the temptation to strain if not fabricate evidence becomes almost irresistible. Few cases of disputed succession or legitimacy, for instance, are tried, in which suspicious evidence is not introduced on both sides; and such is almost always the case in criminal prosecutions in which warring social or political parties are enlisted. We must also remember that false defences of this kind may be the result of the interference of ill-advised counsel or friends.¹

¹ See *Turner v. Com.*, 86 Penn. St. 54. In the days of Sir Elijah Impey, an English merchant in India was sued on a promissory note. "It is forged," he said to his attorney. "Never mind," was the reply, "we will make it all right." The client gave the attorney a list of witnesses who would prove the forgery, and went into court expecting to hear them called. To his surprise, his counsel, after the plaintiff's case was closed, pulled out a release. "But the release"—so the client afterwards objected to his attorney—"was never given to me; I never heard of it before." "That is true," was the reply, "but the shortest way was to meet the plaintiff on his own ground, so we forged the release." It is unfortunate that in our criminal courts there is a class of lawyers who are unscrupulous enough to seize upon any defence that is available, no matter how false they may know it to be. That there are witnesses also ready to swear to any defence, when they do not run the risk of prosecution for perjury, is illustrated by the hangers-on who can be counted upon to offer and to swear to straw bail. It would be unjust, therefore, to impute to the client that which may be the entire

work of the counsel. We have no right to infer guilt, even if false testimony is brought into court knowingly by counsel.

But we must remember that there are many cases in which such testimony may come in without the complicity of either client or counsel. We have already noticed instances in which perjury has been deemed, by the witness committing it, a point of honor. *Supra*, §§ 373 *et seq.* Lord Cockburn, in his *Reminiscences*, notices several trials in which high-minded Scotch lords, who would scorn an untruth themselves, looked upon it as a matter of course that their retainers should come into court to swear to whatever might help their chief. But in many cases where false testimony is rendered, even this extent of connivance cannot be imputed. A man is to be tried on a capital crime. It is natural to suppose that among those whose being is wrapped up in his there may be some one ready to sacrifice himself, if it need be, for the rescue; some one like the Scotch servant, who would "rather trust his soul to God than his master to the Whigs." Yet this may be without any complicity on the part of the person on trial. 1 *Crim. Law Mag.* 17.

§ 745. It may be that the object of such forgery was to injure a third person, either as a means of gratifying revenge or of protecting self. A common instance of this is where stolen goods are clandestinely deposited in the house, room, or box of an innocent person, with a view of exciting suspicion of larceny against him; and a suspicion of murder may be raised by secreting a bloody weapon in like manner.¹

With intent
of injuring
others.

§ 746. Forgery of this kind may be forcibly accomplished. This Mr. Bentham² illustrates by a case where three men unite in a conspiracy against an innocent person; one laying hold of his hands, another putting into his pocket an article of stolen property, which the third, running up, as if by accident, during the scuffle, finds there, and denounces him to justice as a thief.³

Such
forgery
may be
forcible.

¹ Best's Theory of Pres. Proof App. Case 10, p. 102.

² 3 Benth. Jud. Ev. 255. Of a like character was a case which occurred a few years ago in Mississippi. A young man named Boynton had been for some days staying at the house of a friend on a plantation on the Mississippi River. One morning the deceased, the master of the house, was found murdered in a rice brake; by his side were seen Boynton's pistols, and in Boynton's hat, in the room where he was then sleeping, was found a paper which was known to have been a short time before in the pocket of the deceased. On this evidence Boynton was convicted and executed; persisting to the end in his ignorance of the perpetrator of the act, and breaking wildly from the sheriff when the hour of execution arrived, proclaiming his innocence with an earnestness that shook the confidence of the by-standers in his guilt. Not many months after, a man, who had been prowling about the neighborhood at the time, was arrested, tried, and sentenced in another State for a murder subsequently occurring; and when at the gallows he confessed

that he had been the perpetrator of the murder for which Boynton had suffered; that he had taken the pistols from Boynton's pillow, and had in return placed a paper from the dead man's pocket in Boynton's hat.

To the same point is a trial related by Mr. Bentham, where the officers of justice were accused of having altered a common key, found in the possession of the defendant, into a master key, in order to make it appear at the trial that he had a facility for committing the murder which he really did not possess. 3 Benth. Jud. Ev. 60; and see Celebrated Trials, 591.

³ 3 Benth. Jud. Ev. 39.

Another common circumstance of this kind, Mr. Bentham adds, is the pretence of having taken part of the draught from which death has ensued. *R. v. Wescombe*, Annual Register for 1829, p. 142. So, it is not unusual to endeavor to induce the suspicion of suicide, by placing some instrument of destruction in the hand of the murdered party. In the year 1764, a citizen of Liege was found shot, and his own pistol was discovered lying near him; from which circumstance,

§ 747. Fabrication of evidence may also be for the mere purpose of creating a sensation in the community. In the summer of 1879, a lady in New York was found brutally murdered in her chamber, and though for a few days no definite traces of the murderer could be found, the guilt was finally brought home to a colored man named Chastine Cox, who was subsequently convicted. But while the question was still in suspense, public interest was much roused; and a series of letters appeared in the newspapers suggesting various persons as guilty of the murder, and two witnesses were ready to testify to facts grossly exaggerated, if not fabricated, implicating the husband of the murdered woman. Were these speculations and fabrications the work of a person seeking in this way to divert attention from himself? So far from this being the case, the speculations were thrown out as guesses, something in the way in which answers to conundrums are published; and nothing would better illustrate the falsity, as an absolute rule, of the presumption now before us, than the severity with which the prosecuting authorities would have rebuked an attempt to impute the homicide to the author of one of these communications on the ground that throwing the police on a false track is a presumption of guilt on the part of those by whom the luring device was designed. So far as concerns those who concocted fabrications implicating the husband of the murdered woman, we have here further illustrations of the fact that there may be gratuitous and volunteer perjuries for a prosecution, as well as gratuitous and volunteer perjuries for a defence. In the same line may be mentioned letters containing false statements, but designed innocently for the

together with that of no person having been seen to enter or leave the house of the deceased, it was concluded that he had destroyed himself; but upon examining the ball by which he had been killed, it was found to be too large ever to have entered that pistol, and the real murderers were ultimately discovered. *Medical Jurisprudence*, by Paris & Fonblanque, vol. iii. p. 34. Green, Berry, and Hill were tried in the year 1878, for the murder of Sir Edmundbury Godfrey, who was strangled by a handkerchief, in Somerset House,

on a Saturday night; and after remaining concealed until the following Wednesday, he was carried at midnight into the fields beyond Soho, and thrown into a ditch, and his own sword thrust through his body, in order to excite a belief that he had committed suicide. *State Trials*, vol. vii. p. 159. But in cases of this kind consistency is often overlooked, as by placing the weapon in the left hand, an instance of which took place in *Fittler's Case*, cited in *Annual Register* for 1834, p. 115; *Wills's Circum. Ev.* 112.

purpose of diverting a friend from a dangerous enterprise. Mr. Bentham gives, as an analogous illustration, the incident related of the patriarch Joseph, who, with the view of creating alarm and remorse in the minds of his guilty brothers, caused a silver cup to be privately hid in one of their sacks, and after they had gone some distance on their journey, had them arrested as thieves and brought back. The object of suppressing evidence, also, may be to protect, not self, but another person.¹

§ 748. "The suppression or destruction of pertinent evidence," it is remarked by Mr. Starkie, "is always a prejudicial circumstance of great weight; for as no act of a rational being is performed without a motive, it naturally leads to the inference that such evidence, if it were adduced, would operate unfavorably to the party in whose power it is."²

Suppression or destruction of evidence.

¹ It is related of a dissolute English statesman, then in political disgrace, that being visited by a person evidently disguised, there was a suspicion among the police that this visitor was a foreign emissary, whom it was treason to harbor. A search-warrant was issued, and the house was entered. Its master, when he faced the officers, was in obvious confusion. He begged that at least his own chamber should not be searched, and he did this with a distressed earnestness which convinced them that in that chamber they would find the person of whom they were in search. Of course this made them more eager, and they forced their way into the room. A person was there in bed. "I will show you enough to prove to you that this is not the man you seek," said Lord Bolingbroke, for it was his house that was entered. He uncovered enough of the body to show that it was that of a woman, keeping the head concealed so that she might not be identified. His anxiety and confusion when his house was entered sprang from his desire to protect himself and his paramour from detection in a disgraceful intrigue.

² Starkie's Evidence, vol. i. p. 437. To same effect see *Edmund's Case*, 1 Wh. & St. Med. Jur. § 167; *Leeds v. Cook*, 4 Esp. 256; *Gray v. Haig*, 20 Beav. 219; *Moriarty v. R. R.*, L. R. 5 Q. B. 314; *Curlewis v. Cerfield*, 1 Q. B. 814; *Owen v. Slack*, 2 Sim. & St. 606; *Bell v. Frankis*, 4 M. & Gr. 446; *Sutton v. Davenport*, 27 L. J. C. P. 54; *State v. Knapp*, 45 N. H. 148; *Thayer v. Stearns*, 1 Pick. 109; *Com. v. Webster*, 5 Cush. 316; *Grimes v. Kimball*, 3 Allen, 518; *Joannes v. Bennett*, 5 Allen, 169; *People v. Rathbun*, 21 Wend. 509; *Meyer v. Barker*, 6 Binn. 228; *Reed v. Dickey*, 1 Watts, 152; *Page v. Stevens*, 23 Mich. 357; *People v. Marion*, 29 Mich. 31; *Jones v. State*, 64 Ind. 400; *Winchell v. Edwards*, 57 Ill. 41; *Dickerson v. State*, 48 Wis. 288; *Revel v. State*, 26 Ga. 275; *Betts v. State*, 66 Ga. 508; *Blevins v. Pope*, 7 Ala. 371; *Bell v. Hearn*, 10 La. An. 515; *Lucas v. Brooks*, 23 La. An. 117; *Kiser v. State*, 13 Tex. Ap. 201. See, however, remarks in *Baker v. Ray*, 2 Russell, 73. As to spiriting away witnesses see *infra*, § 749.

One of the most prejudicial facts in the trial of Captain Donnellan was that he had rinsed the phials from which Sir Theodosius Boughton had taken the draught which was alleged to have caused his death. And in another conspicuous English case of poisoning, the contents of the stomach of the deceased, which had been placed in a jug for examination, were clandestinely thrown by the defendant into a vessel containing a quantity of water. The defendant was acquitted on the ground of the insufficiency of the evidence of the *corpus delicti*; but besides the tampering with the contents of the stomach, evidence was given of other suspicious facts and declarations, strongly indicative of conscious guilt.¹

Filing away the engraving from articles of plate; cutting out the marks on linen; shoeing a horse backwards, as was the case in a remarkable arson case in New Jersey, so as to reverse the tracks; and the removal, or endeavor to remove from the person or clothes stains of blood, or other marks, together with other instances of obliteration or distorting of marks of identity, may be enumerated under this head. So having a large quantity of counterfeit coin in possession, many of each sort being of the same date and made in the same mould, and each piece being wrapped in a separate piece of paper, and the whole hid in different pockets of the dress, is some evidence that the possessor knew that the coin was counterfeit and intended to utter it.²

In the great number of poison cases so industriously collected by Hitzig,³ there are several in which it was attempted, by the

¹ R. v. Donnell, Wills Circum. Ev. 103.

In a case reported by Mr. Wills, as tried in 1836, before Mr. Justice Bosanquet, for stealing a quantity of rum which had been delivered to his master, a carrier, by canal, for conveyance from Liverpool to Birmingham, the carrier's agent at Liverpool, as was his custom, had taken a sample of the spirit and tested its strength. Upon the delivery at its place of destination, the spirit was found to be under proof, and the portion abstracted had been replaced with water. The carrier's clerk, on the complaint of the con-

signee, went to the boat where the prisoner was to require explanation; but, as soon as he had stepped into it, the prisoner pushed him back upon the wharf, and forced the boat into the middle of the canal, where he broke the jars and emptied their contents, which by the smell were proved to be rum, into the canal. The prisoner was convicted. R. v. Thomas, Reported Wills Circum. Ev. 75.

² R. v. Jarvis, 33 Eng. L. & Eq. 567; Dears. C. C. 552; 7 Cox C. C. 53.

³ Neue Pitaval, von Dr. J. C. Hitzig und Dr. W. Haring.

premature interment of human remains, to conceal the offence, the pretext being that this was rendered necessary by the state of the body. In one case, the presumption arising from a hurried burial was sought to be rebutted by antedating the time of death, and an ingenious but perilous network of letter and funeral notices was spread while the deceased was still in full health. He stumbled unawares upon his own funeral paraphernalia, and was fortunately able, not only to read the mourning notes, but to prevent their necessity. Dr. Hitzig gives in full the trial of a woman who, under the pretext of a family custom, was enabled to direct no less than seven precipitate interments in her own immediate household, no one suspecting that the usage which she thus so rigorously followed was but a trick to cover the violent death of victims whom she appeared tenderly to lament.

§ 749. The holding back of evidence may be used as a presumption of fact against the party who holds back such evidence in all cases in which it could be produced.¹ When, on the refusal of a party to produce on trial papers which have been called for, the opposite party introduces parol evidence of the contents of the papers, then, if there be doubt, the probable interpretation less favorable to the suppressing party will be adopted,² provided the matter be not one which is part of the proper case of the prosecution.³ The non-calling of a witness, however, will not justify an arbitrary presumption of suppression;⁴ unless such witness be important and be under the

So against
withhold-
ing of
evidence.

¹ See cases cited *supra*, §§ 341, 741; C. C. 53; Atty.-Gen. v. Windsor, 24 Abbott, C. J., in R. v. Burdett, 43 B. & Ald. 161; Wentworth v. Lloyd, 10 H. L. C. 589; U. S. v. Schindler, 18 Blatch. 227; Durgin v. Danville, 47 Vt. 95; State v. Moon, 41 Wis. 684.

"Lord Mansfield forcibly observed, in Blatch v. Archer, that 'it is certainly a maxim that all evidence is to be weighed according to the proof which it was in the power of one side to have produced, and in the power of the other to have contradicted.' Cowper, 63, 65." Graves, C. J., Wallace v. Harris, 32 Mich. 394.

See *Armory v. Delamire*, 1 Str. 505; *R. v. Jarvis*, Dears. C. C. 552; 7 Cox.

² *Cooper v. Gibbons*, 3 Camp. 363; *Crisp v. Anderson*, 1 Stark. 35; *Hanson v. Eustace*, 2 How. 653; *Clifton v. U. S.*, 4 How. 242; *U. S. v. Fleming*, 18 Fed. Rep. 907; *Barber v. Lyon*, 22 Barb. 622; *Cross v. Bell*, 34 N. H. 83; *Life Ins. Co. v. Ins. Co.*, 7 Wend. 31; *Shortz v. Unangst*, 3 W. & S. 45.

³ *State v. Wilborne*, 87 N. C. 529; *supra*, §§ 341, 741.

⁴ *Scovill v. Baldwin*, 27 Conn. 316; *State v. Johnson*, 76 Mo. 121. See *Whart. Cr. Pl. & Pr.* 565; *supra*, § 448.

party's especial control;¹ and under statute no presumption is to be drawn from the fact that a defendant does not offer himself for examination.²

Attempts to prevent a witness from attending are admissible as facts from which unfavorable inferences may be legitimately drawn.³

Indicatory proof, however, may be destroyed by the inadvertent interference of third parties.⁴

§ 750. When a suspected person attempts to escape or evade a threatened prosecution, it may be argued that he does so from a consciousness of guilt; and though this inference is by no means strong enough by itself to warrant a conviction, yet it may become one of a series of circumstances from which guilt may be inferred. Hence, it is admissible for the prosecution to show that the prisoner advised an accomplice to break jail and escape;⁵ or that he offered to bribe one of his guards;⁶ or that he killed an officer of justice when making such attempt;⁷ or that he attempted to bribe or intimidate witnesses.⁸ So with flight, to which no proper motive can be assigned,⁹ and with acts of disguise,¹⁰ concealment of person, family, or goods, and similar *ex post facto* indications of a desire to evade prosecution.¹¹ But

That there is no presumption from not calling an accomplice, see *State v. Cousins*, 58 Iowa, 250.

¹ *Williams v. Com.*, 91 Penn. St. 493; *People v. Hovey*, 1 N. Y. Cr. Rep. 180, 283. This is a *fortiori*, the case where the evidence is equally accessible to the prosecution. *State v. Rosier*, 55 Iowa, 517.

² *Supra*, § 435.

³ *State v. Barron*, 37 Vt. 57; *State v. Staples*, 47 N. H. 113; *Adams v. People*, 16 N. Y. Sup. Ct. 89; *People v. Pitcher*, 15 Mich. 397.

⁴ *Infra*, § 777.

⁵ *Byles on Bills*, 449; *People v. Rathbun*, 21 Wend. 509; *Fanning v. State*, 14 Mo. 386. That in such case counter-evidence in explanation may be given, see *State v. Mallon*, 75 Mo. 355.

⁶ *Whaley v. State*, 11 Ga. 123.

⁷ *Revel v. State*, 26 Ga. 275. As to

resistance to arrest, see *Hall v. People*, 39 Mich. 717. But no inference can be drawn from the defendant's refusal to permit his house to be searched without a warrant. *Murdock v. State*, 68 Ala. 567.

⁸ See *People v. Pitcher*, 15 Mich. 397; *State v. Staples*, 47 N. H. 113.

⁹ *Ibid.*; *Batten v. State*, 80 Ind. 394; *Waite v. State*, 13 Tex. Ap. 169; *People v. Stanley*, 47 Cal. 113; *Fox v. People*, 95 Ill. 71; *State v. Hudson*, 50 Iowa, 157; *Cummins v. People*, 42 Mich. 142; *Mathews v. State*, 9 Tex. Ap. 138; *Waite v. State*, 13 Tex. Ap. 169. It is not necessary to show that the flight was on account of the charge. *State v. Frederick*, 69 Me. 400.

¹⁰ *E. g.*, use of an *alias*. *Hope v. State*, 62 Cal. 691.

¹¹ *Mittermaier*, Deutsch. St. sect. 12; *Lanham v. Com.*, 84 Penn. St. 80; *Ryan v. People*, 79 N. Y. 593; *Dean v.*

it must be remembered that while these acts are indicative of fear, they may spring from causes very different from that of conscious guilt.¹ "Many men are naturally of weak nerve, and, under certain circumstances, the most innocent person may deem a trial too great a risk to encounter. He may be aware that a number of suspicious, though inconclusive facts, will be adduced in evidence against him; he may feel his inability to procure legal advice to conduct his defence, or to bring witnesses from a distance to establish it; he may be assured that powerful or wealthy individuals have resolved on his ruin, or that witnesses have been suborned to bear false testimony against him; add to all this, more or less vexation must necessarily be experienced by all who are made the subject of criminal charges, which vexation it may have been the object of the party to elude by concealment, with the intention of surrendering himself into the hands of justice when the time for trial should arrive."² The question, it cannot be too often repeated,

Com., 4 Grat. 541; *Hitner v. State*, 19 Ind. 48; *Waybright v. State*, 56 Ind. 122; *Barron v. People*, 73 Ill. 256; *State v. James*, 45 Iowa, 412; *McMath v. State*, 55 Ga. 303; *Sylvester v. State*, 71 Ala. 17; *State v. Beatty*, 30 La. An. 1266; *State v. Dufour*, 31 La. An. 804; *Gose v. State*, 6 Tex. Ap. 121; *Fanning v. State*, 14 Mo. 386; *People v. Pitcher*, 15 Mich. 397; *State v. Hudson*, 50 Iowa, 157; *Burris v. State*, 38 Ark. 221; *People v. Lockwing*, 61 Cal. 380.

¹ *Wills on Circumstantial Evidence*, 70; 1 Wh. & St. Med. Jur. § 805.

² *Best's Evidence*, 5th ed. 578; *Swan v. People*, 98 Ill. 610.

Dr. Thomas Fuller gives the following quaint excuse for running away from London when charged with treason:—

"And if any tax me, as Laban taxed Jacob, 'Wherefore didst thou flee away secretly, without taking solemn leave?' I say, with Jacob to Laban, 'Because I was afraid.' And that plain-dealing patriarch, who could not be accused for purloining a shoe

latchet of other men's goods, confessed himself guilty of that awful felony that he 'stole away' for his own safety; *seeing Truth may sometimes seek corners, not as fearing her cause, but as suspecting her judge.*" *Truth Maintained*, Letter v.

Lord Bolingbroke, *mutatis mutandis*, speaks to the same effect: "If to decline, in certain circumstances, a trial; if to go into voluntary exile, either before a trial, or even after condemnation, were absolute proofs of guilt, the conduct of many greater and better men than the person now accused would deserve our censure, and that of calumniators, as vile as these libellers, would merit our approbation. Metellus and Rutilius must be condemned—Apuleius and Apicius must be justified." *Bolingbroke, Final Answer*, etc.

See, also, Lord Clarendon's letter to the House of Lords explanatory of his leaving England when under impeachment, and the reasons given by him why a man unjustly accused should evade meeting an unscrupulous prose-

is simply one of inductive probable reasoning from certain established facts. All the courts can do, when such inferences are invoked, is to say, that escape, disguise, and similar acts afford, in connection with other proof, the basis from which guilt may be inferred; but this should be qualified by a general statement of the countervailing considerations incidental to a comprehensive view of the question.¹ To this effect is the charge of Abbott, J., in *Donnall's case*, where he told the jury, that "a person, however conscious of innocence, might not have the courage to stand a trial; but might, although innocent, think it necessary to consult his safety by flight."² So it is proper to keep in mind, as we have seen, the influence which might have been exerted upon the accused by the character of the tribunal before whom, and the mode of criminal procedure in the country where, the trial is to take place.³ Hence is it that conduct exhibiting indications of guilt should not be received by the court, unless there be satisfactory evidence that a crime has been committed. And in all cases the circumstances explaining or excusing flight are to be taken into consideration.⁴

§ 751. For the same purpose, confusion, prevarication,⁵ and embarrassment on the defendant's part, when charged with the crime, may be put in evidence against him,⁶ and so of stolidity and

caution. Compare *Lister's Life of Clarendon*, ii. 415 *et seq.*

As an illustration to the same effect, drawn, however, from the opposite party in the English civil war under Charles I., may be mentioned the case of John Cotton, afterwards a leading New England divine, who, having been charged before the Court of High Commission with some rubrical irregularity, fled disguised to London, "but was there told by his friends, among whom were some very distinguished men, that 'if he had been charged with crime, they could have obtained his pardon, but the sin of being a Puritan was unpardonable.'" *Uhlen's N. E. Theoc. (Conant's Tr.)* 97.

¹ *State v. Williams*, 54 Mo. 170. But proof of flight of another person arrested and indicted for the same

crime is not admissible. *Levison v. State*, 54 Ala. 520; *Crookham v. State*, 5 W. Va. 510. See *State v. Baxter*, 82 N. C. 602.

² Trial of Robert Saule Donnall, London, 1817.

³ Best on Presumptions, p. 322; *Tyner v. State*, 5 Humph. 383.

⁴ *Infra*, § 751. For this reason I cannot concur in *Kennedy v. Com.*, 14 Bush, 341, in limiting the explanatory evidence produced.

⁵ *State v. Williams*, 27 Vt. 724; *People v. Arnold*, 43 Mich. 303; *Curry v. State*, 7 Tex. Ap. 267.

⁶ See *Com. v. McPike*, 3 Cush, 181; *Com. v. Goodwin*, 14 Gray, 55; *State v. Reed*, 62 Me. 129; *People v. McKee*, 36 N. Y. 113; *Levison v. State*, 54 Ala. 520; *Handline v. State*, 6 Tex. Ap. 347; *People v. Ah Yute*, 53 Cal. 613; 54

indifference;¹ and of whatever would sustain an inference as to complicity in the offence charged;² though it is not admissible for the defendant to show that several days after the outrage was discovered he appeared surprised when it was announced to him, such evidence being self-serving.³ But it should always be remembered how delusive this species of evidence is. "Blushing" has been declared to be an evidence of guilt; but many guilty men never blush at all, and some innocent men would blush at the mere idea that they are being looked at to see if they are blushing. "Terror" also has been noticed; but nervousness is not always an incident of guilt, nor the absence of nervousness always an incident of innocence. "Confusion" is as likely to mark the deportment of an innocent person, unused to be made a public spectacle, as that of a guilty person enured to such exposure.⁴

Prevarication and embarrassment may be proved.

Cal. 89; Wh. & St. Med. Jur. § 805. Evidence of preoccupation and absence of mind at the time of the crime will be received. *Nottingham v. State*, 7 Tex. Ap. 301. See *Tooney v. State*, 8 Tex. Ap. 452; *Gaitan v. State*, 11 Tex. Ap. 544.

¹ *Greenfield v. People*, 85 N. Y. 75.

² *McAdory v. State*, 62 Ala. 154. See, however, *State v. Fowler*, 52 Iowa, 103, where it was held inadmissible to show bullying behavior on the part of the defendant after the assault. Evidence that of two persons charged with murder, each accused the other, is competent. *State v. McLane*, 15 Nev. 345. Evidence of eccentricities cannot be given to prove want of premeditation. *Sindram v. People*, 88 N. Y. 196.

³ *Campbell v. State*, 23 Ala. 44. *Contra*, *Bouldin v. State*, 8 Tex. Ap. 332.

⁴ "I do not think," justly says Judge Learned, in charging the jury in *Lowenstein's Case* (Pamph. Albany, 1874, p. 331), "much reliance is to be placed upon the manner of any man when he is suspected or accused of

crime. I mean whether he looks pale or flushed, or the like, for it is impossible for us to tell how a man may act when he is accused of crime. Our own judgment in that is not very reliable. One of you may appear to me flushed or frightened, and to another not so. Therefore, I do not think much reliance is to be placed upon the opinion of witnesses as to manner. I don't speak of conduct, but as to manner." See *Russell v. State*, 53 Miss. 367. *Cf.* *Ram on Facts*, 3d Am. ed. 113.

As to the supposed symptoms of fear, Mr. Bentham gives the cautions which Mr. Best condenses as follows:—

"1st. The emotion of fear may not be present in the mind of the individual. Several of the above symptoms are indicative of disease, and characteristic of other emotions, such as surprise, grief, anger, etc. With respect to the first, for instance, 'blushing,' the flush of fever and the glow of insulted innocence are quite as common as the crimson of guilt. 2dly. The emotion of fear, even if actually present, although presumptive, is by no means conclusive evidence of guilt of the

§ 752. The defendant will not be permitted to give evidence to account for his flight unless the prosecution prove the flight as tend-

offence imputed. The alarm may be occasioned by the consciousness of another crime, committed either by the party himself, or by others connected with him by some tie of sympathy, on whom judicial inquiry may bring down suspicion or punishment; 3 Benth. Jud. Ev. 157; or even by the recollection of a fact, in consequence of which, without any delinquency at all, vexation has been, or is likely to be, produced to him or them. Ibid. So, the apprehension of condemnation and punishment though innocent, or of vexation and annoyance from prosecution, is a circumstance the weight of which, like that of the evasion of justice, depends very considerably on the character of the tribunal before which, and the towns of criminal procedure in the country where his trial is to take place." *Supra*, § 462. "Lastly, the rare, though no doubt possible, case of the falsity of the supposed self-criminative recollection. 3 Benth. Jud. Ev. 157. *E. g.*, an habitual thief is taken into custody for a theft; that he should show symptoms of fear is natural enough, and, confounding one of his exploits with another, he may (especially if the time of the supposed offence be very remote), imagine himself to recollect a theft in which, in truth, he bore no part." 3 Benth. Jud. Ev. 158.

When the bill allowing defendants in criminal cases the aid of counsel was before the House of Lords, the young peer who had charge of it broke down in his opening speech. He recovered himself, however, and made his embarrassment a telling reason for the measure he was to advocate. "If I am confused in making my first speech,"

he said, "though this is a speech about another, what must it be with a man charged with crime, who knows that on what he says, and how he says it, his own life depends?" Few, except the most hardened and desperate of men, can stand such a test without flinching. And, apart from this, we have to consider the horror often incident to the first hearing of the perpetration of a great crime. In a famous English case, *Spencer Cowper*, of a historical family, which has been represented with like eminence in literature, in law, and in politics, was charged with the murder of a young girl with whom he had been intimate, and whose affections he had, however, innocently won. Her drowned body was discovered near a sequestered place where he had, at her request, on the preceding evening, appointed an interview with her. Suicide, or homicide, was the question; and if homicide were established, the indications pointed to Cowper. Her body, still reeking with water, was brought to the house, and he was suddenly charged by her relatives, maddened with grief, with the fearful crime. He staggered with horror under the shock, and this was made one of the main points against him on the trial that followed. He was acquitted ultimately, though after a fierce struggle, as party feeling was enlisted in the trial, Cowper's relatives being leaders among the Whigs, and the Tories undertaking to assume that party influence was enlisted to secure his acquittal. But acquitted he was, and righteously; though it is said that afterwards, when on the bench, he dealt tenderly with men who, when on trial for their lives, were unmanned by

ing to establish guilt;¹ nor can he show that he refused to avail himself of an opportunity of flight.² And in such case evidence of subsequent public excitement, to justify an anticipation of violence, and thus rebut a presumption of guilt from flight, is admissible, if the excitement existed before the flight.³

Evidence
to explain
flight ad-
missible.

the terrors of a trial. 1 Crim. Law. Mag. 23.

In Lodge's *Life of Hamilton*, p. 212, occurs the following:—

"Hamilton sent for two candles and by placing one each side of the witness box threw Croucher's face (Croucher being a witness for the prosecution) into strong relief, and then confronted him with a fixed and piercing gaze. Objection was made to this procedure, but the court overruled the objection, and Hamilton then said with deep solemnity: 'I have special reasons, deep reasons, reasons that I dare not express, reasons that, when the real culprit is detected and placed before the court, will then be understood.' He paused, and the attention of every one was riveted in breathless silence upon the witness. Hamilton continued: 'The jury will mark every muscle of his face, every motion of his eye. I conjure you to look through that man's countenance to his conscience.' A severe cross-examination followed. The wretched witness stumbled, contradicted himself, and utterly broke down. The jury acquitted the prisoner without leaving their seats. The subsequent history of Croucher, who left the court room covered with suspicion and contumely, justified Hamilton's device, which under ordinary circumstances would not be permissible. The incident shows in Hamilton that quickness of apprehension, force of personality, and fertility of resource as well as dramatic sense, which are all such important and necessary quali-

ties to great advocates before a jury."

It may be that Croucher was really the guilty party, and cases may occasionally occur in which the actual perpetrator of a crime, who appears on the witness box to inculpate another, may break down under a cross-examination. But confusion and embarrassment under such an appeal as Hamilton is reported to have made in the above extract, would be at least as likely to overcome a modest and truthful witness as they would a witness hardened in crime. And the inference from expression of countenance is singularly unreliable.

¹ *State v. Hays*, 23 Mo. 287. In *People v. Ah Choy*, 1 Idaho, N. S. 317, it was held that as the defendant was clearly proved to have struck the fatal blow, it was immaterial that he had not been allowed to give evidence to explain his flight.

² *People v. Rathbun*, 21 Wend. 509; *Com. v. Hersey*, 2 Allen, 173; *Gardiner v. People*, 6 Parker C. R. 155; *Campbell v. State*, 23 Ala. 28; *Ford v. State*, 71 Ala. 355; *People v. Montgomery*, 53 Cal. 576.

³ *State v. Phillips*, 24 Mo. 475; *Plummer v. Com.*, 1 Bush, 76; *Golden v. State*, 25 Ga. 527; *Arnold v. State*, 9 Tex. Ap. 435.

In *Kennedy v. Com.*, 14 Bush, 341, it was held that to rebut the inference of guilt which may be drawn from an escape and flight, evidence of apprehended danger, in order to be admissible, should show such danger as could not have been provided against

§ 753. Presumptions resting on antecedent preparations are not presumptions of law, but mere inferences of fact, as to which it is the judge's duty, not to declare a positive rule, but simply to notice the processes of reasoning by which a just conclusion may be reached.¹ Evidence of preparation is always admissible for the prosecution; evidence to explain it is always admissible for the defence.² Among the facts admissible, as affording in this way a basis of induction, are the purchasing, the collecting, the fashioning instruments of mischief, of which numerous cases are elsewhere given,³ and of which a familiar illustration is to be found in the admission of evidence on a trial for burglary to prove that the defendant had manufactured or procured the burglarious instruments.⁴ Under the same head fall cases where the evidence shows a repairing to the spot destined to be the scene of crime; and acts done with the view of paving the way to the guilty enterprise.⁵ For the same purpose it is admissible, on an indictment for arson, to prove a prior insurance of the property, as well as other attempts to destroy it, the object being to defraud the underwriters.⁶

either by the act of the accused or through the instrumentality of the officers of the law. But, as we have seen, this may be gravely questioned. *Supra*, § 750. In *Fox v. People*, 95 Ill. 71, it was held error to tell a jury that flight was evidence of guilt until explained. "The fourth instruction is not fair to the prisoner. It assumes to tell the jury what weight they should give to his supposed flight. That was for the consideration of the jury and not of the court. The court should not have said to them that it was evidence of guilt. It is only evidence tending to prove guilt. Nor should the instruction have stated that if flight was proved that it must be satisfactorily explained, consistently with the innocence of the accused. From this the jury would understand that if flight was proved that it must be proved beyond doubt that it was for an innocent purpose." — Walker, C. J.

See as to inference from preparations, 3 Whart. & St. Med. Jur. 4th ed. [1884] § 827.

¹ The admissibility of evidence on this point has been already considered. *Supra*, § 49.

² *State v. Pike*, 65 Me. 111; *State v. Curran*, 51 Iowa, 112; *Long v. State*, 52 Miss. 23; *Howard v. State*, 8 Tex. Ap. 53; *Taylor v. State*, 14 Tex. Ap. 340.

³ *Supra*, § 49; *infra*, § 799.

⁴ *People v. Larned*, 3 Selden, 445. See *Com. v. Wilson*, 2 Cush. 590; *State v. Morris*, 47 Conn. 179; *People v. Winters*, 29 Cal. 658.

⁵ *Com. v. Costley*, 118 Mass. 1.

⁶ *Supra*, §§ 49 *et seq.*; *Com. v. Bradford*, 126 Mass. 42. See *Com. v. McCarthy*, 119 Mass. 354; *State v. Dubois*, 49 Mo. 573.

Leopold Freund was tried in Moravia, in 1874, for the murder of Ernst Katscher. Freund was a Bohemian

§ 754. In the same connection may be noticed false representations as to the state of another person's health, with the intention of preparing the relatives for the event of sudden death, and to diminish the surprise and alarm which attend its occurrence,¹ and letters addressed to the writer by himself for the purpose of diverting suspicion.² It may also be noticed that persons contemplating secret assassination are apt, as part of their scheme, to throw out dark hints, spread rumors, and utter prophecies relative to the impending fate of their intended victims.³

Acts to
ward off
suspicion.

vagabond, with little money and no employment; and saw Katscher, a rich brewer, at the railway station of Brünn, take out his pocket-book, and arrange its contents. Freund had previously purchased a third class railway ticket for the next station. In a moment, he seems to have arranged his entire plan. He bought a second class ticket for the next station, intending to get into the same carriage with Katscher, and to kill the latter when asleep. Of course he could have bought a ticket for a more distant station, and for this he had money enough; but he was unwilling to spend unnecessarily, and so he concluded that if Katscher did not fall asleep before the next station, then a second ticket for the second station could be bought, and so on until the victim could be noiselessly and unresistingly killed. Three tickets were in this way bought in succession, until at last Katscher, having fallen asleep, was attacked and his throat cut before he had time to cry out. Freund rifled his victim's pocket-book, and when the train slackened speed, leaped out of the window. It was dark; and had he acted prudently he might for a time have baffled pursuit. But cautious as were his preparations, after the murder his cunning vanished. He threw the bloody pocket-book in a field. He stopped at an inn at Köge-

tin, where he left his blood-stained overcoat, as well as a series of receipts addressed to Katscher. He then walked back to Prosnitz, and went out to make purchases in a blood-stained shirt. But his preparations would have led to his conviction, even had he not in this reckless way left evidence of his guilt. The guard found Katscher's body alone in the carriage shortly after the murder; and the guard's attention had been previously curiously directed to Freund by his purchase, at three successive stations, of second class tickets. The guard was, therefore, able accurately to describe the assassin; and he would have been detected on this evidence, even if he had not left so many marks of guilt on the path by which he fled.

¹ Wills on Circums. Ev. p. 112. *Supra*, §§ 742 *et seq.* Jones v. State, 4 Tex. Ap. 436.

² Whitaker's Case, *infra*, § 849.

³ 1 Stark. Ev. 565-6, 3d ed.

In the case of Susannah Holroyd, who was convicted at the Lancaster Assizes of 1816 for the murder of her husband, her son, and the child of another person, about a month before committing the crime the prisoner told the mother of the child that she had had her fortune read, and that within six weeks three funerals would go from her door, namely, that of her husband, her son, and of the child of the person

How far the suppression or concoction of evidence, after a crime has been committed, serves to point out the perpetrator, has been already considered.¹

§ 755. It should be remembered, as Mr. Bentham reminds us, that there may be infirmative hypotheses which may make preparations apparently designed for a particular crime, consistent with innocence of that crime. Thus to adopt, with some modifications, Mr. Best's paraphrase of Mr. Bentham:² The intention of the accused in doing the suspicious act is a psychological question, and may be mistaken. His intention may either have been altogether innocent, or, if criminal, directed towards a different object. (1) Thus, a person may be poisoned, and another, innocent of his death, may have purchased a quantity of the same poison a short time before for the purpose of destroying vermin. So predictions of approaching mischief to an individual, who is afterwards found murdered, may frequently be explained on the ground that the accused was really speaking the conviction of his own mind, without any criminal intention. Sometimes the most affectionate relatives indulge in predictions of this class in regard to a member of their family whom they would surrender their lives to save. Prophecies of death, also, are often the offspring of superstition or political prejudice. (2) A. might purchase a sword or pistol for the purpose of fighting a duel with B., but, before the time of the meeting, the weapon might be purloined or stolen by C., in order to assassinate D. Or, to take a still broader case, A. manufactures guns in quantities to support a filibustering movement forbidden by our laws, and one of these guns is used by a purchaser to gratify private animosity. But even when preparations have been made with the intention of committing the identical offence charged, or previous attempts have been made to commit it, two things remain to be considered:³ (a) The intention may have been changed or abandoned before execution. Until a deed is done, there is always a *locus poenitentiae*,⁴ and the possibility of a like criminal design

whom she was then addressing. And so, on the trial of Zephon in Philadelphia, in 1845, it was shown that the prisoner, who was a negro, had got an old fortune-teller in the neighborhood,

of great authority among the blacks, to prophesy the death of the deceased.

¹ *Supra*, §§ 742 *et seq.*

² Best's Ev. § 456.

³ 3 Benth. Jud. Ev. 74.

⁴ Whart. Crim. Law, 8th ed. § 187.

having been harbored and carried into execution by other persons must not be overlooked.¹ (b) The intention to commit the crime may have existed throughout, but the criminal may have been anticipated by others.²

§ 756. Declarations of intention and threats are admissible in evidence, not because they give rise to a presumption of law as to guilt, which they do not, but because from them, in connection with other circumstances, and on proof of the *corpus delicti*, guilt may be logically inferred. Evidence of this kind, for this purpose, is always competent;³ as where the prisoner, a negro, said he intended "to lay for the deceased, if he froze, the next Saturday night," and

Defendant's declarations of intent and threats admissible for prosecution.

¹ Ibid. § 160.

² A remarkable instance of this is presented by the celebrated case of Jonathan Bradford. This man was an innkeeper. In the middle of the night, a guest in his house was found murdered in bed, his host standing over the bed with a dark lantern in one hand and a knife in the other. The knife and the hand which held it were both bloody, and Bradford on being thus discovered exhibited symptoms of the greatest terror. He was convicted and executed for this murder, but it afterwards appeared that it had been committed by another person, a short time before he came into the deceased's room. Bradford, however, had entered with a similar design, and the trepidation exhibited by him was imputable to his finding himself anticipated; while the blood on his hand and knife came from his having dropped the knife on the body in his perturbation. See this point discussed in Whart. Crim. Law, 8th ed. § 309.

³ Archbold's C. P. 283; U. S. v. Neverson, 1 Mack. U. S. 152; State v. Wentworth, 37 N. H. 196; State v. Alford, 31 Conn. 40; State v. Hoyt, 46 Conn. 330; State v. Hoyt, 47 Conn. 518; Stephens v. People, 4 Parker C.

R. 396; La' Beau v. People, 34 N. Y. 223; Mimms v. State, 16 Oh. St. 221; State v. Green, 1 Houst. C. C. 217; Heath v. Com., 1 Robinson (Va.) 735; Jones v. State, 64 Ind. 400; State v. Guetig, 66 Ind. 94; State v. Rash, 12 Ired. 382; Fulton v. State, 58 Ga. 224; Everett v. State, 62 Ga. 65; Shaw v. State, 60 Ga. 246; Johnston v. State, 17 Ala. 618; Faulk v. State, 52 Ala. 15; Myers v. State, 62 Ala. 599; Ross v. State, 62 Ala. 224; Sylvester v. State, 71 Ala. 17; Redd v. State, 68 Ala. 492; Marler v. State, 68 Ala. 580; Maxwell v. State, 3 Heisk. 420; Jackson v. State, 6 Bax. 452; State v. Crowley, 33 La. An. 782; State v. Edwards, 34 La. An. 1012; State v. Talbot, 73 Mo. 347; Aycock v. State, 2 Tex. Ap. 381; Washington v. State, 8 Tex. Ap. 377; Clappitt v. State, 9 Tex. Ap. 27; People v. Ah Duck, 61 Cal. 387.

And the admission of evidence of this kind cannot be objected to by the defendant, though it were irrelevant if it were favorable to him. Evans v. State, 62 Ala. 6.

As to admissibility of evidence to explain threats, see Abernethy v. Com., 101 Penn. St. 322.

See, also, Bentham's Rat. Jud. Ev. iii. 75.

where the homicide took place that night;¹ where it was said: "I am determined to kill the man who injured me;"² where the prisoner had declared, the day before the murder, that he would certainly shoot the deceased;³ and where the language of the defendant was: "I will split down any fellow that is saucy."⁴ Threats against a class may be put in evidence as explaining the character of an attack on an individual belonging to this class,⁵ though to make threats admissible there must be some kind of individuation, showing that the person injured was in some sense within the scope of the threats.⁶ Several considerations, however, have already been adverted to, which divert the application of evidence of antecedent preparations, and which apply with equal force to threats.⁷ In addition to these it is important to keep in mind Mr. Bentham's cautions: 1st. The words supposed to be declaratory of criminal intention may have been misunderstood or misinterpreted. 2d. It does not necessarily follow, because a man avows an intention to commit a crime, that such intention really exists in his mind. The words may have been uttered in a transient fit of anger, or through bravado, or with a view of intimidating, annoying, or extorting money, or with other collateral objects. Dr. Parkman, for instance, may have frequently been the object of threats or curses of this kind from irritated debtors, and yet it was from a man who used neither that his death proceeded. 3d. Another person, really desirous of committing the offence, may have used the threats as a screen to avert suspicion from himself.⁸ 4th. It must be recollected that the tendency of a threat or declaration of this nature is to frustrate its own accomplishment.⁹ By threatening a man you

¹ *Jim v. State*, 5 Humph. 146.

² *Com. v. Burgess*, 2 Va. Cas. 484.

³ *Com. v. Smith*, 7 Smith's Laws, 697. See *State v. Guy*, 69 Mo. 430.

⁴ *Res. v. Mulatto Bob*, 4 Dall. 146.

⁵ *Hopkins v. Com.*, 50 Penn. St. 9; *Dixon v. State*, 13 Fla. 636; *Burke v. State*, 71 Ala. 385.

⁶ *Supra*, § 29; *Redd v. State*, 68 Ala. 492. But see *State v. Hymer*, 15 Nev. 49. On the subject of threats see *Horrigan & Thompson's Cases*, 589; 612-5; 3 Va. Law Jour. 65. In *Abernethy v. Com.*, 101 Penn. St. 322, it was

held that threats to kill another person are not admissible unless part of the same system.

⁷ See, as giving cautions on this point, *R. v. Hagan*, 12 Cox C. C. 311; *State v. Brown*, 64 Mo. 367.

⁸ An instance of this is given in the *Causes Célèbres*. 5 *Causes Célèbres*, 437.

⁹ Bentham, quoted in *Best on Presumptions*, 315, to which several of the above illustrations and points are to be credited.

put him on his guard, and force him to have recourse to such means of protection as the force of the law, or any extra-judicial powers which he may have at command, may be capable of affording him. Still, however, such threats, as observed by Mr. Bentham, when specific, "by the testimony of experience, are but too often sooner or later realized. To the intention of producing terror, and nothing but terror, succeeds, under favor of some special opportunity, or under the spur of some fresh provocation, the intention of producing the mischief, and, in pursuance of that intention, the mischievous act."

§ 757. Can evidence to the effect that the deceased, prior to a homicide, threatened the defendant's life, be received; and if so, is it a prerequisite to the proof of such threats that they should be shown to have been communicated to the defendant? Certainly, if such evidence is offered to prove that the defendant had a right to kill the deceased, there being no proof of a hostile demonstration by deceased, then it is irrelevant.¹ If A. threatens B.'s life, and the threat is known to B., B.'s duty is to have A. arrested by due process of law, not to shoot him; the right of self-defence being conditioned on an apparent actual attack.² On the other hand, if the question is as to which party in the encounter is the assailant, then it is admissible to prove by the prior declarations of either that the attack was one he intended to make. Threats to this effect by the defendant are always, as has been seen, admissible;³ and it is properly held that there is equal reason, supposing a collision between the deceased and the defendant to be first proved, for the admission of such threats by the deceased.⁴

Deceased's
threats ad-
missible
for de-
fence.

¹ *Hughey v. State*, 47 Ala. 97; *Green v. State*, 69 Ala. 7; *State v. Leonard*, 6 La. An. 420; *State v. Mullen*, 14 La. An. 577; *Evans v. State*, 44 Miss. 762; *Harris v. State*, 47 Miss. 318; *State v. Hays*, 23 Mo. 287; *State v. Guy*, 69 Mo. 430; *State v. Nott*, 50 Mo. 524; *State v. Hall*, 9 Nev. 58; *Myers v. State*, 33 Tex. 525; *Carter v. State*, 8 Tex. Ap. 372.

² *Whart. Crim. Law*, 8th ed. § 488; *State v. Kilgore*, 75 Mo. 587.

³ See *supra*, § 756.

⁴ *Com. v. Wilson*, 1 Gray, 337; *People v. Shorter*, 4 Barb. 460; *S. C.*, 2 Comstock, 197; *Patterson v. People*, 46 Barb. 625; *People v. Rector*, 19 Wend. 599; *Stokes v. People*, 53 N. Y. 164; *Collins v. State*, 32 Iowa, 36; *Cornelius v. Com.*, 15 B. Monr. 539; *Rapp v. Com.*, 14 B. Monr. 615; *Powell v. State*, 19 Ala. 577; *Dupree v. State*, 33 Ala. 380; *Powell v. State*, 52 Ala. 1; *Monroe v. State*, 5 Ga. 85; *Howell v. State*, 5 Ga. 48; *Scoggins v. People*, 37 Cal. 677; *Campbell v. Peo-*

It is true, that by some courts it has been insisted that to make the deceased's threats prior to the encounter admissible, they must be proved to have been brought to the knowledge of the defendant.¹ But it is difficult to understand the reason why an acquaintance by the defendant with the deceased's threats should strengthen the admissibility of such threats. If the defendant knew beforehand that his life was threatened, it might be argued that he should have applied to the law for redress;² if he did not know, and was attacked without warning by the deceased, then proof of the deceased's hostile temper, whether such proof consist of preparations or declarations, is pertinent to show that the attack was made by the deceased. The question whether A. (the defendant) or B. (the deceased) was the aggressor in the fatal collision is to be determined; and if in such case A.'s threats are admissible to prove that A. was the aggressor, B.'s threats, by the same reasoning, are admissible to prove that B. was the aggressor. For the purpose, therefore, in cases of doubt, of showing that the deceased made the attack, and if so with what motive, his prior declarations,

ple, 16 Ill. 17; *Schnier v. People*, 23 Ill. 17; *Williams v. People*, 54 Ill. 422; *State v. Moelchen*, 53 Iowa, 310; *State v. Pearce*, 15 Nev. 188; *State v. Thawley*, 4 Harring. 562; *State v. Abbott*, 8 W. Va. 741; *De Forest v. State*, 21 Ind. 23; *Roberts v. State*, 68 Ala. 156; *Green v. State*, 69 Ala. 7; *State v. Sloane*, 47 Mo. 604; *State v. Hays*, 23 Mo. 287; *State v. Keene*, 50 Mo. 359; *State v. Taylor*, 64 Mo. 368; *State v. Harris*, 76 Mo. 361; *State v. Adams*, 76 Mo. 855; *State v. Nett*, 50 Wis. 524; *Pitman v. State*, 22 Ark. 354; *Harris v. State*, 34 Ark. 469; *Meyers v. State*, 14 Tex. 35; *King v. State*, 9 Tex. Ap. 515.

¹ *Powell v. State*, 19 Ala. 577; *Newcomb v. State*, 37 Miss. 383; *State v. Jackson*, 17 Mo. 544; *State v. Harris*, 59 Mo. 250; *State v. Elkins*, 68 Mo. 259; *State v. Taylor*, 64 Mo. 358; *State v. Dumphey*, 4 Minn. 438; *Coker v. State*, 20 Ark. 53; *State v. Brown*, 22 Kan. 222; *People v. Hen-*

derson, 28 Cal. 465; *People v. Lombard*, 17 Cal. 316. See *State v. Ridgely*, 2 Har. & McH. 120; *Combs v. State*, 75 Ind. 215; *Peterson v. State*, 50 Ga. 142; *Atkins v. State*, 16 Ark. 568; *Pridgen v. State*, 31 Tex. 420; *State v. Gregor*, 21 La. An. 478; *State v. McCoy*, 20 La. An. 593; *State v. Ryan*, 30 La. An. 1176; *People v. Campbell*, 59 Cal. 241; *People v. Alivetre*, 55 Cal. 263.

In Louisiana it has been held that a defendant, after proving threats made by the deceased against him, should not be allowed to give evidence of a fight between him and the defendant the day before the killing in order to show the deceased's animus and his own apprehension; *State v. Cooper*, 32 La. An. 1084; *State v. Fisher*, 33 La. An. 1344. See *State v. Vance*, 32 La. An. 1177.

² See *United States v. Outerbridge*, 5 Sawyer, C. Ct. 620.

uncommunicated to the defendant, that he intended to attack the defendant, are proper evidence. And so it has been frequently held.¹ They are, however, inadmissible, unless proof be first given that there was an overt act of attack, and that the defendant, at the time of the collision, was in apparent imminent danger.² It

¹ *Wiggins v. State*, 93 U. S. 465; *Ferguson*, 9 Nev. 106; *People v. Stock*, 1 Idaho, N. S. 218; *Morgan v. Com.*, 14 Bush, 106. See *Blackburn v. State*, 23 Oh. St. 146, cited *supra*, § 24. In *Nevling v. Com.*, 98 Penn. St. 322, the opinion of the court shows that this was the ground of the exclusion of the declarations. It is admissible to put in evidence "previous threats and conduct of Bailey (the deceased) as having some tendency to explain the character of his assault on Brownell. The attack was in the night, and no witness could see very clearly at any distance what may have been manifest to Brownell as to the extent of his danger." *Campbell, C. J., Brownell v. People*, 38 Mich. 736. That the prosecution cannot introduce deceased's statements that he did not intend to attack the defendant as part of the case in chief, see *People v. Carlton*, 57 Cal. 83.

² *Wiggins v. State*, 93 U. S. 465; *State v. Goodrich*, 19 Vt. 116; *People v. Stokes*, 53 N. Y. 164; *Campbell v. People*, 16 Ill. 17; *Holler v. State*, 37 Ind. 57; *Little v. State*, 6 Bax. 49; cited *Hor. & Thomp. Cas. on Self-Def.* 487; *State v. Turpin*, 77 N. C. 473; *Keener v. State*, 18 Ga. 194 (limited to self-defence in *Lingo v. State*, 29 Ga. 470); *Hoye v. State*, 39 Ga. 718; *Burns v. State*, 49 Ala. 370; *Roberts v. State*, 68 Ala. 156; *Pitman v. State*, 22 Ark. 574; *Palmore v. State*, 29 Ark. 248; *Davidson v. People*, 4 Cal. 145. See *Lyon v. Hancock*, 35 Cal. 237; *People v. Swenson*, 49 Cal. 388; *People v. Travis*, 56 Cal. 261; *Com. v. Andrews*, Whart. on Hom. § 627. Regard must be had to the other evidence and to the facts of the homicide. *People v. Taing*, 53 Cal. 602.

It has been ruled in North Carolina that in a prosecution for assault and battery, it is inadmissible for the defendant to put in evidence prior threats of violence by the prosecutor. *State v. Norton*, 82 N. C. 628; *State v. Skidmore*, 87 N. C. 509. But in these cases there was no proof that the defendant was acting in apparent self-defence.

³ *Ibid.*; *Turpin v. State*, 55 Md. 462; *State v. Turpin*, 77 N. C. 473; *Payne v. State*, 60 Ala. 80; *Roberts v. State*, 68 Ala. 153; *Sylvester v. State*, 71 Ala. 17; *Edwards v. State*, 47 Miss. 581; *Holly v. State*, 55 Miss. 424; *Kendricks v. State*, 55 Miss. 436; *State v. Maloy*, 44 Iowa, 104; *State v. Elliott*, 45 Iowa, 486; *State v. Harris*, 59 Mo. 550; *State v. Alexander*, 66 Mo. 148; *State v. Hall*, 9 Nev. 58; *State v.*

The following notice of recent cases I extract from an article furnished by me to the Southern Law Review for June, 1878, p. 261:—

"Two new cases are reported on the question of the admissibility, on trials for homicide, of evidence of utterances by the deceased, threatening the life of the defendant, such utterances not having been reported to the deceased. One of these cases, decided in 1877 (*The State v. Taylor*, 64 Mo. 358), has a head-note which states explicitly that uncommunicated threats by the deceased are inadmissible when offered by the defendant. When we examine the opinion of the court, however, we find that the ruling is limited to cases

need scarcely be added that all threats which are part of the *res gestae* are *per se* admissible.¹

where the defendant makes no claim to have been acting in self-defence. 'The court,' says Henry, J., 'properly refused to admit evidence of threats by Ghenn against defendant. *It is not pretended, that defendant when he killed Ghenn, was acting in self-defence.* Defendant was aggressor in the difficulty in the forenoon, and, when shot by defendant, Ghenn was not only making no attempt to injure defendant, but was unarmed and endeavoring to escape from him.'

"The other case is *The State v. Turpin*, 77 N. C. 473, also decided in 1877. In this case a '*per curiam*' opinion was given by Bynum, J., who says:—

"1. The uncommunicated threats were admissible for the purpose of corroborating the evidence of the threats which had been already given.

"2. They were admissible to show the state of feeling of the deceased towards the prisoner, and the *quo animo* with which he had pursued his enemy to the house.

"3. In ascertaining whether the prisoner had acted in self-defence a most material question was, who introduced the rock into the conflict, and for what purpose? . . . To corroborate this view, and fix the ownership of the rock, the prisoner offered evidence both of the violent character and deadly threats of the deceased. In this aspect of the case *the threats were equally admissible, whether communicated or uncommunicated*, and, in connection with the other facts indicating a felonious assault upon the prisoner, would constitute a case of murder, man-

slaughter, or justifiable homicide, as the jury, under proper instructions, might determine upon all the facts."

As sustaining the text may be cited *Wiggins v. The People*, 3 Otto (93 U. S.), 465. In this case we have the following from Judge Miller:—

"Although there is some conflict of authority as to the admission of threats of the deceased against the prisoner in a case of homicide, where the threats had not been communicated to him, there is a modification of the doctrine in more recent times, established by decisions of courts of high authority, which is very well stated by Wharton, in his work on Criminal Law, section 1027. 'Where the question is as to what was deceased's attitude at the time of the fatal encounter, recent threats may become relevant to show that this attitude was one hostile to the defendant, even though such threats were not communicated to defendant. The evidence is not relevant to show the *quo animo* of the defendant, but it may be relevant to show that at the time of the meeting the deceased was seeking defendant's life.'"

It may be objected that such evidence is hearsay. To this it may be answered:—

1. It is primary; and hearsay, when primary, is admissible when relevant. The question at issue is, did the deceased attack the defendant? self-defence being set up by the defendant in confession and avoidance. To prove an attack by the deceased—to show, in other words, that his object in meeting the defendant was to attack him—the deceased's intention is mate-

¹ *R. v. Edwards*, 12 Cox C. C. 230; *Thomas v. State*, 11 Tex. Ap. 315. *Supra*, § 262.

§ 758. When we take up the presumption arising from the possession of stolen goods, we have again to deplore the looseness of phraseology which assigns one term, presumption, to processes so very different as fictions, presumptions of law, and inferences. Of the confusion which thus arises the "presumption" now before us is the most striking illustration. It is really an inference of fact; but frequently, from the notion that inferences and presumptions of law are convertible, has been declared to be a presumption of law.¹ But the difference will at once be seen by recurring to the distinct processes of reasoning which are thus invoked. The presumption of law, granting its minor premise, establishes a certainty. It says, for instance: "All persons under seven years are presumed incapable of crime; A. is under seven years; he is therefore incapable of crime." If A. is under seven years, then the conclusion is a certainty, and the jury must be directed so to find. This, in fact, is deductive reasoning, in which the major premise is matter of law,

Possession
of stolen
goods or of
other fruits
of crime.

rial. How is this intention to be discovered? If the deceased were alive, we would call him and ask him as to the facts. He is not alive, and the best evidence we can have of an intended attack on his part is his own expressions, whether in word or in deed. If we reject these expressions, then we have no other way of proving a material fact.

2. Whenever the condition of a party's mind is at issue, then expressions of the party are admissible, when tending to throw light upon such condition. See *Hadley v. Carter*, 8 N. H. 40; *Com. v. O'Connor*, 11 Gray, 94; *Howe v. Howe*, 99 Mass. 88. This is eminently the case when the party whose declarations are to be proved is dead, and where his state of mind, when material, can be proved in no other way than by his declarations. In *R. v. Johnson*, 2 Car. & Kir. 354, where the prisoner was charged with murdering her husband, and when the deceased's state of health prior to the day of his death became material, a

witness was called to prove declarations on this topic by the deceased a day or two before the death. This was objected to by the prisoner, but was admitted by Alderson, B., who said that he thought that what the deceased said to the witness was reasonable evidence of the deceased's state of health at the time. And in a suit on a policy of life insurance, it was held admissible to show that the deceased had made declarations at various times as to his health at variance with those which he had given to the defendants. His good faith at the time was at issue, and his declarations were held admissible to negative such good faith. *Aveson v. Kinnaird*, 6 East, 188; *Witt v. Klindworth*, 3 S. & T. 143. See, also, note by Mr. Proffatt, 1 Am. Dec. 373. That threats against the defendant's life are admissible in a prosecution for carrying concealed weapons, see *Polk v. State*, 62 Ala. 237.

¹ See *Dreyer v. State*, 11 Tex. Ap. 503.

and in which all that remains to the jury is to find as to the truth of the minor premise. But in inferences, such as those immediately before us, the process is inductive, and neither major nor minor premise is matter of law.¹ Thus in the case of the inference from receiving stolen property the reasoning is as follows:—

“The proportion of guilty persons holding stolen goods to innocent is two to one: A. holds stolen goods; therefore the probability of his guilt is two to one.” Now as to this process it is to be remarked: (1) That the major premise is a statement which is of no value unless it is based upon a large observation of facts; (2) That the conclusion is only a probability; and (3) That no case arises in which the question comes up pure and simple, for in all cases the fact of possession is mixed with some other qualifying fact or inference.

Taking up, then, the point immediately before us, we may say that a court may properly tell the jury that the possession by a party of stolen goods is a fact from which his complicity in the larceny may be inferred.² But the possession must be personal;³ must be recent;⁴ must be unexplained;⁵ and must involve a distinct

¹ See *supra*, § 716, and remarks of 60 Cal. 74; *Rarley v. State*, 9 Tex. Ap. Mr. Best in note. 476.

² *Knickerbocker v. People*, 43 N. Y. 177; *Stover v. People*, 56 N. Y. 315; *Goldstein v. People*, 82 N. Y. 231; *Mimms v. State*, 16 Oh. St. 221; *Smathers v. State*, 46 Ind. 447; *Smith v. State*, 58 Ind. 340; *Waters v. People*, 104 Ill. 841; *State v. Brown*, 25 Iowa, 561; *State v. Golden*, 49 Iowa, 48; *State v. Hessians*, 50 Iowa, 135; *Criley v. State*, 20 Wis. 231; *Gregory v. Richards*, 8 Jones (N. C.), 410; *Tucker v. State*, 57 Ga. 503; *Foster v. State*, 52 Miss. 595; *State v. Gray*, 37 Mo. 463; *State v. Creson*, 38 Mo. 372; *Newbrandt v. State*, 53 Wis. 89; *Lewis v. State*, 4 Kans. 296; *People v. Hurley*, 27 Iowa, 126; *State v. New*, 22 Minn. 71; *State v. Graves*, 72 N. C. 482; *Curtis v. State*, 6 Cold. 9; *Sartorius v. State*, 24 Miss. 602; *State v. Brown*, 75 Mo. 317.

³ *R. v. Hughes*, 14 Cox C. C. 223; 39 L. T. (N. S.) 292.

⁴ *R. v. Rickman*, 2 East P. C. 1035; *R. v. Cockin*, 2 Lew. C. C. 235; *R. v. Dewhurst*, 2 Stark. Ev. 614; *R. v. —*, 2 C. & P. 459; *R. v. Evans*, 2 Cox C. C. 270; *R. v. Adams*, 3 C. & P. 600;

⁵ *R. v. Evans*, 2 Cox C. C. 270; *R. v. Dibley*, 2 C. & K. 818; *State v. Merrick*, 19 Me. 398; *Dillon v. People*, 1 Hun, 670; 4 Thomp. & C. 205; *Jones v. People*, 12 Ill. 259; *State v. Brady*, 27 Iowa, 126; *State v. New*, 22 Minn. 71; *State v. Graves*, 72 N. C. 482; *Curtis v. State*, 6 Cold. 9; *Sartorius v. State*, 24 Miss. 602; *State v. Brown*, 75 Mo. 317.

and conscious assertion of property by the defendant.¹ If the explanation involves a falsely disputed identity or other fabricated

R. v. Partridge, 7 C. & P. 551; *R. v. Harris*, 8 Cox C. C. 333; *R. v. Hughes*, 14 Cox C. C. 223; *State v. Merrick*, 9 Me. 398; *Com. v. Millard*, 1 Mass. 6; *Com. v. Montgomery*, 11 Met. (Mass.) 534; *State v. Raymond*, 46 Conn. 345; *Davis v. People*, 1 Parker C. R. 447; *Stover v. People*, 56 N. Y. 315; *Sloane v. People*, 47 Ill. 76; *Comfort v. People*, 54 Ill. 404; *Smith v. People*, 103 Ill. 82; *Engleman v. State*, 2 Cart. 1; *People v. Walker*, 38 Mich. 106; *Gablick v. People*, 40 Mich. 716; *Warren v. State*, 1 Greene (Iowa), 106; *State v. Taylor*, 25 Iowa, 273; *State v. Emerson*, 48 Iowa, 172; *Heed v. State*, 25 Wis. 421; *Hughes v. State*, 8 Humph. 75; *Hunt v. Com.*, 13 Grat. 757; *State v. Adams*, 1 Hayw. 463; *State v. Graves*, 72 N. C. 482; *State v. Reynolds*, 87 N. C. 544; *State v. Jennett*, 88 N. C. 665; *State v. Rights*, 82 N. C. 675; *State v. Bennett*, 2 Tread. Const. R. 692; *State v. McAfee*, 68 Ga. 823; *Jones v. State*, 26 Miss. 247; *Jones v. State*, 30 Miss. 653; *Belote v. State*, 36 Miss. 96; *State v. Wolff*, 15 Mo. 168; *State v. Floyd*, 15 Mo. 349; *State v. Lange*, 59 Mo. 418; *State v. Hill*, 65 Mo. 84; *Yates v. State*, 37 Tex. 202; *Perry v. State*, 41 Tex. 485; *Beck v. State*, 44 Tex. 430; *People v. Kelly*, 28 Cal. 423; *People v. Swinford*, 57 Cal. 68; *People v. Williams*, 57 Cal. 108; *People v. Hurley*, 60 Cal. 75. That presumption is rebuttable see *State v. Snell*, 46 Wis. 524.

Possession by a letter-carrier of a bank note some months after it has been sent by post and lost is not sufficient evidence of a felonious stealing by him, although not accounted for otherwise than by his mere assertion that he found it. *R. v. Smith*, 3 F. & R. 123—*Bramwell*. See *Stuart v. Peo-*

ple, 42 Mich. 255, 758. That the presumption arises from a possession shared with others, see *State v. Raymond*, 46 Conn. 345.

¹ 1 Ben. & Heard Lead. Cas. 360; *R. v. Mansfield*, C. & M. 142; *R. v. Hingley*, 2 M. & R. 524; *State v. Bishop*, 51 Vt. 217; *Com. v. Randall*, 119 Mass. 107; *State v. Williams*, 2 Jones (N. C.), 194; *Davis v. State*, 50 Miss. 86; *Hall v. State*, 8 Ind. 439; *Turbeville v. State*, 42 Ind. 490; *Bailey v. State*, 52 Ind. 462; *State v. Walker*, 41 Iowa, 217; *State v. Hessians*, 50 Iowa, 135; *State v. En*, 10 Nev. 279; *Garcia v. State*, 26 Tex. 209; *Thomas v. State*, 43 Tex. 658. See *Gose v. State*, 6 Tex. Ap. 121; *Connor v. State*, 6 Tex. Ap. 457; *Jorasoo v. State*, 8 Tex. Ap. 540; *Lower v. State*, 11 Tex. Ap. 253; *Roberts v. State*, 11 Tex. Ap. 275; *Gonzales v. State*, 13 Tex. Ap. 758; *Tyler v. State*, 13 Tex. Ap. 205; *Flores v. State*, 13 Tex. Ap. 665; *Smith v. State*, 13 Tex. Ap. 507.

Where the prisoner was the servant of a firm which owned a large number of shovels, four of which were found in his possession, it was held that the question of larceny was properly left to the jury, although there was no evidence to show when they were missed, or how long they had been in his possession. *R. v. Knight*, L. & C. 378. But see *State v. Kelley*, 9 Mo. App. 512; *Boykin v. State*, 34 Ark. 443; *Ingalls v. State*, 48 Wis. 647.

Where several were accused of a robbery committed in concert, it was held proper on the separate trial of one of them to show that the plunder was found with one of the others, or in the cell where he had been locked up. *People v. Whitson*, 43 Mich. 419.

On the trial of an indictment for hav-

evidence, the inference increases in strength;¹ and so where the goods are part of a mass of stolen property;² and where the case is that of a forged instrument held by one claiming under it.³ But in any view the question is one of fact.⁴

§ 759. The possession, as has been just noticed, must be recent.

Possession
must be
recent.

But what is "*recent*?" The cases on this point, as heretofore given, are very numerous, and on a general view of their contents we are led to the conclusion that "*recent*," as here used, is a term incapable of exact definition, and that what is "*recent*" varies, within a certain range, with the conditions of each particular case. There are, however, additional circumstances, the presence or absence of which tends to expand or contract this particular inference of guilt.⁵ These will be now noticed.

§ 760. Has the article in the defendant's possession such earmarks as made it his duty, on its coming into his hands, to seek

ing obtained the property of another by threats, evidence that the same property was discovered, in a concealed state, in the house of the prisoner, is admissible, as going to show that the prisoner was conscious of having obtained it improperly. *State v. Bruce*, 11 Shep. 71.

¹ Steph. Dig. C. L. art. 308; *R. v. Evans*, 2 Cox C. C. 270; *R. v. Dibley*, 2 C. & K. 818; *R. v. Burton*, Dears, 282; *State v. Bennett*, 2 Const. R. 692.

² See *supra*, § 44; *R. v. Bowman*, Allison C. L. 314. See *Webb v. State*, 8 Tex. Ap. 115.

³ *Com. v. Talbot*, 2 Allen, 161.

⁴ *People v. Titherington*, 59 Cal. 598.

⁵ In *Ingalls v. State*, 48 Wis. 647, we have the following by Taylor, J.: "The effect of such evidence was very ably discussed by the late Chief Justice Dixon, in *Graves v. The State*, 12 Wis. 591, and more recently by Justice Orton, in *The State v. Snell*, 46 *ibid.* 524. The rule to be derived from these cases, and which is sustained by the

later elementary writers upon evidence in criminal cases, is that the possession of the stolen goods by the accused recently after the larceny does not raise any legal presumption of the guilt of the party so found in possession. The fact of the possession of the stolen goods by the accused is evidence tending to prove his guilt, but is in no sense conclusive as to his guilt, nor does his guilt follow as a presumption of law unless such possession be explained by the accused. The courts of California have held that it was error to charge the jury that they should convict the accused upon the mere proof of the possession of the stolen property recently after the larceny. *People v. Ah Ki*, 20 Cal. 177; *People v. Chambers*, 18 *ib.* 382; *People v. Levison*, 16 *ib.* 98. And these decisions seem to be supported by both Wharton and Greenleaf. See 2 Wharton Crim. Law, § 728." See, as taking a stronger view, *State v. Jennett*, 88 N. C. 665.

out its owner?¹ For, supposing even that he *found* it, yet, if it has such ear-marks, he is guilty of larceny if he do not return it to the party whose property he is thus notified it is.² Hence the question of "recent" is much affected by that of marks of this class. Thus a book without any name upon it, or any mark to identify it as belonging to any particular private owner, may innocently be picked up at a book-stall within a few hours after it was stolen. Yet, notwithstanding the "recentness" of the stealing, no jury would or should convict a person in whose possession the book was found, although he should be unable to remember the book-stall at which he bought it, or in any way to corroborate his story. For the purchase of second-hand books at book-stalls is of such every-day occurrence, and in a large city book-stalls are so numerous, and so easily confused in the memory, that it would be both irrational and unsafe to convict of larceny simply because the defendant had in his possession, shortly after it was stolen, a book which had nothing on its face to show that it had been taken feloniously from any particular owner. It would be otherwise, however, with a book of marked appearance,

Ear-marks
to be
proved.

¹ See *Com. v. Tolliver*, 119 Mass. 312; *Com. v. Brown*, 76 Penn. St. 319. *McNair v. State*, 14 Tex. Ap. 79.

² Whart. Crim. Law, 8th ed. § 901.

"In *R. v. Dredge*, 1 Cox C. C. 235, the prisoner was indicted for stealing a doll and other toys. The prosecutor proved that he kept a large toy-shop, and that the prisoner came into the shop dressed in a smock frock. After remaining there some time, from some suspicion that was excited, he was searched, and under his smock frock were found concealed the doll and other toys. The prosecutor could not go further than to swear that the doll had once been his, but he could not swear that he had not sold it, and he had not missed it; and from the mode in which he kept his stock it was not likely that he would miss that or any other of the articles found on the prisoner. *Erie, J.*, directed an ac-

quittal. In *R. v. Burton*, Dears. C. C. 282, the prisoner was indicted for stealing pepper. He was found coming out of a warehouse in which there was a quantity of pepper both loose and in bags; when stopped and accused, he threw some pepper on the ground, and said, 'I hope you will not be hard with me.' Upon the case of *R. v. Dredge* being cited, *Maule, J.*, pointed out the distinction that in this case the prisoner had, in fact, admitted that the pepper had not been honestly come by; and he added: 'If a man go into the London Docks sober, and comes out of one of the cellars, wherein are a million gallons of wine, very drunk, I think that would be reasonable evidence that he had stolen some of the wine in that cellar, though you could not prove that any wine was missed.' *Roscoe's Cr. Ev.* 8th ed. § 19. See *R. v. Hooper*, 1 F. & F. 85.

and peculiar value, containing an owner's name. Recent possession, also, of an ordinary coin amounts to but little; it is otherwise as to possession of a collection of coins which are unique and rare.¹

§ 761. What the defendant said on the discovery of the goods with him is admissible in his favor, if made instantaneously and without opportunity of concoction, as part of the *res gestae*.² So far as concerns subsequent explanations, it may be noticed that the law in this respect has been materially affected by the statutes authorizing the examination of defendants in their own behalf. Under the old law it was appropriate to speak of *unexplained* inferences, because, as to the defendant, all inferences were unexplained. He could not open his lips; and so far as he was concerned, the inference was rendered far less cogent by the fact that his silence was compulsory. Hence the law, when any considerable period of time—say one, two, or three months—elapsed between the stealing of an article and its discovery, was prompt to invoke other counter and cancelling inferences—*e. g.*, “from certain facts it may be inferred that the defendant bought the article *bond fide*, or that it was put in his house as a trap, and, as he cannot tell us, we must give him the benefit of this supposition.” But now, when the defendant *can* tell us, and he declines to do so, it may be argued in jurisdictions where such argument is not forbidden by statute that the term “recent,” in this relation, is not to be so sharply defined.³ In any view, the inference to be drawn from the possession of stolen goods is not one of law, but of probable reasoning, as to which the court may lay down logical tests for the guidance of the jury, but can impose no positive binding rule.⁴ And good character may outweigh the presumption.⁵

¹ *People v. Getty*, 49 Cal. 581. See *McPhail v. State*, 19 Tex. Ap. 273; *People v. Noregea*, 48 Cal. 123, to the effect that naked possession is not enough to sustain conviction. *Sitterlee v. State*, 13 Tex. Ap. 587; *Flores v. State*, 13 Tex. Ap. 665, and cases cited to succeeding notes in this section.

² *Supra*, §§ 263, 691, where the cases are given in detail; *Davis v. People*, 1 Parker C. R. 447; *Bennett v. People*, 96 Ill. 602; *Henderson v. State*, 70 Ala. 23; *Payne v. State*, 57 Miss. 348;

³ See *McDonel v. State*, 90 Ind. 327.

⁴ See, as giving a restrictive view of the inference, *People v. Chambers*, 18 Cal. 383; *People v. Brown*, 48 Cal. 253;

⁵ *State v. Butterfield*, 75 Mo. 297; *People v. Hurley*, 60 Cal. 74.

The inference of stealing may be rebutted by counter inferences indicating that the property was obtained honestly.¹ Thus, where

People v. Cleveland, 49 Cal. 578; *Durett v. State*, 62 Ala. 434.

"If the party have secreted the property; if he deny that it is in his possession, and such denial is discovered to be false; if he cannot show how he became possessed of it; if he give false, incredible, or inconsistent accounts of the manner in which he acquired it; if he has disposed of, or attempted to dispose of it at an unreasonably low price; if he has absconded, or endeavored to escape from justice; if other stolen property, or picklock keys, or other instruments of crime, be found in his possession; if he were seen near the spot at or about the time the act was committed; or if any article belonging to him be found at the place or in the locality where the theft was committed, at or about the time of the commission of the offence; if the impression of his shoes or other articles of apparel correspond with the marks left by the thieves; if he has attempted to obliterate from the articles in question marks of identity, or to tamper with the parties or officers of justice—these and all like circumstances are justly considered as throwing light upon and explaining the fact of possession and render it morally certain that such possession can be referable only to a criminal origin, and cannot otherwise be rationally accounted for." *Wills's Circum. Ev.* p. 57. See *supra*, §§ 263, 691.

"In *R. v. Crowhurst*, 1 C. & K. 370, the prisoner was indicted for stealing a piece of wood; upon the piece of

wood being found by the police constable in the prisoner's shop about five days after it was lost, he stated that he bought it of a man named Nash, who lived about two miles off. Nash was not called as a witness for the prosecution, and no witness was called by the prisoner. Alderson, B., said to the jury, 'in cases of this nature you should take it as a general principle that where a man in whose possession stolen property is found gives a reasonable account of how he came by it, as by telling the name of the person from whom he received it, and who is known to be a real person, it is incumbent on the prosecutor to show that the account is false; but if the account given by the prisoner be unreasonable or improbable on the face of it, the onus of proving its truth lies on the prisoner.' It appears, therefore, that the learned judge thought that in this case the prisoner's account was sufficiently reasonable to shift the burden of proof back again on to the prosecutor, but the report does not state whether or not the case was left to the consideration of the jury. In *R. v. Wilson*, 26 L. J. M. C. 45, the prisoner was indicted for stealing some articles of dress. It was proved that the property was stolen, and sold by the prisoner. The prisoner, on being apprehended, said that C. and D. brought them to his house, and that he sold them. In consequence of this C. and D. were apprehended, and C. was tried and convicted for stealing other articles taken from the prosecutor's house at the same time as the

¹ *Grimes v. State*, 68 Ind. 193; *v. State*, 7 Tex. Ap. 464; *Taylor v. Shackelford v. State*, 2 Tex. Ap. 385; *State*, id. 659. See *State v. Butterfield*, 75 Mo. 297.

the defendant was charged with stealing a shawl and vest on June 1st, 1870, and the shawl was found in his possession on July 12th, it was held admissible for him to offer any evidence from which it might be inferred that he obtained the shawl by purchase.¹

§ 762. In cases of larceny and embezzlement, similar inferences may be drawn from sudden accessions of property by persons previously poor.² In homicide, it is in like manner admissible to trace to the defendant articles of property connected with the deceased.³ A remarkable case of this kind occurred in Philadelphia, in 1845, on the trial of a German named Papenburg for murder. Towards the close of the case a handkerchief was accidentally drawn from a coat which it was proved he had worn on the night of the offence. On this handkerchief was pencilled, apparently in blood, the profile of a broken hatchet, which was proved to have belonged to the deceased prior to the fatal blow. Still this was dangerous evidence, deriving its force from the improbability of the counter-presumption that the coat had been so placed, between the homicide and the trial, as to admit of the handkerchief being slipped in by a third person—a feat which Boynton's case, already stated, shows to be not unprecedented.

articles in question; D. was discharged. The constable made inquiries as to the statement made by the prisoner of how he came by the goods, but no evidence of what transpired on such inquiries was received, being objected to by the prisoner's counsel. Neither C. nor D. were called as witnesses for the prosecution, and no witness was called by the prisoner. The jury found the prisoner guilty, and the conviction was upheld by the Court of Criminal Appeal, upon the ground, as stated by Pollock, C. B., that there was some evidence for the jury upon which the prisoner might be convicted." Roscoe's Cr. Ev. (8th ed.) 21.

See as to fruits of offence 3 Whart. & St. Med. Jur. 4th ed. (1884) § 858.

¹ Way v. State, 35 Ind. 409. See People v. Dowling, 84 N. Y. 478; and

as to evidence of proof of defendant's statement at the time, *supra*, §§ 263, 691, 761. This, however, does not make admissible statements as to past transactions. Allen v. State, 71 Ala. 5.

² See Com. v. Montgomery, 11 Met. 534, and cases cited. Betts v. State, 66 Ga. 508; State v. Grebe, 17 Kans. 458; McCoy v. State, 44 Tex. 616; Foster v. State, 1 Tex. Ap. 531.

³ R. v. Burdett, 4 Barn. & A. 1-95; R. v. Courvoisier, Wills on Cir. Ev. 241; Williams v. Com., 29 Penn. St. 102; State v. Babb, 76 Mo. 501.

The admission of a party charged with murder that he had in his possession certain property of the murdered person is not a confession of guilt. State v. Red, 53 Iowa, 69. See *supra*, § 628.

On a trial for murder, there having been evidence that the murdered woman had money, and that the prisoners had spoken of robbing her, the account of her administrator was, in Pennsylvania, held admissible to show that he found no money.¹

§ 768. Where the charge is burglary, it is held that mere possession of the stolen goods, unaccompanied by other suspicious circumstances, is not enough to give *prima facie* evidence of the burglary.² But it is otherwise when there is indicatory evidence on collateral points.³

In burglary.

III. INFERENCES FROM MECHANISM OF CRIME.

§ 764. Undoubtedly we find it constantly stated that from a deadly instrument the law presumes a deadly design,⁴ But, in the first place, this, so far as it concerns the logical process, is a mere *petitio principii*; the design

Inference from instrument used.

¹ Howser v. Com., 51 Penn. St. 332. But see Com. v. Sturtivant, 117 Mass. 122. *Infra*, § 784.

² Davis v. People, 1 Parker C. R. 447; Jones v. People, 6 Parker C. R. 126; Walker v. Com., 28 Grat. 969; People v. Gordon, 40 Mich. 716; Stuart v. People, 42 Mich. 255; State v. Shaffer, 59 Iowa, 290; State v. Reid, 20 Iowa, 413. See Frank v. State, 39 Miss. 705; Bryan v. State, 82 Ga. 179; People v. Ah Sing, 59 Cal. 400. Possession by the prisoners of part of the stolen property very soon after the burglary, with an account given of it, which is not reasonable or credible, is sufficient *prima facie* evidence, without express evidence to falsify it. It is so, however, only if the account given is not reasonably credible. R. v. Exall, 4 F. & F. 922—Pollock. See, as qualifying this, R. v. Langmead, 9 Cox C. C. 467. Compare Whart. Crim. Law, 8th ed. § 813.

³ Knickerbocker v. People, 57 Barb. 365; Methard v. State, 19 Oh. St. 363; Breese v. State, 12 Oh. St. 146. See Brown v. State, 61 Ga. 311; Smith v. State, 62 Ga. 663.

⁴ *Supra*, § 736. See Foster, 255; 1 East P. C. 340; State v. Knight, 48 Me. 11; U. S. v. Cornell, 2 Mason, 91; Com. v. Drew, 4 Mass. 391; Com. v. York, 9 Met. 93; Com. v. Webster, 5 Cush. 290; State v. Zellers, 2 Halst. 220; Resp. v. Bob, 4 Dall. 145; Penn. v. Honeyman, Addis. 148; State v. Town, Wright (Ohio), 75; Davis v. State, 25 Oh. St. 369; Com. v. Hill, 2 Grat. 594; Kriel v. Com., 5 Bush, 362; Mitchell v. State, 5 Yerg. 340; McDermott v. State, 87 Ind. 871; Murphy v. People, 37 Ill. 447; Davison v. People, 90 Ill. 222; State v. Decklotts, 19 Iowa, 266; State v. Shippey, 10 Minn. 224; State v. Johnson, 3 Jones (N. C.), 266; State v. Irwin, 1 Hayw. 112; State v. Merrill, 2 Dev. 269; State v. Bowman, 80 N. C. 426; State v. Peters, 2 Rice's Dig. 106; State v. Smith, 2 Strobb. 77; Clements v. State, 50 Ala. 117; Riland v. State, 52 Ala. 322; Hadley v. State, 55 Ala. 28; De Arman v. State, 71 Ala. 351; Woodsides v. State, 2 How. Miss. 656; Green v. State, 28 Miss. 689; Riggs v. State, 30 Miss. 687; Dixon v. State, 13 Fla. 636.

being held deadly because the instrument is deadly, and the instrument being held deadly because the design is deadly. And in the second place, the use of the term "law" is ambiguous, and is likely to mislead. If it be said that the use of a weapon likely to inflict a mortal blow implies, as a presumption of law, in its technical sense, a deadly design, this is an error; and *a fortiori* is it so when it is said that the use of such weapon implies a malicious design. There is no such thing, as we have already noticed, as a purely abstract killing;¹ no killing can be proved in a court of justice except in the concrete, accompanied by such circumstances as enable us, as a matter of probable reasoning, to determine whether the killing was or was not malicious. An executioner, under mandate of law, hangs a convict; here the instrument of death is deadly, but no malice is inferred. In the same category fall by far the greater number of violent deaths which history records; those of persons killed in the due course of legitimate war. On the other hand, when a person without authority, and with the appearance of deliberation, shoots another, we infer, as a presumption of *fact* (not of *law*), design. There is no *petitio principii* in this. We do not say that the killing was designed because it was designed. What we say is this: Taking aim at another with a gun, by a person without authority, and not in public war, and then firing, ordinarily implies an intent to kill; this was a case of such firing without authority; therefore this implies an intent to kill. Or, to vary the incidents; for a strong man, in possession of his senses, persistently and violently to kick a child on its vital parts can only be explained on the hypothesis of malice; this was such a case; therefore this case can only be explained on the hypothesis of malice. Or, again: to lock a child up in a room and knowingly to leave him without food for a week implies malice; this the defendant did; therefore, in this case, malice is to be inferred. We cannot, in this case, leave out the word "knowingly;" for such a locking up might be accidental, in which case there would be no inference of malice. Yet "knowledge" in such a case is not a presumption of law, but an inference of inductive reasoning, to be drawn from a series of facts. It is incorrect, therefore, to tell a jury that malice, when the weapon is deadly, is a presumption of law. But while telling them that

¹ See *supra*, §§ 10, 734-7-8.

whether there is or is not malice is a point to be determined by a scrutiny of all the facts in the case, it is proper to remind them that there are certain rules of probable reasoning which it is right for them to keep in view. And one of these rules is that when a responsible person, without authority, and under such circumstances as indicate deliberation, without apparent provocation or necessity, wounds another in a vital part with a deadly weapon, then malice is to be inferred.¹

¹ See, as authorities bearing on this topic, *R. v. Noon*, 6 Cox C. C. 137; *R. v. Selten*, 11 Cox C. C. 674; *R. v. Welsh*, 11 Cox C. C. 336; *R. v. Ward*, L. R. 1 C. C. 356; *U. S. v. Cornell*, 2 Mason, 91; *U. S. v. McGlue*, 1 Curtis C. C. 1; *U. S. v. Mingo*, 2 Curtis C. C. 1; *U. S. v. Armstrong*, 2 Curtis C. C. 446; *State v. Gilman*, 69 Me. 163; *Com. v. York*, 9 Met. 93—Wilde, J., diss.; *Com. v. Webster*, 5 Cush. 290; *People v. McLeod*, 1 Hill (N. Y.), 377; *People v. Clark*, 3 Selden, 385; *People v. Sullivan*, *ibid.* 396; *People v. Kirby*, 2 Parker C. R. 28; *Thomas v. People*, 67 N. Y. 218; *State v. Zeller*, 2 Halst. 220; *Resp. v. Bob*, 4 Dall. 146; *Penn. v. Honeyman*, Addis. 148; *Penn. v. McFall*, *ibid.* 257; *Penn. v. Lewis*, *ibid.* 282; *O'Mara v. Com.*, 75 Penn. St. 424; *Lanahan v. Com.*, 84 Penn. St. 80; *McLain v. Com.*, 99 Penn. St. 86; *State v. Bowen*, 1 Houst. C. C. 91; *State v. Manluff*, 1 Houst. C. C. 205; *State v. Roane*, 2 Dev. 58; *State v. Merrill*, 2 Dev. 269; *State v. Johnson*, 3 Jones (N. C.), 226; *State v. West*, 6 Jones (N. C.), 505; *State v. Smith*, 2 Strobh. 77; *Clarke v. State*, 35 Ga. 75; *Fraser v. State*, 55 Ga. 325; *Hogan v. State*, 61 Ga. 43; *Hanvey v. State*, 68 Ga. 612; *Russell v. State*, 68 Ga. 785; *Holland v. State*, 12 Fla. 117; *Seaborn v. State*, 20 Ala. 15; *Clem v. State*, 31 Ind. 480; *Bradley v. State*, 31 Ind. 492; *Miller v. State*, 37 Ind. 432; *Murphy v. People*, 37 Ill. 447; *Hurd v. People*, 25 Mich. 405; *Weller v. People*,

30 Mich. 16; *State v. Decklots*, 19 Iowa, 447; *State v. Hoyt*, 13 Minn. 132; *Anderson v. State*, 3 Heisk. 86; *Seals v. State*, 3 Bax. 459; *McAdams v. State*, 25 Ark. 405; *Wray, Ex parte*, 30 Miss. 673; *Jeff v. State*, 39 Miss. 593; *Barcus v. State*, 49 Miss. 17; *Hawthorne v. State*, 58 Miss. 778; *State v. Evans*, 65 Mo. 574; *State v. Alexander*, 66 Mo. 148; *Isaacs v. State*, 25 Tex. 174; *People v. Barry*, 31 Cal. 357; *State v. Bertrand*, 3 Oregon, 61. As sustaining the text, see *State v. Wingo*, 66 Mo. 181, where it was held error to charge the jury that the law presumes from wilful killing murder in second degree, and that the burden of exculpation is on the defendant. See *supra*, § 721. To same effect see *Ferris v. Com.*, 14 Bush, 362. As to the question of fact where character of weapon is doubtful, see *State v. Davis*, 14 Nev. 407. See, also, *Walker v. State*, 7 Tex. Ap. 627.

In *U. S. v. McClare*, 17 Bost. Law Rep. 439, the case consisted simply of proof of a blow struck. "The mere fact," say the court, "of a blow struck does not make out a crime. In charging a crime, the government charges a criminal intent, and must prove it. Proving a blow may in some cases be sufficient evidence of a criminal intent, but such intent may be repelled by the circumstances. If on all the evidence the jury are left in reasonable doubt as to the intent of the defendant, they cannot convict him of the crime." To

§ 765. When it is alleged that a death was produced by a particular instrument, the condition of the instrument becomes a

same effect see *King v. State*, 45 Ind. 518, and cases cited *supra*, § 671, and the remarks of Christiancy, J., in his opinion in *Maher v. People*, 10 Mich. 212. See, also, *Coffey v. State*, 3 Yerg. 283; *Floyd v. State*, 3 Heisk. 342; *Hamby v. State*, 36 Tex. 523, and cases cited *supra*, §§ 734 *et seq.*

Judge Grover, in *Stokes v. People*, 53 N. Y. 164, delivering the unanimous opinion of the Court of Appeals, said:—

"It can hardly be supposed that, under such proof as to what the circumstances really were, the judge intended to charge the jury that the law implied the crime of murder from proof of killing under the circumstances of the case, and upon such proof such an instruction would have been erroneous. The instruction in effect was, and the jury must so have understood it, that the law implied motive, and consequently the crime of murder in the first degree, from the proof of killing the deceased by the prisoner, and that upon this proof they should find him guilty of that crime, unless he had given evidence satisfying them that it was manslaughter or excusable homicide.

"But for the idea conveyed by the part of the charge excepted to, that the law implied the crime of murder in the first degree from the proof of killing only, unless the prisoner satisfied them it was not murder, the benefit of the doubt to be given to the prisoner would not have been restricted to their finding the evidence evenly balanced, so that they did not know where the truth lay; on the contrary, the instruction would have been not to convict of that crime, unless convinced by all the evidence in the case that he

was guilty, and that if a careful examination of all the evidence left in their minds reasonable doubts of his guilt, they should give the prisoner the benefit by an acquittal."

This is sound law, in conformity with what is stated in the text. At the same time, we must repeat that while it is essential to maintain that intent is an inference of fact, to be drawn by the jury from all the circumstances of the case, it is important that questions of this kind should not be left to the jury without such instructions from the judge as will lead them to make correct inferences. They should be reminded that all acts committed by intelligent persons are to be canvassed by the tests of practical logic as applied by us to the transactions of every day life: that intent is not proved substantively, but inferred from acts and declarations; and that though the jury have to determine this question, they must be guided by the ordinary rules of inductive reasoning. And they should be also told (and in this respect the opinion just quoted falls short), that presumptions of fact of this kind are as much *proof* as are any other part of the evidence of the case, and are to be taken into consideration as part of the case when the jury apply the test of reasonable doubt.

To same effect see remarks of Judge Wells in *Com. v. Sturtivant*, Appendix to Whart. on Hom. See, also, *King v. State*, 45 Ind. 519.

In *Com. v. Sturtivant*, 117 Mass. 139, it was said by Endicott, J.:—

"The remaining exception was to the evidence that the defendant in chopping wood used the axe with his right hand forward. It does not appear how this testimony applied to the

pertinent subject of inquiry. Is a knife, for instance, with which it is alleged a homicide was committed, marked in such a way as to indicate use of the character assigned?¹ When suicide was set up as the cause of the Earl of Essex's death, in 1683, it was a strong point against this hypothesis that the razor with which the fatal wound was inflicted was notched by the act of drawing it across the neck-bone in a way very unlikely to have resulted if the deceased had himself inflicted the wound. In cases of hanging, the condition of the rope is material; and so in poisoning is that of the vessel in which the poison was contained.²

Inference from condition of weapon.

§ 766. In the case of Courvoisier, who was tried for the murder of Lord William Russell, there were two facts relied upon to repel the hypothesis of suicide. One was that a napkin was placed over the face of the deceased, and the other that the instrument of death did not lie near the body.³ To the same point is the case of Jane Norkott, who was found dead in her bed with her throat cut, while a bloody knife was found sticking in the floor some distance from the bed, and as it stuck the point was turned toward the bed and the haft from it. Yet in such case the jury must be satisfied that the body was not moved between the death and the period of observation. Thus Mr. Taylor⁴ tells us of a case of homicide in which the "weapon, a razor, was found under the left shoulder; a most unusual situation, but which, it appears, it had taken owing to the body having been carelessly turned over before it was seen by the surgeon first

Inference from position of weapon.

case, and, therefore, the bill of exceptions fails to show that its admission was erroneous. If, as is to be presumed, it appeared in evidence that the fatal blows upon the deceased were inflicted by a weapon used with the right hand forward, it was competent to prove that the defendant so used his axe when chopping wood. It is like the ordinary case, where a blow is apparently inflicted by a left-handed person, it is competent to prove that the accused is left-handed. It does not prove that he struck the blow, but it is a circumstance pointing to him as

belonging to a class by one of whom the blow was struck, and, in connection with other inculpatory testimony, is competent," *Infra*, § 773.

A jack-knife is not necessarily a dangerous weapon. *Com. v. O'Brien*, 119 Mass. 342.

¹ See Papenburg's Case, cited *supra*, § 762.

² See 3 Wh. & St. Med. Jur. 4th ed. §§ 507 *et seq.* Compare *infra*, § 774.

³ 3 Wh. & St. Med. Jur. 4th ed. §§ 302 *et seq.*

⁴ Med. Jur. by Reese, 284.

called."¹ That the weapon is firmly grasped in the deceased's hand strengthens the inference of suicide.² When it is placed in the hand after death, it is held loosely. That the instrument (*e. g.*, a razor) was *closed* is not conclusive against suicide.³ It should also be kept in mind that the weapon found near the person of the deceased may not be the one with which the crime was committed.⁴

§ 767. Dress, independently of the questions to be hereafter noticed, adds often an important element of indicatory proof.⁵ Thus, in a case cited by Taylor,⁶ there were two cuts in a shirt produced in evidence. These cuts were near each other, and precisely similar; leading to the inference that the knife producing them went through two folds of the shirt. From this, however, it followed that the shirt could not have been on the deceased at the time of the wounding, since if it had been there would have been *three* not *two* cuts. So, on the trial of Stokes for the murder of Fisk, in 1873, the condition of the deceased's cloak, immediately after the wound, was admitted to show the force and direction of the shot. The lay of blood-stains, also, may indicate the direction in which the blood flowed.⁷ Nor is it necessary, it has been ruled, that the garments in question should be themselves produced.⁸ Their condition can be described by witnesses without such production, if their non-production is satisfactorily explained.⁹ But if practicable they should be secured and brought into court, though before admitting them there should be evidence that they have not been tampered with since the commission of the crime.¹⁰

¹ See 3 Whart. & St. Med. Jur. 4th ed. §§ 297 *et seq.*

² 3 Whart. & St. Med. Jur. 4th ed. §§ 297 *et seq.* See Taylor's Med. Jur. by Reese, 284. *Infra*, §§ 776, 781.

³ See case reported in 3 Whart. & St. Med. Jur. 4th ed. §§ 297 *et seq.*

⁴ See cases given in Wills's Circum. Ev. p. 112.

⁵ See 3 Wh. & St. Med. Jur. (4th ed.) §§ 633, 933; *People v. Ah Duck*, 61 Cal. 387; *King v. State*, 13 Tex. Ap. 277.

⁶ Taylor's Med. Jur. by Reese, p. 274.

⁷ *Com. v. Sturtivant*, 117 Mass. 122. *Infra*, § 778; *Leontade's Case*, *infra*, § 776.

⁸ As to inspection, see *supra*, §§ 311 *et seq.*

⁹ *Com. v. Pope*, 103 Mass. 440. See *supra*, §§ 163-7; *infra*, § 778.

¹⁰ See *Com. v. Twitchell*, 1 Brewst. 561, cited fully *infra*, §§ 774, 777.

Mr. Wills (*Wills on Circumstantial Evidence*, 5th Am. ed. pp. 119, 120) says:—

"Identification is often satisfactorily inferred from the correspondence

§ 768. If, however, the instrument of death has been found, and homicide is suspected, the inquiry becomes important, To whom does it belong? In order to ascertain the ownership, it will be necessary to examine the weapon itself carefully for any name or other mark by which it may be identified, and to inquire who possessed such a weapon; whether any one purchased or procured one of the kind a short time before the murder was committed;¹ whether any one was observed preparing it for use; whether there are any marks upon it to indicate the hand, or the size of the hand, in which it was held, or the direction in which the fatal blow was given; whether the weapon is imperfect or broken, and if so, who has been observed in possession of a fragment corresponding to the broken portion.²

Inference from ownership of weapon.

of fragments of garments, or of written or printed papers, or of other articles belonging to or found in the possession of parties charged with crime, with other portions or fragments discovered at or near the scene of crime, or otherwise related to the *corpus delicti*, or by means of wounds or marks inflicted upon the person of the offender. A woman who was tried for setting the prosecutor's ricks on fire had been met near the ricks about two hours after midnight, and a tinder-box was found near the spot containing some unburnt cotton rag, as also a piece of the woman's neckerchief in one of the ricks where the fire had been extinguished. The piece of cotton in the tinder-box was examined with a lens, and the witness deposed that it was of the same fabric and pattern as a gown and some pieces of cotton print taken from the prisoner's box at her lodgings; that a neckerchief taken from a bundle belonging to the prisoner, found in her lodgings, corresponded with the color, pattern, and fabric of the piece found in the rick, and that they had both belonged to the same square; and from the breadth of the hemming, and the distance of

the stitches on both pieces, as well as from the circumstance that both pieces were hemmed with black sewing silk of the same quality (whereas articles of that description were generally sewed with cotton), he clearly inferred that they were the work of the same person. The prisoner was capitally convicted, but there being reason to believe that she was of unsound mind, she was reprieved."

¹ See *Nichols v. Com.*, 11 Bush, 575. As to instruments as preparations, see *supra*, § 753; *infra*, § 799.

² After a death was produced by a dirk knife, the possession of such a knife was traced to the prisoner on the day of the homicide, and on the next morning, the handle of a knife, with a small portion of the blade remaining, was found in an open cellar near the spot. Afterwards, upon a *post-mortem* examination of the deceased, the blade of a knife was found broken in his heart. Some of the witnesses testified to the identity of the handle as that of the knife previously in possession of the accused, but there was no evidence to the identity of the blade. The question remained, therefore, whether the blade

§ 769. In ordinary cases the shape of the wound will agree with the instrument with which it has been produced.¹ This is particularly the case with wounds inflicted by a knife, a dirk, a sword, or a razor, or, in general, by any sharp weapon by which a cut or thrust may be made. If, however, death has been produced by a bruise or contusion,² the case presents more difficulty, as it not unfrequently happens that such wounds are unaccompanied with any mark of external violence. In most cases, even of this class, however, a careful investigation will lead to the discovery whether the instrument were blunt or sharp, of wood or of metal, whether the blows were repeated, and whether they were sufficient to cause death.

§ 770. If the wound has been produced by a gun or pistol, it becomes necessary to inquire whether it was received from a person near at hand, or at a distance. Marks on the body of the deceased may afford indications of the distance of the assailant at the time of the attack. If there are marks of powder on the deceased, a close attack may be inferred.³

belonged to the handle; and when these pieces came to be placed together, the toothed edges of the fracture exactly fitted each other, leaving little doubt that they had belonged together, because, from the known qualities of steel, two knives could not have been broken in such a manner as to produce edges that would precisely match. Whart. on Hom. § 768. An analogous instance is mentioned of a trial before Lord Eldon of murder with a pistol. The surgeon had stated in his testimony that the pistol must have been fired near the body, because the body was blackened, and the wad was found in the wound. It being asked by the judge if he had preserved that wad, he said that he had, but had not examined it; on being requested so to do, he unrolled it carefully, and on examination it was found to consist of paper, constituting part of a printed ballad; and the corresponding part of the same ballad, as

shown by the texture of the paper and purport and form of stanzas of the two portions, was found in the pocket of the accused, and tended to fix him as the person who loaded the pistol. And in a homicide trial in Massachusetts, in 1874 (Com. v. Sturtivant, Whart. on Hom. Appendix), a stake by which the murder was effected was connected with the defendant by evidence that the stake fitted into a particular cart belonging to him.

¹ See as to inferences from wounds, 3 Whart. & St. Med. Jur. 4th ed. (1884) §§ 265, 332, 802; Powell v. State, 13 Tex. Ap. 244.

² See 3 Wh. & St. Med. Jur. 4th ed. §§ 382, 802; Gardiner v. People, 6 Parker, C. R. 155. *Supra*, § 765.

That a non-expert may describe a wound, see People v. Ah Duck, 61 Cal. 387. As to experts, see *supra*, § 412.

³ See 3 Wh. & St. Med. Jur. § 847. Of the effect with which such evidence

§ 771. The line followed by a wound may afford a basis from which the place from which it was aimed may be inferred.¹ But evidence of this kind must be received with extreme caution.² Thus, in an interesting case tried in Texas, in 1878,³ the evidence was that the defendant (who was a hired servant of the deceased) was in the habit of getting up in the night to look after the horses in his care. On the night of the homicide he pretended to suspect that some interloper was prowling about the premises, and he called the deceased to go out with him to look. He had a pistol; and when they were a short distance from the house, the deceased was killed by a shot from the pistol in the hands of the defendant. The defence was that the shot was accidental; that the deceased, at the time of the shooting, was walking before the defendant; that the defendant had cocked his pistol, and was trying to let the hammer down, holding the pistol in his hands, at an angle of about 45°; that the hammer slipped from under his

Direction
of wound.

may be used, an illustration is given Taylor's Med. Jur. 330. "The question by a case some years ago in Ireland. was, whether in a scuffle a pistol had accidentally gone off and occasioned the death, or whether the assailant had deliberately fired at him from some distance. The sons of the deceased swore that the pistol was fired from some distance, the prisoner taking deliberate aim. This was confirmed by the dying declaration of the deceased. But on a careful examination of the body, which was disinterred for that purpose, the surgeon was enabled to swear positively that the pistol must have been fired close to the body of the deceased, as there distinctly appeared the marks of powder and burning on the wrist. So conclusive was this evidence deemed, that the prisoner was acquitted, and the parties who had appeared as witnesses against him were indicted and convicted of perjury." As to marks of powder see case cited *supra*, § 769.

¹ Where the deceased was shot in

the street, when looking at a parade, and where the question was whether he was killed by a stray shot, or by a gun which there was some evidence to show was aimed from a third story window, the doubt was solved by the slanting direction of the wound. 3 Wh. & St. Med. Jur. (4th ed.) §§ 332, 802 *et seq.*; Watson on Hom. 276. The same point was made in another case, stated by Watson, where the prisoner was tried for shooting a man who came to his house under suspicious circumstances. The defence was that the ground being rough and slippery, the prisoner stumbled, and both barrels of the gun had gone off by accident. This statement was confirmed by tracing the direction of the shot in the body of the deceased, which was found to be pointed upwards. Watson on Hom. 276.

² That the question is not one distinctively for an expert, see *People v. Westlake*, 62 Cal. 303.

³ *Saunders v. State*, 37 Tex. 710.

thumb, causing an accidental discharge of the pistol, the ball penetrating, as he supposed, the deceased's back. In point of fact, however, the ball entered the head of the deceased, about the base of the occipital bone, proceeding about two inches in a downward range towards the chin. Experts were produced to contradict the defendant's statement by showing that it was irreconcilable with the course actually taken by the ball. The defendant was on this evidence convicted and sentenced to death: but in the Supreme Court the judgment was reversed and a new trial ordered.¹ Nor can the

1 "The State," said Walker, J., "has adopted a theory, favored by the evidence of professional witnesses, inconsistent with the statements of the appellant, which appears to be predicated (to postulate?) that the direction of the ball, after it entered the head of the deceased, must necessarily have followed the prolongation of a straight line from the point at which it was discharged from the pistol. This theory, if true, to account for the depression in the line of direction pursued by the ball, after entering the man's head, would establish the fact that the ball must have been fired from a point higher than the head of the deceased, which might, perhaps, involve the case in speculation, if not in absurdity. At all events, it is inconsistent with the idea that the pistol was held in the ordinary position in which such weapons are held when aimed at an object, if the theory of the State be correct. But, after having examined some authorities of very high standing on gunshot wounds, and particularly the reports of surgeons employed in the field and base hospitals during the late war in the United States, we are perfectly satisfied that to whatever degree of perfection the noble science of surgery may have been brought, no rules have ever been laid down or attempted to establish the geometrical direction of war missiles after entering the human body."

. . . "There are plenty of living men who could, upon their own bodies, illustrate the erratic and utterly uncertain direction of gunshot wounds, by a simple reference to the wound of entrance and the wound of exit. A ball passing through the atmosphere under a diminishing force will be deflected more easily than one flying with the full velocity of its exit from the muzzle of the piece from which it is discharged. Many instances are found where partially spent balls, entering merely the muscular parts of the human body, have traversed a line varying many degrees from the line upon which they entered the body. The most remarkable and singular results are often witnessed where leaden balls come in contact with the tough sinewous cartilages or ossified parts of the human body. Nevertheless it is true that the conical balls used in modern warfare, when passing through a line of any direction with great velocity, and brought in contact with substances of less density, will pass forward on a straight line for a short distance, unless the form of the object be such as to exert an unequal resistance on the striking surfaces. We feel sure we are authorized in these remarks by the experience and scientific observation of every author who has treated the subject, and especially those who have written from personal

conclusion reached by that tribunal, that the evidence was not sufficient to sustain a conviction, be disputed. No absolute rule can be laid down as to the precise course taken by a ball when entering a human body. The line it takes when resisted varies with the calibre of the ball, and the quality and quantity of the powder; and it is deflected by obstacles which seem very slight.¹ In respect to the direction of incised and punctured wounds greater accuracy of conclusion, as is elsewhere shown, can be reached.²

§ 772. In incised wounds an inference may be drawn from the skill of infliction. A person acquainted with anatomy is likely, if the object be to kill, to strike at a vital part; Skill in wound. and hence, when a wound is skilfully directed to such a vital part as an ordinary observer would not be acquainted with, special knowledge of the subject is inferred. So, in an English case, a wound was traced to a butcher from the fact that it was inflicted in the way used by butchers in killing sheep.³

observation. We do not feel authorized in a legal opinion to enter at length into mere scientific speculations. But we think in this case we are called on to deduce from science as far as it goes, and from known facts and principles, whatever can be so legitimately deduced in favor of innocence and human life."

Another cause of uncertainty is the fact noticed by an eminent surgeon, that no two human bodies present the same kind of resistance to a shot.

In *Billings's Case*, 18 Alb. L. J. 261, it was "shown by very reliable experts, mechanical, medical, and scientific, that a bullet found in the head of deceased, and which caused her death, was very much lighter than any of those usually fired from guns of the kind found in the well; that one of the latter bullets could not have lost sufficient weight in its progress after being fired to reduce it to the size of the one found; and that a bullet fired from the gun at a point near enough to discolor the glass of the window with burning

powder, as was done in this case, would have passed entirely through the head of the deceased instead of lodging in it."

In *People v. Smith*, 4 Pacific C. L. J. 213, "it was held that testimony having been given to the effect that the course of the pistol ball through the body of the deceased was direct from the point of its entrance to the point where it was found, it was error to permit the prosecution to ask the opinion of a medical witness, as an expert, as to the relative positions of the deceased and the defendant at the time when the defendant fired the shot, the object being to show that the prisoner stood on higher ground than the deceased." 20 Alb. L. J. 423.

¹ See this illustrated in 3 Wh. & St. Med. Jur. 4th ed. §§ 265 *et seq.*; and see, as bearing on this point, *State v. Morphy*, 33 Iowa, 270; *State v. Porter*, 34 Iowa, 131.

² See 3 Wh. & St. Med. Jur. 4th ed. §§ 283 *et seq.*

³ *Taylor's Med. Jur. by Reese*, 277.

§ 773. Left-handedness has sometimes been resorted to for the purpose of connecting the defendant with the offence charged; and at all events, if the wound is shown to have been effected by a person who was right-handed, it is a ground of defence that the defendant was left-handed, and there may be a slight inculpatory inference, in case of a left-handed wound, drawn from the fact that the defendant was left-handed.¹

§ 774. Whether a particular wound could have been produced by a particular instrument, is a question as to which the opinion of experts can be asked.² The opinion of an expert as to which of two

¹ See Taylor's Med. Jur. by Reese, 279; R. v. Phillips, Woodhull's Trials, 80; Wills Circum. Ev. 97. Where Sellis, a servant of the Duke of Cumberland, was found in his bed killed by a razor, the question of suicide or homicide (in which there was an attempt to implicate the duke) arising, the hypothesis of suicide was said at first to be sustained by the fact that the razor was found on the left side of Sellis's bed. This was met by proof that Sellis was ambi-dextrous. Ibid; 3 Whart. & St. Med. Jur. 4th ed. §§ 297-316.

That it is competent to prove right-handedness, see Com. v. Sturtivant, 117 Mass. 139, cited *supra*, § 765.

² *Supra*, § 412; Com. v. Lenox, 3 Brewst. 249; Davis v. State, 28 Md. 15; State v. Morphy, 33 Iowa, 270; State v. Porter, 34 Iowa, 131; though see Wilson v. People, 4 Parker C. R. 619. In Com. v. Twitchell, 1 Brewst. 566, the court permitted a surgeon examined as an expert to state that in his opinion a particular wound could not have been produced by a poker exhibited in court, but ruled that his opinion on the result of experiments of other pokers on other skulls was to be excluded.

In the course of the opinion of Brewster, J., on a motion for a new trial, it was said:—

"But aside from all these refinements, the offer contradicted nothing. A physician, in one of our criminal trials, swore that the defendant's knife could not produce the wound found upon the throat of the deceased. During the recess, the then district attorney, now of counsel for the accused, directed another surgeon to make the experiment; and the last expert was able to contradict the first by swearing that the weapon had in his hands actually made a still greater wound, and had decapitated a corpse. In Commonwealth v. Geisenberger (Oyer and Terminer, Philadelphia, Dec. Term, 1858, No. 679), a very respectable physician swore that the blow from the defendant's fist could not have broken the skull of the deceased. A piece of the bone was, however, produced, and it was almost as thin as tissue-paper. Dr. Parkman's skull was fractured with a grape-vine stick. Bemis's Rep. 566.

"In Champ v. Com., 2 Metc. (Ky.) Rep. 27, cited by Judge Ludlow upon the trial, Judge Duvall, delivering the opinion of the Court of Appeals, said: 'It is agreed on all hands that such opinions (of experts), to be admissible, must always be predicated upon and relate to the facts established by the proofs in the case. Mere professional opinions upon abstract questions of

wounds, either of itself necessarily fatal, actually caused the death of the deceased, is competent evidence.¹ And the possession by the defendant of an instrument fitted to produce abortion is evidence against him on a trial for producing the abortion.²

Adaptation
of instru-
ment to
wound.

§ 775. An examination of a number of reported cases of suicide leads to the conclusion that the object of the self-destructor is to produce death by a single blow; that if he uses a cutting instrument, he selects the throat; if he stabs himself he selects the chest, particularly the heart or belly; and if he shoots himself he generally does it through the head.³ It therefore becomes a subject of legitimate investigation whether or not the wounds are in a position likely to have been selected by one seeking instantaneous self-destruction, and who would be inferred to have designed to strike at what he conceived to be the most accessible vital part.⁴

Inference
from num-
ber of
wounds.

science, having no proper relation to the facts upon which the jury are to pass, evidently tend to lead their minds away from the true and real points of inquiry, and should, therefore, be excluded.'

"There is, therefore, nothing in this reason which entitles it to consideration as a question of law. As matter of fact, the defendant cannot stand upon it, for his witness stated that he did 'not think any poker of this material could have inflicted the wounds, because it is not misshapen sufficiently; it could not have been used four times without bending. . . . It is possible to break the temporal bone with the angle of this poker, and to drive the tongue through the fractured skull. There is authority for the assertion that a penetrating wound can be made by a poker.' " The ruling in this case, it must be remembered, was virtually sustained by the Supreme Court of the State, that court refusing to grant an *allocatur* for a review.

¹ *Egglar v. State*, 56 N. Y. 642. But

see *Hunt v. State*, 9 Tex. Ap. 166. *Supra*, § 412.

² *Com. v. Blair*, 126 Mass. 40.

³ See Wh. & St. Med. Jur. 3d ed. §§ 702 *et seq.*; Watson on Homicide, 276.

⁴ Compare the case of the Duchess of Praslin, reported in Ann. d'Hyg. 1847, tit. 2, p. 377, and a case where a husband inflicted on his wife fifty-six wounds, reported in Taylor's Med. Jur. by Reese, 281.

So, too, the variety of the wounds will often sufficiently indicate the fact of murder. William Corder was tried at the Bury St. Edmund's Summer Assizes for the murder of Maria Marten, whose body was discovered in a barn twelve months after her disappearance. He alleged that she had committed suicide; but upon examination of the body a handkerchief was found drawn tightly around the neck; the course of a pistol-ball was traced through the left cheek, passing out at the right orbit; and three other wounds were found, one of which had entered the

§ 776. It is important to inquire, in cases where the defence of suicide may be started, whether there are marks upon the person other than those made by the fatal wounds; *e. g.*, whether the hands or arms have the appearance of having been held forcibly during the commission of the deed; whether the head appears to have been bruised, as if the victim were first rendered insensible by a blow upon that portion of the frame; whether the wound is in a position that could not have been reached by the deceased, and which may often be ascertained by placing the weapon in the hand of the corpse, and observing whether or not the direction of its probable course corresponds with that of the wound.¹ It must be considered, also, whether there are signs of the presence of another, as in the case of a woman found dead in a room with her throat cut, and a large quantity of blood on her person, while on the floor the presence of another person in that room was plainly indicated by the print of a bloody left hand on the left arm of the deceased.² All stains or marks of dirt on the person or dress of the deceased should be carefully scrutinized.³ In the famous case of *Leontade*, where a young girl, after having been ravished, was killed, her dress was partially identified, and that of her murderer connected with it, by the fact that on both of them were found traces of evacuations, which took place during the violence commit-

heart, and all of which had been made by a sharp instrument, means of death so various and unusual with females as to discredit entirely the statement of the prisoner, and lead to his conviction and execution. *Wills Cir. Ev.* 169.

¹ See *infra*, § 781; *supra*, § 766.

Where a dead and rigid body is found evenly extended and closely fitting the surface on which it rests, with the eyes and mouth closed, the inference is that there was some interference with the body after death, but before *post-mortem* rigidity began. And where a dead and rigid body is found which has not taken its posture from the surface on which it lies, as where the body is straight and the surface broken, or the surface is uneven and the body crooked or contorted, then the in-

ference is the place where the body is thus found is not that where death took place. On the other hand, "if a dead and rigid body, with open eyes and dropped jaw be discovered fitting itself (as it were) to the surface on which it rests . . . the probability is that the death occurred at the *precise spot* where the corpse is found. Supposing, however, that there had been any interference with the body after death, such interference, it is next to certain, must have taken place *before post-mortem* rigidity set in." 1 *Tidy's Legal Med.* (1883) 66.

² Case of *Mary Norkot* and others, 14 *How. St. Tr.* 1324.

³ *State v. Kingsbury*, 58 *Me.* 239, cited *supra*, § 27.

ted on her, which evacuations contained the seeds of figs of which she had previously copiously eaten.

The *hands* of the deceased should be examined for the purpose of seeing whether they exhibit any traces of attack or defence.

The *mouth* and *throat* of the deceased, if sleeping at the time of the attack, may have been compressed by the murderer to prevent an outcry; and of this the body may subsequently exhibit signs.¹

In cases of alleged rape, proof of bruises on the person of the prosecutrix are admissible.²

§ 777. *Traces of blood* in cases of homicide, near the corpse or in the way leading to or from it, or marks or spots of blood upon the person or clothes of the accused, should be carefully examined with a view to the solution of any or all of the following inquiries: (1) Were the wounds self-inflicted, or the act of another? This may in some cases be determined by the fact that blood is visible in spots or pools in places where it could not have been if the death had been the result of suicide; or where there is no communication between the blood on the floor and the corpse; as if the body had been removed by another from the spot on which the deed was committed.³ (2) Was the deceased erect or lying down when the wounds were received? It will throw much light on this question, as will be presently again noticed, if the spots of blood on the adjoining wall, or any other erect body near the locality, be examined, as the direction from which they came may frequently be determined from the manner in which they have spattered. It is important, also, to search for prints of bloody hands and impressions of bloody feet, which may give information as to the direction taken by the murderer after the commission of the act. Care should be taken, however, not to create *indicia* while searching for them.⁴

¹ As to inferences from stains on body, see Wh. & St. Med. Jur. 4th ed. §§ 304 *et seq.*, §§ 847 *et seq.*

In a remarkable case in Missouri, the bones of the deceased were brought into court for the purpose of explaining his position during the encounter. *Wiener v. State*, 66 Mo. 13. For other cases of inspection, see *supra*, §§ 311 *et seq.*

² *State v. McLaughlin*, 44 Iowa, 83.

³ *Infra*, § 778. See as to blood stains, 3 Wharton & St. Med. Jur. 4th ed. (1884) § 304.

⁴ *Infra*, § 778. See this subject discussed fully in 3 Wh. & St. Med. Jur. 4th ed. §§ 304 *et seq.*, §§ 724 *et seq.*

A young man was found dead in his bed, with three wounds in the front of his neck. The physician who was

§ 777 a. Scarcely a case arises where this issue is material in which experts have not appeared ready to identify dried blood as human, and by this process to supply a link on which a conviction of a capital offence may be made to rest.¹ It is perhaps a minor matter that in this way enormous expenses are heaped not only on the State, but on the accused. Experts are brought from a dis-

Human blood cannot be distinguished beyond reasonable doubt from other blood.

first called to see him had, unknowingly, stamped in the blood with which the floor was deluged, and had then walked into an adjoining room, passing and repassing several times. The consequence was that suspicion was raised against a party who narrowly escaped being committed to take his trial for murder. It subsequently turned out to be a clear case of suicide. 1 Tayl. Med. J. 372; and see *Com. v. Sturtivant*, Appendix to Whart. on Hom.; 117 Mass. 122.

¹ See *McLain v. Com.*, 99 Penn. St. 86. On the trial of Leavitt Alley, in Boston, 1873, elsewhere adverted to, the question whether dried human blood can be distinguished from horse blood was largely discussed by experts. Although there was some expert testimony tending to the affirmative, the tenor of the evidence, and that of the subsequent discussion, is, that no positive conclusion can be reached on the subject. See evidence given in 3 Wh. & St. Med. Jur. 4th ed. § 320.

In *People v. Gonzales*, 35 N. Y. 49, decided by the New York Court of Appeals in 1868, the officer who made the arrest was permitted to testify that he found blood on the prisoner's clothes. The Court of Appeals affirmed this, saying: "Stains of blood found upon the person or clothing of the party accused have always been recognized among the ordinary *indicia* of homicide. The practice of identi-

fying them by circumstantial evidence, and by the inspection of witnesses and jurors, has the sanction of immemorial usage in all criminal tribunals. The testimony of a chemist who has analyzed blood, and that of the observer who has merely recognized it, belong to the same legal grade of evidence."

In *Com. v. Twitchell*, 1 Brewst. 561, the course taken by the court in this relation deserves high commendation. It is thus stated in the report: "At the conclusion of the Commonwealth's case, Charles H. T. Collis, Esq., for the defendant, moved that the articles of clothing which the Commonwealth's witness, Dr. Levis, had testified were stained with blood, should be delivered for examination by defendant's experts."

"This motion was argued by counsel on both sides.

"Brewster, J.: The articles identified by the officers as the clothing of the defendant, having been examined by Dr. Levis, and his opinion having been given to the jury as to the results of his examination thereof, the defendant's counsel have moved that the defendant's experts be permitted to examine them in the presence of officers of the court. The district attorney has opposed this motion, stating that he is willing that the examination shall take place as desired, if the name of the defendant's expert is submitted to and approved by the Commonwealth's officer and by the court. The defendant

tance by the State at great cost; protracted experiments are made by them afterwards to be detailed to the jury; and testimony is

has declined to submit the name of his expert, and has insisted upon his absolute right to have the articles examined when, where, and by whom he pleases, conceding only that the officers of the court may be present. The articles having been exhibited to the jury, and some of them having been handed to the jury, they must be regarded as in evidence. The defendant should have the fullest right of examination accorded to him, consistent with the preservation of the articles from accidental or intentional destruction. If the object is to inspect by the use of glasses, this can be accomplished by examination in open court, or in an adjoining room, in the presence of officers. If the purpose is to secure a chemical analysis, I think the defendant is entitled, as matter of right, to have such an examination made by any expert he may select; but, to guard against the possible destruction of important evidence, the tests should be applied in the presence of the court.

"Ludlow, J.: A motion having been made by the prisoner's counsel to permit the clothing and other articles which Dr. Levis has examined and identified as being sprinkled, saturated, or smeared with the blood of a mammal, to be examined by some person to be selected by them, but not in the presence of the court, though in the view of an officer or officers to be selected by the court, it becomes necessary to state what, in my judgment, ought to be the practice of this tribunal.

"1. It is to be noted that the articles in question, except the poker, have not yet been offered in evidence, and

they, therefore, remain in the custody of the Commonwealth's officers. This motion is, therefore, premature.

"2. When the articles shall have been offered in evidence, they are placed in the special custody of the court, to be dealt with as justice requires.

"3. Should the prisoner's counsel then desire them to be examined, the court should see to it that they are guarded from intentional or accidental injury with the most scrupulous care, and they may be examined in open court by any person selected by the prisoner or his counsel, or if, from necessity, the examination cannot be made accurately in open court, they should be placed in the hands of any respectable chemist or physician to be selected by the prisoner, with the consent of the court. They should be properly identified as the very articles offered in evidence by the Commonwealth, before they are delivered to the person who has been selected by the prisoner's counsel, and for this purpose that person should receive them in open court; and they should then be examined in the presence of an officer or officers of the court.

"The defendant's counsel refusing to submit the names of their experts to the court, it was ordered that all the articles be taken to the grand jury room, on the next Saturday morning at half-past nine o'clock, there to be produced by the district attorney in the presence of the judges, the counsel for the prisoner, and such experts as they might select." As is elsewhere argued, private examinations taken by experts without notice to the other side may be as *ex parte* as private aff-

adduced which the defendant must meet at the peril of his life. Controvert it he readily may, if he can procure the means, for the great weight of authority, as will presently be seen, is that such identification cannot be accurately determined. But to procure this testimony may be impossible for him, unless the prosecution assume the expense, which it often is either unwilling or unable to do.¹ This amounts to a perversion of justice; but this is not the chief objection. Supposing experts are obtained so as to fully exhibit to the jury both sides of this vexed question, and the case goes to the jury on their testimony, what then? Is there not danger that the jury may regard the question as one determined, not by ascertainable physical laws, but by their own discretion or on the authority of particular experts? It would seem, in view of these dangers, and in view of the more recent explorations of scientists who have viewed the question, not as advocates retained by a particular party, but as dispassionate investigators, that the time has now arrived in which it is the duty of courts to advise juries, in all cases in which it is proposed to rest a conviction on the identification of certain blood-stains as human, that as a matter of fact no such identification can be made out beyond reasonable doubt. That stains look like blood may be proved by expert and non-expert;²

davits taken without notice to the other side. The proper course is to require due notice of such examination, and to reject the result of the examination unless such notice were given, and unless the integrity of the thing examined be proved.

¹ See on this point 8 Cent. L. J. 184. *Supra*, § 347.

² *Infra*, § 778; *Thomas v. State*, 67 Ga. 460.

Dr. Lionel Beale, than whom on this point there can be no higher authority, thus speaks:—

"In these investigations the skilled witness is often called upon to determine whether a red stain is caused by blood, and if so, whether the blood is that of the human subject or one of the lower animals. The latter of these inquiries is most difficult to answer, if

we have to rely on scientific evidence alone. In some instances, although after examination we may feel pretty sure in our own minds as to the real nature of the blood, I can hardly think that in any given case the scientific evidence in favor of a particular blood-stain being caused by human blood will be of a kind that ought to be considered sufficiently conclusive to be adduced, for example, against a prisoner upon his trial. At the same time cases will occur in which a strong presumption may be of value in weakening or strengthening circumstantial evidence which is not perfectly conclusive." *Beale's Microscope in Medicine*, 4th ed. London, 1878, p. 266.

See learned articles by Prof. Wormley, in *Phil. Med. Times* for Oct. 1878, and articles in *Am. Law Register* for

that they are dried *human* blood can be satisfactorily proved by no one.¹

§ 778. Assuming, however, that it cannot be absolutely proved that certain patches of dried blood are human, it by no means follows that evidence of such blood is inadmissible. Collateral inferences. So far from such being the case, the existence of blood, or of that which appears to be blood, either fresh or dried, on and near a place where violence has been inflicted is always relevant as cumulative proof.² And in this connection the following points must be kept in mind:—

May, 1877, and Sept. 1878, and following issues.

Dr. Tidy (1 Legal Med., 1883, p. 215) says: "Admitting the value of Richardson's laborious researches on the size of the blood-corpuscles of different animals, it would in our judgment be exceedingly unwise to hazard an opinion as to the source of a given specimen of blood from the microscopic measurement of the disks. And this more especially considering that as a rule where evidence of this kind is needed, the measurements have to be made after treating the dried corpuscles with some liquid reagent."

Of the spectroscopic test, which is of all others the most satisfactory, the same high authority adds that "with our present knowledge, the spectrum microscope affords no information whatsoever, whether the blood comes from man or beast, nor the class of animals from which it is derived, nor, if human, does it enable us to hazard a conjecture as to its origin." By this test blood may be distinguished from other substances, but not the blood of human beings from that of other animals.

Ingenious as are Dr. Richardson's experiments in this relation, they cannot be regarded as differentiating human blood. See Tidy, Leg. Med. 230; "Lancet," 1874, i. 210; 1875, i. 321, 700. In fact, Dr. Richardson him-

self states "that, at present (1875), there is no method known to science for discriminating, microscopically or otherwise, the dried blood of a human being from that of a dog, monkey, rabbit, muskrat, elephant, lion, whale, seal, or, in fact, any animal whose corpuscles measure more than $\frac{1}{1000}$ inch diameter."

¹ As cases in which such testimony has been received see *State v. Knight*, 43 Me. 11; *Com. v. Alley*, Boston, 1873, Pamph.; *People v. Lindsay*, Syracuse, 1875, Pamph.; *People v. Gonzales*, 35 N. Y. 49; *Com. v. Gaines*, 50 Penn. St. 319; *People v. Bell*, 49 Cal. 486; *Knoll v. State*, 55 Wis. 249.

The student is particularly referred to a valuable article in 10 Cent. Law Jour. (Feb. 1880) 183, which, with modifications by Dr. Laws, is given in the 8th edition of this work, § 777 a. See, also, 3 Whart. & St. Med. Jur. §§ 304 *et seq.*

So far as concerns menstrual blood, concerning which a question was raised in Alley's Case (*supra*), it is stated by Dr. Tidy (1883) that "we doubt if in the present state of science we should be justified in venturing a *positive* opinion as to a stain being, or not being, menstrual."

² *McLain v. Com.*, 99 Penn. St. 86; *Dillard v. State*, 58 Miss. 368.

Heavy blunt instruments may produce death without immediate effusion of blood;¹ a weapon may be wiped after the fatal blow; and in all cases, the handle, casement, and joints of the weapon should be scrutinized. Often a weapon, after inflicting a rapid incised or punctured wound, is wiped by the edges of the wound closing before blood has reached the surface.

In stabs, the dagger or knife may inflict death without receiving any blood-stains, or at the most a film, which leaves when dried a faint yellow-brown tinge.

The absence of blood-stains on the dress of the accused affords but a slight inference of innocence, even in cases of violent homicide by cutting, since such stains may have been effaced, and since, also, there are many cases of such homicides (*e. g.*, cutting a throat from behind), in which the blood would not reach the person of the assailant.²

The form and direction of blood-spots on walls or furniture may indicate the position of a wounded person in respect to such spots;³ and the way in which blood-stains lie on clothes may form a means of determining the place from which the blood spurted.⁴

On clothing, supposing it to be identified with the deceased, which is a prerequisite,⁵ the direction of the flow of the blood must be examined. If downwards it proves an upward blow, and indicates that the wounded person was more or less erect at the time of the wound.

Spattering may indicate an arterial wound, or a continued struggle.

On shirts, blood-stains may arise from flea or mosquito bites; and the shirt may have been worn on both sides. In Alley's case, tried in Boston in 1873, one hypothesis presented by the defence was that the blood was caused by a menstrual discharge from the defendant's wife. But when the blood is dried, no satisfactory solution of this question can, as has been already seen, be reached.⁶

¹ 3 Whart. & St. Med. Jur. §§ 265 *et seq.* In *O'Mara v. Com.*, 75 Penn. St. 424, it was held that the extent of the effusion of blood was admissible to indicate the nature of the wound.

² Taylor's Med. Jur. by Reese, 290.

³ See *Richardson v. State*, 7 Tex. Ap. 487.

⁴ *Com. v. Sturtivant*, 117 Mass. 122. *Supra*, § 777.

⁵ Secondary evidence of the condition of the clothing may be given, though the clothing be not produced. *Com. v. Pope*, 103 Mass. 440. *Supra*, § 767.

⁶ See *supra*, §§ 767, 777 *a*; *Com.*

Blood-stains, or what appear to be such, may be proved as tending to the identification of specific articles.¹

§ 779. Hair, adhering to a weapon, is evidence connecting the weapon with the homicide, when the hair resembles that of the deceased. But hair should be carefully examined by microscope so as to determine whether or no it is human. Thus, Dr. Lyons details a case where a *prima facie* case of homicide was rebutted by proof that the hair was that of a brute.² So, in a case tried in Massachusetts in 1874, an inference that a stake traced to the defendant had been used in the homicide was drawn from the fact that the stake, besides being bloody, had on it a piece of bone, such as in the blow given might have been taken from the deceased.³ But the question of identity of hair is purely one of fact for the jury. An expert may speak of similarity between particular locks of hair, and give his reasons. But he cannot be permitted to swear that the hairs all came from the same head.⁴

Inference
from
things ad-
hering to
weapon.

The same remarks apply to fibres of clothing. In a case cited by Dr. Taylor⁵ "a razor was produced in evidence, with which it was alleged the throat of the deceased had been cut. I examined the edge microscopically, and separated some small fibres from a coagulum of blood, which, under a high magnifying power, turned out to be cotton fibres. It was proved that the assassin, in cutting the throat of the deceased while lying asleep, had cut through one of the strings of her cotton night-cap." Other cases are cited by the same author of woollen fibres thus being mixed with blood.⁶

§ 780. We have already had occasion to advert to cases in which injuries have been inflicted, either casually, or in order to evade a probable though unfounded suspicion of complicity, on a body after death.⁷ Other cases may occur in which wounds are inflicted in order to heap on the dead frame marks of execration; and of these we have

Indications
as to
whether
marks on
body were
after death.

v. Sturtivant, Appendix, Whart. on Hom.; Com. v. Udderzook, 76 Penn. St. 340; App. to Whart. on Hom.

¹ Com v. Tolliver, 119 Mass. 312.

² Apology for the Microscope, p. 24.

³ Com. v. Sturtivant, App. Whart. on Hom. See *infra*, § 804.

⁴ Knoll v. State, 55 Wis. 249; see 3 Whart. & St. Med. Jur. 4th ed. § 681.

⁵ R. v. Harrington, Taylor's Med. Jur. by Reese, 386.

⁶ See Kennedy v. People, 39 N. Y. 245.

⁷ *Supra*, § 743.

illustrations in the cases of dismemberment of corpses after collisions inflamed by intense party or social excitement. It may also appear that a person, on whom certain wounds are visible, died really from poison administered by himself. In all cases a causal relation between the wound and the death must be established.¹

¹ Whart. Crim. Law, 8th ed. §§ 152 *et seq.* See Beck's Med. Jurisp. 766, 7th ed.; *supra*, § 728; Best's Ev. 8th ed. 563; Norkot's Case, 14 How. St. Tr. 1324.

Dr. Casper (Gericht. Med. 307) enumerates the following conditions as throwing light upon this question :—

1. The condition in life and personal surroundings of the deceased, so far as they may be likely to impel to suicide.

2. Threats or intimations on the part of the deceased, that he harbored such a purpose; he being found in a room made fast from within, etc.

3. Of far more importance, however, is an examination of the body, its position, the clothing, etc.

Where death has been produced by shooting, the following circumstances require attention :—

1. The position of the body. Many authors have advanced the opinion that when the body of a person who has been killed by shooting is found resting on the back, this fact is a sure indication of suicide, while other positions of the body indicate some previous struggle. From this Dr. Casper dissents.

2. Whether the weapon used be found near the dead or not is a circumstance which, according to Dr. Casper, proves nothing, since in the case of suicide the weapon may be stolen away, and in case of murder be left lying near the body in order to mislead. When the weapon is

found, however, it often adds something to the probabilities of the case. As, for instance, if the weapon be old and rusty, or in very bad repair, it is not probable that such a one would be selected by a murderer for the execution of his purposes. So, too, if the weapon has exploded from being too heavily loaded, the fact would rather point to suicide, as the overcharge was probably inserted through ignorance, or else from a desire to make sure work. The ball should of course be compared with the barrel of the weapon. This is often impossible, as the ball frequently passes through the body; is sometimes mutilated, and slugs and buckshot are frequently used, which are adapted, of course, to barrels of all sizes. The matter, however, is not one of much importance, as the murderer who leaves a weapon lying by the body would be most apt to leave the identical one used.

3. The hands of the dead body, in some cases, help to solve the doubt. Where the pistol is found so firmly clinched in the hand that the fingers must be sawed off in order to get it loose, this is an infallible mark of suicide. In cases, also, where the fingers are thus broken, or where the skin of the hand is thus injured, these are, generally, indications of suicide, although sometimes they may point to a previous struggle with the murderer. Where the hands are blackened by powder being burnt into them, this affords a strong probability of suicide, unless there is reason to believe that

§ 781. We have already incidentally observed that the character of the wound, together with the position of the deceased, and the condition of his clothing, are to be considered for the purpose of determining whether the death was self-inflicted, or the work of another person.¹ In addi-

Indications
whether
wounds
were homi-
cidal or
suicidal.

the discoloration was produced at some other time, and not by the shot which caused death. This case, however, is not to be confounded with that grayish-black color sometimes given to the hands by working in metal, which latter may be washed off, while the former remains fast. It is no negative evidence against the fact of suicide that the hands should be entirely free from this discoloration. Gloves may have been worn which have afterwards been stolen from the body; or the hands may not have been directly employed in firing the weapon; and, in fact, with percussioned fire-arms, no such discoloration is apt to be received except where the instrument is awkwardly used. So, also, injuries to the hand are not apt to occur except through unskilful management, and hence, in the majority of cases of suicide, no such marks are found.

4. The direction followed by the ball, as we have seen, sometimes furnishes important evidence in the question of suicide. In cases, for instance, where the ball is found to penetrate from behind, or to run downwards, it may often be seen that suicide cannot have been possible. If the barrel of the pistol has been placed in the mouth and then fired, the probability is strongly in favor of suicide. In the great majority of cases, however, the question must be left doubtful so far as its answer depends upon an examination of the body. See *supra*, § 771. The most that the physician can say, usually, is, that the probabilities are greater or less, as the case may be, in

favor of suicide, or that there is nothing inconsistent with the fact of suicide.

5. Where the throat is cut in suicide, the wound runs commonly from left to right, although the opposite may sometimes occur. In many cases, it is impossible to trace the course of the wound, and, sometimes, to determine which, among many wounds, proved the mortal one. When none of the above-mentioned circumstances render the case in hand a plain one, the physician can only give an opinion as to the greater or less probability of suicide; and in many cases, he cannot safely go farther than to say that he finds nothing inconsistent with the supposition that the death is that of a suicide.

¹ See as to question between homicidal and suicidal death, 3 Whart. & St. Med. Jur. 4th ed. [1884], § 297.

"After the suicide of two persons from hydrocyanic acid," says Dr. Tidy, 1 Legal Medicine (1883), p. 65, "I found the bodies firmly folded in each other's arms, as though, after taking the fatal draught, they had embraced one another, died, and stiffened in the act. It has been recorded in the case of a man poisoned by the carbonic acid generated from a lime-kiln, that he was found some time after death in the attitude of sleep, resting his hand on his head, the arm being supported only on the elbow. Again, the suicide may be found sitting in a chair, with dropped arms, but firmly grasping in his hand the pistol, knife, or other instrument employed by him to take away his life. So strong, indeed, under such circum-

tion to the points already noticed,¹ the question of motive is to be considered. Was the party on whom the injuries were inflicted likely to have caused them by his own hand? (1) Would it have sheltered him from impending prosecution could he make it appear that he was robbed after a stout resistance? A bank officer, for instance, who believes himself to be a defaulter, may, to avoid discovery, concoct a plan by which all the appearances of a violent attack on his office may be exhibited, and may even inflict on himself mortal wounds.² (2) A family may be rescued from ruin by the falling in of a life insurance, and the party insured may for this purpose put an end to himself. (3) Wounds may be self-inflicted in order to make out a case against an alleged enemy, to whom the injury is to be imputed. (4) To avoid military or other duty similar devices may be resorted to. (5) A person morbidly craving sympathy or desiring to produce a sensation may subject himself, in order to gratify this yearning, to great physical discomfort, to wounds, to dismemberment, and to fastings or even poisonings likely to produce death. (6) In all cases the presumption of love of life throws the burden of proof on those setting up suicide.³

§ 782. Hanging, as is noticed by Dr. Casper,⁴ is most frequently resorted to by suicides, suffocation rarely, and throttling, perhaps, never. It would be very difficult to hang a person in full life and strength against his will, and in such cases the body would almost certainly show the traces of a previous struggle, while murder may easily be effected by throttling or suffocation. It must be observed in this connection, however, that certain red, or reddish-yellow and brown spots upon the face, neck, breast, etc., may be nothing more than the results of a rough handling of the body subsequent to death, and are not to be mistaken for marks of a struggle during life. As regards the position in which the body is found, there is no position, whether it be that of

stances, may be the grip with which the weapon was held, that a considerable force may be required to remove it from the hands. Or, again, hand and arm may be fixed in the exact position of the last voluntary act, as, *e. g.*, the attitude assumed in firing a pistol."

¹ *Supra*, § 776.

² See *Barron's Case*, cited *supra*, § 726.

³ *Supra*, § 726; Whart. on Ev. § 1247; *People v. Messersmith*, 61 Cal. 246; 3 Whart. & St. Med. Jur. 4th ed. §§ 497 *et seq.*

⁴ *Gericht. Med.* ed. 1867, p. 518.

a person suspended in the air, or with the feet touching the ground, or in a sitting or kneeling posture, or lying obliquely on the floor, etc., which precludes the supposition of suicide, since cases of undoubted suicide are quoted in which each of these positions has been observed. On the other hand, the situation of the body may sometimes clearly indicate suicide, as where it is found hanging high up in a tree.

Post-mortem examinations, according to the same high authority, can never decide the question whether strangulation was the actual cause of death, except where appearances are found which belong exclusively to such cases: as erection or swelling of the *penis*, emission of semen, suggillations on the neck, and tearing of the muscles of the neck.

§ 783. Dr. Casper states the points in reference to drowning as follows:¹ The question which arises first is, whether death was actually produced by drowning, or whether the body was thrown into water subsequently to death.

Inferences
in drown-
ing.

This latter often happens in the case of young infants. It may also be possible that suicide has been committed by some other means even when the body is found in water; as the party may have inflicted some mortal wound upon himself at the water's edge, or while standing in the water. In these cases an examination of the body will show that death was produced by some other means.

Injuries found upon the dead body can seldom be relied on as showing violent treatment by another person. These injuries may have been produced by the party himself in an attempt at suicide, and drowning have been afterwards resorted to. Or they may have been produced by striking against some object in the act of drowning. Or they may have been caused by the body, after death, coming in contact with floating ice, stays of a bridge, a ship's rudder, or other colliding objects. Where the process of decomposition is considerably advanced, it will be very difficult to distinguish between the appearances which result from decomposition, and suggillations produced by violence done to the living body, and here even experienced physicians may be deceived. In this, as in all other cases, some light may be thrown upon the question by the circumstances attending the particular case. As, for instance, where the

¹ Gericht. Med. p. 580. See, as to St. Med. Jur. 4th ed. (1884), §§ 523 *et* inferences in drowning, 3 Wharton & *seq.*

body is naked and the season a proper one for bathing, the probability will be accidental drowning, and so when the deceased was a person whose business was on the water. On the other hand, traces of blood upon the shore, torn clothing, articles of clothing belonging to another person, may indicate probable murder.

Whether the water in which the body is found is deep or shallow, a dirty pond or fresh pool, may serve to throw light upon the question; although it may sometimes happen that a drunken, feeble, or epileptic person may be drowned in shallow water, or in a ditch, or fetid pond.¹

IV. INFERENCES FROM LIABILITY TO ATTACK.

§ 784. Liability to attack may be assigned ordinarily to one or more of the following causes, any one of which may be the object of indicatory proof:² (1) Rapacity, excited by the possession of money or valuable articles; (2) Special obnoxiousness to certain desperate parties; (3) An old grudge, or similar cause, such as a previous quarrel;³ (4) Jealousy. In the first of these cases the questions arise whether the fact that the deceased was in the possession of money, particularly if the amount be considerable, was known to any one; and if so, to whom;⁴ whether money was found on the corpse or was missing; whether there is evidence that any suspected party, suddenly and from an unexplained cause, became possessed of a large sum,⁵ paid long-standing and pressing debts of considerable amounts, or largely increased his expenditures. Pedlars, especially itinerant vendors

¹ See 3 Whart. & St. Med. Jur. § 538.

² *Supra*, §§ 23-8.

³ *State v. Hannett*, 54 Vt. 83; *Pontius v. People*, 82 N. Y. 339; *State v. Brandby*, 84 N. C. 760; *State v. Morris*, 84 N. C. 756; *Coxwell v. State*, 66 Ga. 309; *Commander v. State*, 60 Ala. 1; *Preston v. State*, 8 Tex. Ap. 30; *Hubby v. State*, 8 Tex. Ap. 597. This does not, however, involve the merits of the old grudge. *State v. Commander*, *ut supra*.

⁴ See *State v. Crowley*, 33 La. An. 782.

⁵ See *supra*, §§ 23, 24, 758 *et seq.*; *McConkey v. Com.*, 101 Penn. St. 416.

Where the prosecution, in a homicide case, contends that the murdered man had a certain sum of money in his possession, and that the taking of this was the motive of the murder, the defendant may show that no money was missing; but information obtained by the administrator of the deceased, upon inquiry by him, as to what moneys the deceased had received, and what he had paid out prior to his death, is hearsay evidence and inadmissible. *Com. v. Sturtivant*, 117 Mass. 122. See *supra*, § 762.

of jewelry and other valuable articles, are from this cause rendered peculiarly liable to attack, and it is of importance to inquire, in cases of this description, who was last seen in company with the deceased, or having any of the articles known to have been in his possession.¹

To show that the motive was to get rid of an importunate creditor, it is admissible to introduce evidence showing that the deceased had a pecuniary claim on the defendant.² That the life

¹ Wills on Circum. Ev. 237-243. See *Lindsay v. People*, 63 N. Y. 143.

² *Hamby v. State*, 36 Tex. 523. See *State v. Edwards*, 34 La. An. 1012.

"On a late trial for murder, Lord Chief Justice Campbell thus summed up the doctrine under discussion: 'With respect to the alleged motive it was of great importance to see whether there was a motive for committing such a crime, or whether there was not; or whether there was an improbability of its having been committed so strong as not to be overpowered by positive evidence. But if there be any motive which can be assigned, I am bound to tell you that the adequacy of that motive is of little importance. We know from the experience of criminal courts, that atrocious crimes of this sort have been committed from very slight motives; not merely from malice and revenge, but to gain a small pecuniary advantage, and to drive off, for a time, pressing difficulties.'" Wills Circum. Ev. 5th Am. ed. pp. 43, 44. As to inadequacy of motive, see Whart. Crim. Law, 8th ed. § 121.

See, also, remarks of Judge Wells, in *Com. v. Sturtivant*, Appendix to Whart. on Hom.

"Another form in which murder is committed for the sake of immediate gain is when the property of a person has been, by the force of circumstances, brought under the control or within the reach of another; and nothing but the life of such person prevents its

passing entirely into the other's hands. If, by the force of the same circumstances, or by actual contrivance or artifice, the person also is brought within reach, a motive of great force is presented, to attempt the removal of the obstacle by criminal means. In the case of *R. v. Burdock* (see Best on Pres. § 196), an elderly lady, possessed of some property, had gone to live with the prisoner, who kept a lodging-house. Being taken unwell, and attended by the prisoner, the cupidity of the latter was excited so strongly as to induce her to administer poison in some gruel which she prevailed on her lodger to take, and which resulted in death. The change which was observed soon after in the prisoner's life and habits showed that the death had been to her a lucrative event; and, on the evidence of this, and other cogent circumstances, she was convicted and executed. In the case of *R. v. Patch* (see Wills Circum. Ev. § 230), the prisoner, who boarded with his employer, had been enabled, from his relations to the latter, to obtain, to a considerable extent, the control of his business, and was endeavoring to secure it permanently by a course of fraud. His plans being in danger of frustration by the vigilance of his employer, he was tempted to put the latter out of the way, which he did by shooting him one evening, as he sat in his parlor. The crime, in this case, seems to have been induced by the

of the deceased was insured for the benefit of the defendant has been also received in evidence as a motive for the homicide.¹

double motive of the desire of gain and the fear of detection." Burrill Cir. Evidence, pp. 287, 288.

In the trial of the Knapps for the murder of Joseph White, it appeared that Mr. White was childless, and left as his legal representatives Mrs. Beckford, his housekeeper, the only child of a deceased sister, and four nephews and nieces, the children of a deceased brother. He had executed, as was known in the family, a will by which he left by far the larger portion of his estate to Stephen White, one of the children of the testator's brother, reserving a smaller interest to Mrs. Beckford. A daughter of Mrs. Beckford married Joseph J. Knapp, Jr., who, with his brother, John Francis Knapp, were young shipmasters of Salem, of respectable family, the sons of Joseph J. Knapp, also a ship-master. Shortly after the murder, the father received a letter obscurely intimating that the party writing the letter was possessed of a secret connected with the murder, for the preservation of which he demanded a "loan" of three hundred and fifty dollars. This letter Mr. Knapp was unable to comprehend, and handed it to his son, Joseph J. Knapp, who returned it to him, saying he might hand it to a vigilance committee which had been appointed by the citizens on the subject. This the father did, and it led to the arrest of Charles Grant, the person writing the letter, who, after some delay, disclosed the following facts: He (Grant) had been an associate of R. Crowninshield, Jr., and George Crowninshield; he had

spent part of the winter at Danvers and Salem, under the name of Carr, part of which time he had been their guest, concealed in their father's house in Danvers; on the 2d of April he saw from the windows of the house Frank Knapp and a young man named Allen ride up to the house; George walked away with Frank, and Richard with Allen, and on their return, George told Richard that Frank wished them to undertake to kill Mr. White, and that J. J. Knapp, Jr., would pay one thousand dollars for the job. They proposed various modes of doing it, and asked Grant to be concerned, which he declined. George said the housekeeper would be away all the time; that the object of Joseph J. Knapp, Jr., was first to destroy the will, and that he could get from the housekeeper the keys of the iron chest in which it was kept. Frank called again on the same day in a chaise, and rode away with Richard, and on the night of the murder, Grant stayed at the Half-way House, in Lynn. In the mean time suspicion was greatly strengthened by Joseph J. Knapp, Jr., writing a pseudonymous letter to the vigilance committee, trying to throw the suspicion on Stephen White. Richard Crowninshield, Geo. Crowninshield, Joseph J. Knapp, Jr., and John F. Knapp, were arrested and committed for murder. Richard Crowninshield made an ineffectual attempt, when in prison, to influence Grant, who was in the cell below, not to testify, and when this failed, committed suicide. John F. Knapp was

¹ See as to inferences from life insurance, 3 Whart. & St. Med. Jur. 4th ed. (1884) § 920; R. v. Heeson, 14 Cox C. C. 40; Hunter v. State, 40 N. J. L. 495; State v. West, 1 Houst. C. C. 371; Udderzook's Case, *infra*.

It is also relevant to inquire whether the party charged was on bad terms with the party injured,¹ or was inflamed by any special animosity to a cause with which the latter was identified.² In con-

then convicted as principal, and Joseph J. Knapp, Jr., as accessory before the fact. George Crowninshield proved an *alibi*, and was discharged.

The motive was the inheritance to White's estate; and yet the murderers acted on a mistake of law, they supposing that Mr. White's representatives, in case of his death intestate, would take *per stirpes*, whereas in fact they would take *per capita*; so that actually Mrs. Beekford, to increase whose estate the murder was committed, received no more by an intestacy than she would have by the will.

The Webster trial itself furnishes many suggestions which, in this class of cases, should be pursued. Was the defendant at the time desperately insolvent? Was his social position such as to make *appearances* of great moment; and had he been in the habit of playing at heavy odds to keep them up? In *Com. v. Twitchell*, 1 Brewst. 560, it was held competent for the prosecution to prove that defendant was pressed for money, but not that he lived expensively and had no occupation or means. Were the evidences of debt of such a character as if, carried on the person, could have been easily destroyed; and was there any attempt to induce the deceased to bring them with him to the spot appointed for the interview? What, in other words, were the probabilities of the debt being cancelled by the death; for upon this the question of *intention* would depend? Should it be shown that the debt was one of record, the presumption would be much more in favor of manslaughter, arising from sudden irritability on being pressed with the debt, than it would be should

it appear that the deceased had the sole evidences of debt on his person; that he had been invited to bring them, and that they were afterwards destroyed. All this is evidence, and so are those circumstances from which countervailing inferences could be drawn, such as the fact that the deceased had independent securities for the debt, on which the defendant was not liable, or that the defendant's circumstances were not such as to render the discharge of the debt of paramount importance.

In the remarkable trial of Udderzook for the murder of Goss, the evidence was that the deceased's life was largely insured, no doubt in pursuance of a fraudulent conspiracy that after the insurance he should disappear, and the sum be collected from the company. This was attempted; but as his continued existence, after the payment, was inconvenient to his co-conspirator, he was killed by the latter. On the trial, the whole history of the insurance was held legitimate testimony, as showing the motive. *Com. v. Udderzook*, 76 Penn. St. 340; S. C., Appendix to Whart. on Hom. See, also, *State v. West*, 1 Houst. C. C. 371.

¹ *State v. Hoyt*, 46 Conn. 330; *Pontius v. People*, 82 N. Y. 339; *Evans v. State*, 62 Ala. 6; *McAdory v. State*, 62 Ala. 154; *Meyers v. State*, 62 Ala. 599; *Gray v. State*, 63 Ala. 66; *Marler v. State*, 68 Ala. 580; *Marnoch v. State*, 7 Tex. Ap. 269; *Powell v. State*, 13 Tex. Ap. 244.

² *Murphy v. People*, 63 N. Y. 590; *Conwell v. State*, 66 Ga. 309; *Hinds v. State*, 55 Ala. 145. But if A., who bears malice towards B., is attacked by B. and kills B., such killing is not to

nection with this, evidence, as we have seen, is admissible of threats and declarations of hostile purpose, as well as of quarrels and alienations.¹ But it should always be remembered that there are few persons whose lives have not been at some time threatened; and that the cases where threats have been the mere expressions of transient anger are innumerable.² Nor is it likely that an intelligent assassin would embarrass himself by uttering threats in advance.

Jealousy, and the facts on which it rests, may always be put in evidence as throwing light on motive.³

V. DISTINCTIVE INFERENCES IN MARITAL HOMICIDES.

§ 785. Among the circumstances from which malice, in a killing by a husband of his wife, may be inferred, are adultery by either husband or wife, illustrating a desire to get rid of the marital relation;⁴ and bigamy by either party.⁵ Thus, where A., a husband, after an absence, during which he was believed to be dead, returned and found his wife married to B., and B., after

be presumed to be in consequence of the malice. *Dumas v. State*, 62 Ga. 58. And when immediate provocation is shown, the act will not be imputed to the old grudge. *Barnwell v. State*, 80 N. C. 466; *Wh. Cr. L.* 8th ed. § 477.

¹ See *supra*, § 756; *People v. Hendrickson*, 1 Parker C. R. 406.

² *Supra*, § 756. An illustration of this is to be found in the Wellington Dispatches published in 1880. Scarcely a day passed, during the Reform agitation, in which the duke did not receive letters threatening assassination.

³ *Infra*, § 785. See *Com. v. Madan*, 102 Mass. 1; *McCue v. Com.*, 78 Penn. St. 155; *Nesbit v. State*, 43 Ga. 238; *Everett v. State*, 62 Ga. 65; *Evans v. State*, 62 Ala. 6; *Walker v. State*, 63 Ala. 110; *Marler v. State*, 68 Ala. 580; *Templeton v. People*, 27 Mich. 501; *State v. Lawlor*, 28 Minn. 216. As to restrictions on evidence of this class, see *Com. v. Abbott*, 130 Mass. 472.

"It was certainly competent to show that the prisoner and the deceased had

visited the same woman, and to follow this by evidence that, immediately after the homicide, the prisoner referred to the fact that he warned the deceased to let her alone, that she would be a curse to any one, and now his words had come to pass. Jealousy is among the strongest of the human passions, and it certainly was for the jury to determine, in the absence of any other assignable motive, whether it was the cause of the prisoner's act." *Agnew, J.*, *McCue v. Com.*, 78 Penn. St. 185. See *St. Louis v. State*, 8 Neb. 405; *Gardiner v. State*, 11 Tex. Ap. 265.

⁴ *Supra*, § 51; *Com. v. Costley*, 118 Mass. 2; *Greenfield v. State*, 85 N. Y. 75; *Turner v. Com.*, 86 Penn. St. 54; *Binns v. State*, 57 Ind. 46; *Weyrich v. People*, 89 Ill. 90; *Templeton v. State*, 27 Mich. 501; *State v. Rash*, 12 Ired. 382.

⁵ *State v. Green*, 35 Conn. 205. *Supra*, § 51. See *Billingslea v. State*, 68 Ala. 486.

an altercation and partial reconciliation, shot A.; the marriage, absence, and second marriage, were held admissible as facts from which to infer malice.¹ So it may be shown, as supplying a motive for the crime, that the deceased had assaulted the defendant's paramour in the defendant's company.²

§ 786. Long ill-treatment by husband of wife;³ misconduct leading to a suit against him by his wife to compel good behavior;⁴ and violent quarrels between husband and wife,⁵ are relevant to prove motive in cases of marital homicide; though as instances of such quarrels are very numerous, generally expending their force in words, such proof is entitled to little weight unless connected in some way with the fatal wound.⁶ Quarrels.

¹ *Com. v. Smith*, 7 Smith's Laws, Ap.; 2 Wheel. C. C. 80. See *Binns v. State*, 66 Ind. 428. *Supra*, § 51.

Where marital discord is offered by one on trial for murdering the wife of another, to make it probable that the husband and not he committed the crime, it will be rejected if it appear that at the time of the murder the ill-feeling on the part of the husband had disappeared, the wife's character had improved, and they were living together quietly. *Com. v. Abbott*, 130 Mass. 472.

² *State v. Lawlor*, 28 Minn. 216.

³ *State v. Watkins*, 9 Conn. 49; *State v. Green*, 35 Conn. 203; *McCann v. People*, 3 Park. C. R. 272; *Costley v. State*, 48 Md. 175; *Stone v. State*, 4 Humph. 27; *State v. Langford*, Busbee, 436; *Marler v. State*, 67 Ala. 55. See *Binns v. State*, 57 Ind. 46.

⁴ *People v. Williams*, 3 Park. C. R. 84.

⁵ *People v. Kern*, 61 Cal. 244.

⁶ See *State v. Watkins*, 9 Conn. 49; *State v. Green*, 35 Conn. 203. *Supra*, § 51. In a New York case (*McCann v. People*, 3 Parker C. R. 272), a witness was offered to prove that during his acquaintance with the defendant who was charged with murdering his wife,

which acquaintance ended a few months before the death, the husband and wife had frequent difficulties and altercations. It was held that the evidence was admissible as tending to show want of affection, and as justifying the jury in inferring that the same state of mind continued after the witness moved away. It was also ruled that evidence was admissible, on the question of motive, to show that about six months before the homicide the wife made a complaint against her husband for an assault, on which he was held to bail. In a similar case, it was held that it was competent for the government to show, that some time before the alleged killing the wife had complained of her husband as a disorderly person, and that he was adjudged to pay two dollars weekly for her support. *People v. Williams*, 3 Parker C. R. (N. Y.) 84. See *Poindexter v. Com.*, 33 Grat. 766.

In *Sayres v. Com.*, 88 Penn. St. 29, it was held that where it had been shown that the prisoner had domestic troubles, extending over years, it was not error to admit evidence of a quarrel that occurred about two years before the murder, for the purpose of showing hatred and malice on the part of the prisoner. It appeared that the de-

VI. DISTINCTIVE INFERENCES IN POISONING.

§ 787. In the examination of alleged cases of poisoning, it is peculiarly important to keep in mind the rule, that to sustain a criminal conviction guilt should be made out beyond reasonable doubt.¹ (1) The supposed poison may have been an innocuous drug; (2) The giving of the poison may have been accidental, or it may have been an imprudent overdose of an opiate or other powerful remedy, self-administered; (3) The disease of which the deceased died may not have been induced by poison, since there are few symptoms attendant on poisoning which are not also attendant on certain types of natural disease;² (4) As to *post-mortem* observations, it is to be observed that substances supposed to be poison may have been the accumulation of over-dosing by the deceased himself, or have been surreptitiously introduced into the body, or may be after all innocuous matter; or, if deleterious, may not have been the real cause of death. As to each of these points, however, there must necessarily be more or less doubt; as it can never, in other words, be demonstrated that a substance administered to the deceased, or found in his body, actually caused his death, or that this substance was administered to him with the intention of killing him. On the other hand, we must recollect that there are countervailing considerations which enable us to determine the guilty intent with greater certainty in poisonings than in most other cases of violent homicide.³ Certain kinds of poison are rarely purchased except for

ceased refused to live with the prisoner, and he made repeated efforts to induce her to permit him to do so, one of which immediately preceded his shooting her. The bank deposit books of the deceased and the prisoner were admitted in evidence, for the purpose of showing that the prisoner had exhausted his funds and was in destitute circumstances, and that he had, therefore, a motive in desiring to return to live with his wife. It was held that this evidence was properly admitted.

¹ See *R. v. Sawwell*, Wills on Cir. Ev. 180.

² See as to proof of poisoning 3 Whart. & St. Med. Jur. 4th ed. (1884) §§ 784 *et seq.* Compare article by Dr. Doremus, in 1 Crim. Law Mag. 293 (1880).

³ Mr. Best cites on this point the following:—

“Venenum arguis: ubi emi? à quò? quanti? per quem dedi? quo conscio?” Quintilian, Inst. Orat. lib. 5, c. 7, vers. fin.

In Scotland a conviction is recorded in a case where a servant girl had mixed some poisonous matter with gravy, and Dr. Christison was led to suppose that poison had been swal-

the object of destroying life. Most poisons leave behind them traces which indicate their action. If such poisons, not in ordinary family use, and not likely to have been mistaken for other innocent drugs, have been administered, it is difficult to avoid the inference of intent. And as poisonings are rarely single, there is usually a group of cases from which, should ignorance or mistake be set up, guilty knowledge and intent can be inferred.¹

§ 788. It must be remembered that the mere presence of poison in a dead body does not prove the *corpus delicti*, unless it be shown (1) That the remains were those of the deceased; and (2) That these remains had not been tampered with by strangers, and that the examination had been conducted in such a way as to exclude the hypothesis of the poison being introduced after exhumation.² Hence in a Virginia trial for homicide by poisoning, the

Proof of poison in remains should not be received without proof of identity of remains.

lowed, merely from the circumstance of two persons being taken ill nearly at the same time, after partaking of the same food, and with symptoms which various kinds of poison would produce; though he said that this probability was strengthened by the fact that the violence of the symptoms was in proportion to the quantities of the suspected food taken. More recently Taylor lays down the principle, that while the chemical investigation should never be omitted, yet the detection of poison in the body by means of the chemical analysis is not essential, but the offence will be sufficiently proved if established by the concurrent evidence of the symptoms of the disease, the marks upon the body after death, and other inferential testimony. Taylor, 159. See 3 Wh. & St. Med. Jur. 4th ed. §§ 700, 716 *et seq.* Guy lays peculiar stress upon chemical investigations detecting poison, if corroborated by other proofs. Guy's For. Med. iii. 404-407. Puccinotti places no reliance on the pathological observations, and on the chemical ones only when all the conditions above cited are fulfilled.

Puccinotti, 222, 253. And there are cases in which poison (*e. g.*, antimony) may be utterly eliminated from the body before death. See Lancet, Aug. 4, 1860, p. 119; *R. v. Palmer*, cited in Taylor's Med. Jur. by Reese, 101.

As to arsenic see pamphlet by Dr. E. S. Dana, published by Linn & Co., Jersey City, 1880.

¹ See 2 Whart. & St. Med. Jur. 4th ed., where the subject of poisoning is treated at large; *State v. Wharton*, cited Taylor's Med. Jur. by Reese, 25; *Com. v. Schoeppe*, cited Taylor's Med. Jur. by Reese, 25; *Pitts v. State*, 43 Miss. 472; *Wills on Cir. Ev.* 180; 33 Am. Jur. 1. As to inference from several poisonings see *supra*, § 52. Compare the observations of Buller, J., in *Donnellan's Case*; of Abbott, J., of Rolf, B., and of Parke, B., cited in *Wills on Cir. Ev.* 187-191. See, also, *R. v. Geering*, 18 Law Jour. 215. In *Blackburn v. State*, 23 Ohio St. 146, "administering" poison was held to include, "persuading to take." Causation in poisoning is discussed in Whart. Crim. Law, 8th ed. §§ 133, 161-6, 340.

² See *supra*, § 422.

omission to prove directly that the body analyzed was that exhumed was properly held fatal to the prosecution.¹

§ 789. Poison may be possessed by the defendant either in its manufactured state, or it may be prepared by him. In the latter case we may expect to find materials from which the poison could be concocted, drugs peculiarly or exclusively suited for the purpose of adulterating food, or receptacles fitted for the preserving of such articles. It may be also relevant to show that the accused was in the habit of making materials of this class, and that he was familiar or acquainted with the criminal purposes to which they might be made subservient. Such evidence may be admissible both for the prosecution and for the defence. For the prosecution it may be admissible for the purpose of showing that the defendant had in his hands the drugs by which the crime could be effected. For the defence it may be offered for the purpose of showing that the drugs were in his hands for innocent objects; or in the ordinary course of his business; or for domestic purposes. Of the last line of cases a common illustration is the claim that the poison was bought in order to kill rats. This, however, is a defence which is open to rebuttal, by showing that the poison was not so used, or if so used, was used only as a pretext.²

§ 790. In cases of poisons which act instantaneously, some light may be thrown on the question by the position of the body. Thus Mr. Amos³ tells us of a trial in which the hypothesis of suicide was defeated by the fact, that while the united result of medical experience is that prussic acid produces *instantaneous* death, the deceased was found with a *corked* bottle in her hand, from which five drachms had been taken, and with the bed-clothes composed about her person with elaborate precision.⁴

§ 791. As cumulative proof in such cases, it is admissible to prove that the defendant unnecessarily forced himself into contact with the deceased, or out of the sphere of his usual duties or

¹ Com. v. Lloyd, reported Whart. 896, and cases in Whart. Crim. Law, on Hom. § 732. See 1 Crim. Law Mag. 8th ed. § 345.

293. And see Hatchett v. Com., 76 Va. ³ Great Oyer, 347.

1026.

⁴ See 3 Wh. & St. Med. Jur. §§ 700,

⁵ R. v. Higgins, 14 Lond. Med. Gaz. 716; 2 ib. § 63.

habits tried to administer meat or drink to the deceased. It may, under such circumstances, be important to go far back for the purpose of discovering who prepared the meats or had access to the dishes, and such evidence is clearly admissible. There are many cases where it may not be out of place to inquire whether any members of the deceased's family were observed unaccountably to abstain from the dish previously poisoned, particularly if it belonged to the usual meal of the family, or was a favorite of the deceased; whether there was any attempt to prevent others from partaking of it or to dissuade the deceased from abstaining from such food; and particularly, whether there was any effort to prevent a *post-mortem* examination, or to hide or destroy any remaining portions of the food or drink of which the deceased partook, or any of the vessels containing them; or whether there was an effort to throw unreasonable obstacles in the way of the employment of a competent physician during the illness of the deceased.¹

Inferences
from con-
duct.

§ 792. It used to be held that there were certain poisons which would not operate fatally for months, or even for years after their administration. Under such circumstances, prosecutions were maintained on the Continent of Europe for poisonings in which the death did not occur till years after the alleged guilty act.² Under our own law it is necessary, in order to sustain a prosecution for homicide, that the death should have occurred within a year and a day from the injury inflicted.³

Duration
of working
of poison.

§ 793. If it be assumed that certain poisons have a stated time to run, it may be argued, in cases in which such poisons are alleged to have been administered, that unless the deceased's illness corresponded with such period, the inference of poisoning is negatived. But the conflict of expert testimony on this point is too great to sustain any definite conclusion; and if it should appear that the defendant was poisoned and died of poison, the length of his illness within the limitation above given is immaterial.⁴

Duration
of sickness
as indicat-
ing poison.

¹ *Supra*, § 748. See 2 Mitter. Dent. St. § 124.

² Whart. Crim. Law, 8th ed. § 312.

³ *R. v. Russell*, cited in Taylor's

⁴ See on this subject Amos's Great Oyer, 347; and see also discussion in 3 Wh. & St. Med. Jur. §§ 784 et seq.

Med. Jur. by Reese, 99. See 2 Wh. & St. Med. Jur. 4th ed. §§ 5 et seq.; 3 ib. §§ 784 et seq.

§ 794. Malice in poisoning cases depends upon two conditions:

Inference
of malice
in poison-
ing.

First, the design must be wickedly to take life or inflict bodily hurt. A physician may administer a dangerous medicine either discreetly or negligently. In the first case, where the drug is administered in order to save life, and the patient, notwithstanding that the physician exercises the diligence usual to good physicians in his circumstances, dies from the medicine, there is no criminal liability. In the second case, where the drug is administered negligently, and the patient dies of the drug, the person administering the drug is guilty of manslaughter.¹ To constitute malice, therefore, in order to convict of murder, there must be an evil intent to take life, or inflict some grievous bodily harm. But this is not all. There must be a knowledge of the dangerous character of the poison, and it must be actually dangerous. A. may administer a supposed enchanted but innocent potion to B., with intent to kill B.; but this will not be administering poison. On the other hand, when the poison is known by the defendant to be deadly, his administering it without proper medical advice is strong proof of malice. If the poison be administered negligently, the case is manslaughter.²

Whether other poisonings are admissible to rebut defence of accident has been already discussed.³ In any view, after due ground laid, it is admissible to prove motive such as would prompt the guilty act.⁴

VII. INFERENCES FROM EXTRINSIC INDICATORY PROOF.

§ 795. In another work, inferences of this character, so far as concerns questions of identity, are examined at length.⁵

It should be observed that indications such as these, if relevant, go to the jury for what they are worth.⁶ Thus it has been held

¹ Whart. Crim. Law, 8th ed. §§ 362-368. hands were tied by a cord in a sailor's knot is relevant in a prosecution in which a sailor is tried for the homicide.

² Whart. Crim. Law, 8th ed. § 345.

³ *Supra*, § 50.

⁴ *Templeton v. People*, 27 Mich. 501.

⁵ 3 Wh. & St. Med. Jur. 4th ed. §§ 847 *et seq.*

⁶ *Supra*, § 24. The following anonymous cases have been reported:—

The fact that the deceased person's

A piece of rope, found near the deceased, was proved, in a homicide case, to match a piece of rope found on the person of the accused, and the two pieces appeared to have been carelessly cut apart. This, however, was met by

admissible to put in evidence a memorandum made in pencil in the pocket-book of the accused, and this without proof of handwriting.¹

§ 796. The character of footprints leading to the scene of murder, and their correspondence with the defendant's feet, may be put in evidence in cases when the defendant's agency is disputed.²

the testimony of a rope-maker, that one piece was twisted to the right and another to the left.

It is also relevant to prove that the room in which the accused slept on the night of the homicide showed marks indicating that it had been stealthily left during the night; that when the crime was committed by the aid of chloroform, the accused, shortly afterwards, smelt strongly of chloroform; that fragments of clothes torn from the assailant in the struggle matched fragments in possession of the accused; that a dog belonging to him was seen prowling about the place of crime soon after its commission.

Other cases are referred to *supra*, §§ 24, 764 *et seq.*

A witness, who, soon after a homicide, had taken a pair of shoes from the defendant's house, one of which, as the government contended, fitted a track supposed to have been made by the murderer, was permitted to testify that the shoes appeared as if they had recently been washed. It was ruled that the admission of this testimony afforded no ground of exception. *Com. v. Sturtivant*, 117 Mass. 122.

¹ *Whaley v. State*, 11 Ga. 123. But see *supra*, § 682.

² *Com. v. Pope*, 103 Mass. 440; *Murphy v. People*, 63 N. Y. 590; *State v. Graham*, 74 N. C. 646; *State v. England*, 78 N. C. 552; *Jones v. State*, 63 Ga. 395; *Campbell v. State*, 23 Ala. 44; *Campbell v. State*, 55 Ala. 80; *Young v. State*, 68 Ala. 569.

See, as to footprints, 3 Whart. & St. Med. Jur. 4th ed. (1884) § 672.

That a witness, who has examined a track, may prove its correspondence to a particular shoe, see *State v. Moelchen*, 53 Iowa, 310. *Cf. Meyers v. State*, 14 Tex. 35; *supra*, §§ 315, 458, 757.

It is within the discretion of the court, when the question whether the defendant could have made certain footprints, to permit him to make tracks with his naked feet on the ground as tests. *Campbell v. State*, 55 Ala. 80.

In Judge Landon's charge in *People v. Billings*, Saratoga, 1878, we have the following:—

"This case affords abundant illustrations of circumstantial evidence. Here is a flower-bed newly spaded. A heavy rain falls upon it Tuesday afternoon. You know that a flower-bed must be wet as a consequence of that rain. If, on the following morning, there are footprints, distinct and deeply sunken in the flower-bed, you conclude somebody must have stepped there since the rain, otherwise the tracks would not have been so deep and distinct; otherwise the rain would have washed them out. But if you see two of the footprints are like each other and different from a third one, you conclude two persons have stepped in that flower-bed. Two of the prints may have peculiar impressions around the heel, as if the boot heel had a sort of rim projecting around it, and you conclude the man who stepped there wore a boot having such a projecting rim. If upon close inspection you find in those footprints a peculiar mark, as if the boot had a sharp triangular point running out on the tap or sole of the boot, you

Footprints
and other
marks on
soil.

Such evidence is not by itself of any independent strength,¹ but is admissible with other proof as tending to make out a case.² The measurement of the tracks

conclude the man who made the tracks wore a boot corresponding with those impressions. Do those footprints lead along to the corner of the garden and to the garden fence? You conclude so the man walked. Is there mud or dirt upon the fence, and do the tracks seem to stop at that fence? You conclude the man got over the fence there. Is there an orchard beyond with a heavy tuft of grass or sod upon it? You conclude he may have passed in there, where the sod would not retain the impression. You conclude so, since the man is not there, since, perhaps, there are no returning footsteps. You pass to the next field, a corn-field recently ploughed. You pass along its south fence, and you find now and then like tracks. You think the same man has been along there. Some of these tracks are four feet apart. You reason upon them. Did the man run, and if he ran, why did he run? Do you find tracks of both feet brought together? You reason, did the man stop, and if he stopped why did he stop? Was it to listen, and if he listened, what was it he heard—a cry, a shriek, or the running of many feet? But I need not pursue these illustrations further to enable you to understand the nature and force of circumstantial evidence. You see at once, it only requires you to reason in a natural way upon the facts proved.”

¹ *R. v. Britton*, 1 F. & F. 354.

² See remarks of Wells, J., in *Com. v. Sturtivant*, Whart. on Hom. App.

Mr. Wills (Cir. Ev. p. 122) says: “A farm laborer was tried for the murder of a young woman, a domestic servant living in the same service. A little

before seven in the evening she went on an errand to take some barm to a neighboring house about two hundred yards distant, but it not being wanted she did not leave it, and set out about seven o'clock on her way back. Being about to leave her situation that evening, she had requested the prisoner to carry her box to the gardener's house, about a quarter of a mile distant. Soon after she set out on her errand the prisoner followed her carrying her box, but did not reach the gardener's cottage until after eight. On the following morning she was found lying on her back, drowned in a shallow pit near a foot-path leading from her master's house to the gardener's cottage. There were marks of violence on her person, and one of her shoes and the jug in which she had carried the barm were found near the pit. Barm was also found spilt near the spot, and there were marks of much trampling, and chaff and grains of wheat were scattered about, which were material facts, the prisoner having been engaged the day before in threshing wheat. Impressions were found in the soil, which was stiff and retentive, of the knee of a man who had worn breeches made of striped corduroy, and patched with the same material, but the patch was not set on straight, the ribs of the patch meeting the hollows of the garment into which it had been inserted; which circumstances exactly corresponded with the prisoner's dress. The prisoner denied that he had seen the deceased after she left the house on her errand, and stated that he had been, in the interval before his arrival at the gardener's house, in company

may be made by a person not an expert, and without notice to the defendant, and his opinion as to their correspondence is admissible.¹

When the question of adaptation of the foot to tracks is at issue, and where, at a preliminary hearing before a magistrate, a party under suspicion was compelled to allow his foot to be placed in the track, it was held that the results of the experiment could afterwards be detailed on trial.² But he cannot be compelled to place his foot in clay for experimental purposes during the final trial.³ The defendant, also, is entitled to show that his feet did not correspond to the alleged foot-marks, and that he offered to try his feet on the tracks.⁴

The following qualifications are to be kept in mind when considering indications from foot-prints:—

1. Rapidity of movement affects the character of the print. Hurried motion slurs and breaks the edges; and the print of a person running, resting as he does mainly on the ball of the foot, is smaller and more circular than that of a person walking. The print of a person walking, also, is smaller than that of a person standing.

2. The shape of the shoe has much to do with the print. Bevelled edges produce a smaller print than edges which slope outwards. Nailed shoes, also, have a different impress from stitched shoes; and a foot when clothed in a coarse shoe necessarily leaves a larger print than a foot with a shoe which is neat and close fitting. But none of these indications are of value unless sustained by proof that the shoe in question was worn by the accused at the particular time.

3. In sand, from the falling in of the edges, the print is smaller than in clay; and in moist sand the distinctive features of the print rapidly vanish.

4. Peculiarities of gait have a good deal to do with foot-prints. Some persons habitually drag their feet on the ground; a limping gait makes alternate prints peculiarly deep; some persons bear chiefly on the heel, others on the ball of the foot.

with an acquaintance whom he had met with on the road; but it was proved that the person referred to at the time in question was at work thirty miles off. He was convicted and executed."

¹ *State v. Reits*, 83 N. C. 634; *State v. Morris*, 84 N. C. 756.

² *State v. Graham*, 74 N. C. 646; *Walker v. State*, 7 Tex. Ap. 246.

³ *Stokes v. State*, 5 Bax. 619. *Supra*, § 312.

⁴ *Bouldin v. State*, 8 Tex. Ap. 332.

5. Casts are unreliable unless several can be taken.¹

6. The measurements or casts, to be reliable, must have been taken when the prints were fresh.²

7. Marks on soil over which a body has been dragged may be detailed to the jury for the purpose of showing the character of the transaction.³

§ 797. When there is an inspection of the scene of guilt, it must be shown what changes, if any, have taken place since the guilty act.⁴ In most jurisdictions the jury may be taken to view the premises,⁵ but the visit must be in the presence of the accused.⁶ The view may be granted after the judge has summed up the case.⁷ If a part of the jury are allowed to go by themselves to the view, this is error.⁸

Scene of
guilt and
view of
jury.

§ 798. The inferences we have just noticed are not limited to cases of homicide. Footprints are available as cumulative proof of identity in all cases where identity is to be proved. In the Tichborne case, one of the strongest proofs against the claimant was that his foot could not in any way be made to fit the measurements used to make the shoes of Roger Tichborne. In an unreported New Jersey case of arson, elsewhere noticed, in which, while there were two tracks of horses' shoes coming from the place burned, there were no tracks going to it, it was a principal point against the accused that his horse was found, the day after the firing, with marks on his hoofs which showed that the shoes had recently been reversed so that he could have ridden to the spot with shoes reversed, and from it with the shoes in the usual position.⁹ Similar inferences may be drawn from

Similar
inferences
in other
cases.

¹ 1 Tidy Leg. Med. (1883) p. 176.

² Ulrich v. People, 39 Mich. 245.

³ State v. McCann, 13 Sm. & M. 471.

⁴ State v. Knapp, 45 N. H. 148.

⁵ See Mass. Gen. Stat. c. 172, § 9;

5 Cush. 298; Chute v. State, 19 Minn.

271; Fleming v. State, 11 Ind. 234.

See, however, doubts as to view at common law, Doud v. Guthrie, 13

Bradw. 659.

⁶ State v. Bertin, 24 La. An. 46.

But that he or his counsel, must make application to be present, see State v.

Ah Lee, 8 Or. 214.

⁷ R. v. Martin, L. R. 1 C. C. 178.

⁸ Ruloff v. People, 18 N. Y. 179;

Eastwood v. People, 3 Parker C. R. 25.

As to diagrams see *supra*, § 545; State

v. Jerome, 33 Conn. 265. See R. v.

Haseltine, 12 Cox C. C. 404, approving

of experiments to test the effect of fire in arson cases.

⁹ See as to inferences to be drawn from an overridden horse, People v.

How, 2 Wheel. C. C. 412; 3 Whart. &

St. Med. Jur. (4th ed.) §§ 836, 857.

other extrinsic facts.¹ Breaking, in burglary, for instance, may be shown by marks on the building broken into;² rape, by the condition of the place of offence, and of the dress of the accused;³ abortion, by the possession of the mechanism of the crime, and by traces on the party injured of wounds from such mechanism;⁴ arson, by the possession of means of ignition and by the traces of combustion, as well as from other burnings;⁵ robbery, by the violence done to the property seized, as well as to the clothes and person of the prosecutor;⁶ larceny, by facts indicating stealth and concealment;⁷ malice, in malicious mischief, by marks of peculiar malignity on the thing injured.⁸ But in all cases where conviction is sought on the ground that the defendant had opportunities for committing the crime, it must be remembered that proof of this class is only of value when offered either to anticipate or to rebut the defence that the defendant had no such opportunities. That a man could have done a wrongful act is, by itself, no sufficient proof that he did it.⁹

§ 799. As has been already observed, it is relevant to put in evidence any instruments or tools of crime, in the defendant's possession, indicating preparations on his part to commit the suspected offence.¹⁰ Nor is proof of the

Inference
from incul-
patory in-
struments.

¹ See as to inferences from surrounding objects, 3 Whart. & St. Med. Jur. 4th ed. [1884] §§ 817 *et seq.*

² *Infra*, § 799; Whart. Crim. Law, 8th ed. § 759.

³ Whart. Crim. Law, 8th ed. §§ 566, 576 *a*.

⁴ *Ibid.* § 598. *Infra*, § 799.

⁵ Whart. Crim. Law, 8th ed. §§ 826-831.

⁶ *Ibid.* §§ 849-50.

⁷ *Ibid.* §§ 895, 908, 923, 926.

⁸ *Ibid.* §§ 1071, 1082 *c*.

⁹ "The infirmative hypotheses affecting motives to commit an offence are applicable, also, to means and opportunities of committing it; and some unhappy cases show the danger of placing undue reliance on them. A female servant was charged with having murdered her mistress. No persons were in the house but the deceased and the pris-

oner, and the doors and windows were closed and secure as usual. The prisoner was condemned and executed, chiefly on the presumption that no one else could have had access to the house; but it afterwards appeared, by the confession of one of the real murderers, that they had gained admittance into the house, which was situated in a narrow street, by means of a board thrust across the street from an upper window of an opposite house, to an upper window of that in which the deceased lived; and that, having committed the murder, they retreated the same way, leaving no traces behind them." Stark. Ev. 865; Best's Ev. 572.

¹⁰ *Com. v. Wilson*, 2 Cush. 590; *Com. v. Gallagher*, 124 Mass. 54; *Com. v. Kahlmeyer*, 124 Mass. 322; *Com. v. Blair*, 126 Mass. 40; *Com. v. Levy*,

possession of such instruments excluded by the fact that it implicates the defendant in independent crimes.¹

126 Mass. 240; *People v. Larned*, 3 Selden, 445; *Robbins v. People*, 95 Ill. 275; *People v. Winters*, 29 Cal. 658; *Hope v. State*, 62 Cal. 291. *Supra*, §§ 32-9, 314.

Where the possession of deadly weapons is shown as proving intent the defendant may show he took them in self-defence. *Marnoch v. State*, 7 Tex. Ap. 269.

Upon the trial of an indictment for an illegal operation upon a woman, certain surgical instruments and a speculum chair, found in the defendant's house, were exhibited to the jury. There was evidence that the chair had been used in performing the operation, and medical experts were allowed to testify that the surgical instruments were adapted to producing abortions, although none of them could be said to be so exactly designed for such use as not to be appropriate also

for use in lawful acts of surgery. It was held by the Supreme Court that the defendant had no ground of exception to the admission of this evidence. *Com. v. Brown*, 121 Mass. 69. To the same effect is *Com. v. Blair*, 126 Mass. 40.

In conformity with the view in the text, on the trial of an indictment for breaking and entering a building and stealing therefrom, a number of burglarious tools and implements, found together in the possession of the defendant, at the time of his arrest, may be brought into court and exhibited to the jury, although some of them only, and not the residue, are adapted to the commission of the particular offence in question. *Com. v. Williams*, 2 Cush. 582, 583. In a case of burglary, where the thief gained admittance into the house by opening a window with a penknife, which was broken in the

¹ *Supra*, §§ 39 *et seq.*; *State v. Wintzengerode*, 9 Oreg. 153.

In *Ruloff's Case*, decided in New York, in 1871, the conviction rested in a large measure on the production of implements found in the prisoner's room, and on photographic likenesses of the deceased. The applicatory law is thus stated by Judge Allen: "Objection was made upon the trial, to the production in evidence of certain implements and papers found in the room and desk of the prisoner. Both the room and desk were used somewhat in common by him and one of his associates, but he was the chief occupant. The articles were taken some time after his arrest, and evidence was given tending to show that he had the key of the room, and showing how the room had been kept during his absence; and

the prisoner upon the trial, admitted the possession of one of the implements. Other evidence was given, also tending to connect the prisoner with the articles found in his room, and the question of fact was properly submitted to the jury upon that issue. The ratchet-drill, which, it was claimed, the bits with which the entry into the store was effected fitted, the prisoner admitted on the trial had been in his possession as a new invention and a curious thing. This alone was some evidence that the articles found with the drill were there while the prisoner occupied the room and used the desk, especially with the other evidence tending to show that the room had remained locked from the time he left until the articles were found and taken away." *Ruloff v. People*, 45 N. Y. 213.

VIII. PHYSICAL PRESUMPTIONS.

§ 800. Boys under fourteen, and girls under twelve, are by the English common law presumed incapable of matrimonial consent; and this presumption is irrebuttable. The same limit is prescribed by the Roman law, and by the Council of Trent.¹

Infants presumed incapable of matrimony.

§ 801. Children under seven are presumed irrebuttably to be incapable of crime;² between seven and fourteen the presumption is rebuttable by proof that the defendant is *capax doli*, the burden of proving capacity being on the prosecution.³ A boy under fourteen is presumed incapable of

And so of crime.

attempt, and a part of the blade left sticking in the window frame, a broken knife, the fragment of which corresponded with that in the frame, was found in the pocket of the prisoner, and was held proper evidence. And so evidence was received to trace the implements with which the burglary had been committed to the defendant's home. *People v. Larned*, 3 Selden, 445.

In a homicide case tried in Petersburg, Illinois, in March, 1884, the deceased was a poor girl, Zora Burns, and the defendant, "a well to-do merchant, had been her employer. An attempt was made to show that the defendant had been with the girl on the night of the murder, by means of the identity of two hairpins, one found in his buggy and the other on the person of the murdered girl; and also by showing that these hairpins were peculiar in make and not commonly sold in that neighborhood. An expert was found, who, by means of enlarged photographs and a microscope, showed clearly enough that the buggy hairpin and those used by Zora Burns were of the same peculiar make. He also testified that he had bought a large number of pins at sundry stores and had examined hundreds collected in vari-

ous ways and had failed to find any others identical with those offered in testimony. On the other hand, counsel borrowed a few hairpins from the wives of court officers, and the expert was obliged to admit that some of these hurriedly gathered pins were precisely like the buggy hairpin."

¹ Whart. Conf. of L. § 147.

² 1 Hale, 19, 20; 4 Bl. Com. 23; *R. v. Giles*, 1 Mood. C. C. 166; *Marsh v. Loader*, 14 C. B. (N. S.) 535; *R. v. Owen*, 4 C. & P. 236; *People v. Townsend*, 3 Hill (N. Y.), 479; *State v. Goin*, 9 Humph. 175; *Godfrey v. State*, 31 Ala. 323.

³ *R. v. Smith*, 1 Cox C. C. 260; *Com. v. Mead*, 10 Allen, 398; 1 Green Cr. R. 402; *Rose v. State*, 82 Ind. 344; *State v. Adams*, 76 Mo. 355; *State v. Fowler*, 52 Iowa, 103; *Wagoner v. State*, 5 Lea, 352. The question is one of fact. *State v. Toney*, 15 S. C. 409. In the case of an infant of eleven years the proof must be strong and clear. *Angelo v. People*, 96 Ill. 209.

In England this presumption is not affected by the Act of 24 & 25 Vict. c. 106, ss. 48, 50. *R. v. Groombridge*, 7 C. & P. 582, per Gaselee, J., and *Ld. Abinger*; and it applies to the offence of carnally abusing a girl under ten years of age. *R. v. Jordan*, 9 C. & P.

rape, as principal in the first degree.¹ Nor can he, according to the prevalent view, be convicted of an assault with intent to ravish.²

As an infant under seven is not *capax doli*, an action for false imprisonment lies for the arrest of such an infant under charge of felony.³

§ 802. Identity of name is not by itself, when the name is common, and when it is borne by several persons in the same circle of society, sufficient to sustain a conclusion of identity of person. The inference, however, rises in strength with circumstances indicating the improbability of there being two persons of the same name at the same place at the same time, and when there is no proof that there is any other person bearing the name. Names, therefore, with other circumstances, are facts from which identity can be presumed.⁴ Where a father and son bear the same name, the name, if used without any addition, is presumed to indicate the father.⁵

§ 803. Permanence in individuality is the basis of all our inferences as to identity. In order to make these inferences we assume two things: (1) That no two individuals are precisely alike, each individual having his perceptible differentia;⁶ (2) That these distinctive features are not

118, per Williams, J. But if the boy have a mischievous discretion, he may be a principal in the second degree. 1 Hale, 630. The pathic may be convicted of an unnatural crime, though the agent be under fourteen. *R. v. Allen*, 1 Den. C. C. 364; 2 C. & K. 869.

¹ 1 Hale, 630; *R. v. Eldershaw*, 3 C. & P. 396; *R. v. Groombridge*, 7 C. & P. 582; *R. v. Phillips*, 8 C. & P. 736; *R. v. Jordan*, 9 C. & P. 118; *Hiltabiddle v. State*, 35 Oh. St. 52.

² Whart. Crim. Law, 8th ed. § 551; *R. v. Eldershaw*, 3 C. & P. 305; *State v. Sam*, Winston N. C. 300; *State v. Pugh*, 7 Jones N. C. 61; though see *Com. v. Green*, 2 Pick. 380; *People v. Randolph*, 2 Park. C. R. 213.

³ *Marsh v. Loader*, 14 C. B. (N. S.) 535.

⁴ *State v. Kelsoe*, 76 Mo. 505. See

State v. Trice, 88 N. C. 627, as to identification of persons whose name was unknown.

⁵ See Whart. on Ev. § 1273; *Shepherd v. State*, 72 Ill. 480; *Richardson v. People*, 85 Ill. 495.

⁶ "The specific gravity of any elementary substance, the proportions in which such substances are chemically united into compounds, the definite forms into which they crystallize, the modes of action or affinities of different reagents, and many other similar instances of nature's work in this province, are precisely similar to each other; they do not vary even by a hair's breadth.

"Far otherwise is it in the world of living organisms, where variety is the rule and uniformity is the exception; nay, it is not even the exception, for

capable of voluntary change; and that he who possesses these features to-day may be inferred to have possessed them yesterday, and that he who possessed them yesterday may be inferred to possess them to-day.¹ The first of these assumptions—that of the apparent distinctiveness of all human beings, so that no two persons are precisely alike—is one of the axioms on which society rests. It may be possible that there are adults so precisely alike as to be undistinguishable even by those who know them best; but the cases of such supposed identity are so imperfectly substantiated, that it is far more probable that the witnesses testifying were mistaken than that such similitude actually existed. There are cases, also, in which mimics have been able to assume for a short time the appearance and expression of others, or to obliterate their own peculiar features, but these deceptions can be maintained but for very brief periods, and vanish when tried by close tests. We have a right to hold, in fact, that it is an absolute law that each individual should have certain features assigned to him by which he is distinguishable from all others; and that these features, while subject to gradual modification by age, should yet retain their characteristics so as to be distinguishable for months, even under the most artful disguises.² The whole figure may be changed by dress; the hair may be cut off or dyed; yet the eyes, the nose, the mouth, the voice

not one such exception—that is the case of no two indiscernibles—can be produced. So far as I know, Leibnitz is the only philosopher of modern times who has noticed and duly emphasized this wonderful fact; for the statement of it is one of the fundamental axioms on which his whole system is founded. . . . The illustration he employed while discussing the subject in the presence of the Princess Caroline, as they were walking in a garden together, was that no leaves precisely alike could be found on any bush. Another gentleman who was present took up the challenge, but after a long search was obliged to confess that the statement of Leibnitz was probably correct. A better illustration, as it seems to me, might be taken from the human face. Here

all the differences are crowded together within narrow compass, say within the limits of six by ten inches, and all the main features, brow, nose, eyes, cheek, mouth, and chin, are constructed essentially on the same general pattern. But what a marvellous wealth of difference underlies all this uniformity! Among the many millions of human faces that people this earth, no two can be found so nearly alike but that they are easily distinguished at a glance.” Prof. Bowen in *Princeton Rev.* May, 1880, p. 334.

¹ *Infra*, § 816. See as to continuity of appearance, 3 Wharton & St. Med. Jur. 4th ed. (1884) § 660; *Mixon v. State*, 55 Miss. 525.

² See *Brown v. Com.*, 76 Penn. St. 319.

remain, each of which possesses traits which cannot be defaced by any means short of destruction. "The Trimmer," says Macaulay, when narrating, in a striking passage, the arrest of Jeffreys, "was walking through Wapping, when he saw a well-known face looking out of the window of an ale-house. He could not be deceived. The eyebrows, indeed, had been shaved away. The dress was that of a common sailor from Newcastle, and black with coal dust; but there was no mistaking the savage eye and mouth of Jeffreys." But the face is not the only test. Voices are equally distinguishable, and their distinguishability has been made the basis of convictions in criminal courts.¹ A much more difficult point arises when we take up the question of the change of appearance by time. Undoubtedly the presumption of continuance, which is now immediately before us, extends so far as to justify us in saying that a person will continue to look to-morrow, next week, or even next month, as he looks to-day. When we take longer periods, however, the presumption fades gradually away. All persons who have reached middle life, and who have been absent for years from their school or college companions, are aware what alterative effects ten or fifteen years have on the countenance, and how after forty or fifty years the features which once constituted individuality have acquired such new expressions as to defy recognition. It may be said that this is because of the weakened memory of the observer. But that there is a material and sometimes decisive change in the parties observed arises from the necessary action of time on the countenance,

¹ In *Com. v. Scott*, 123 Mass. 222, an effort was made to identify by the voice the burglars who had broken into the Northampton Bank. The cashier testified that he had been compelled by masked burglars to open the vault, and stated that he could identify them by the voice. To show that there was no peculiarity in his voice, the defendant, Scott, was then asked by his counsel to stand up and repeat something, which he did, and the witness said he was suppressing his voice. Scott was then told by his counsel to "speak it right out." The judge then said: "I do not think this is competent." The counsel for the defendants contended that he had a right to have the peculiarities of the defendants' voices pointed out by the witness, and that for this purpose the voices themselves were competent. The judge ruled that though identification could be by voice, experiments in court were inadmissible. *King v. Donahoe*, 110 Mass. 155. In *Brown v. Com.*, 76 Penn. St. 319, a confession was identified by voice. In *Harrison's Case*, 12 St. Tr. 850, conviction rested in part on identification of voice. See, as to identification by voice, 3 Whart. & St. Med. Jur. 4th ed. (1884) § 634.

and is illustrated by photographs taken of the same person at different stages of life. We must remember, also, that while two persons (*i. e.*, twins) may be undistinguishable, except by near relatives, at an early period of life, they diverge, as they grow older, and gradually assume distinct types. We must therefore hold that the presumption of continuance, when invoked in questions of identity, cannot be extended further than to imply such a continuance of appearance as is subject to the usual modifications of time.¹

§ 804. After death, the presumption of continuance of appearance rapidly weakens.² Even when death is sudden, there is an

¹ As to proof of identity, see *supra*, §§ 13, 378. For identification by inspection, see *supra*, § 312. See *People v. Williams*, 1 N. Y. Cr. Rep. 336; and see on identity generally, 3 Whart. & St. Med. Jur. (4th ed.) §§ 620, 643 *et seq.* Reference, also, is made to Lord C. J. Cockburn's exposition of the law in the Tichborne Case, as given in the 8th ed. of this work, § 803.

Mr. Serjeant Ballantine, who was counsel for the claimant in the Tichborne ejectment case, declares, in his "Experiences of a Barrister's Life," that the claimant's case would have been defeated at the outset had the fact been brought out that the genuine Sir Roger had tattoo marks on his arm. As to tattoo marks, see further, 3 Whart. & St. Med. Jur. 4th ed.) § 639. See article in 10 Cent. L. J. 123.

² See as to identification of corpses, 3 Whart. & St. Med. Jur. 4th ed. (1884) §§ 682 *et seq.*

In September, 1826, William Morgan, a man of roving habits, who had been connected with a Masonic Lodge in Western New York, quarrelled with his Masonic associates, and took part in the publication of a book in which their secrets were disclosed. This was resented by his old friends, and he was subjected, it was said, to persecutions, which were followed by his disappearance on September 12, 1826. It was

reported that he had been kidnapped; and the country was soon in a blaze of excitement. What became of him was never known: the theory of one side was that the alleged abduction was a trick on his part to elude his creditors; the theory, on the other side, that he was carried off by Masons and drowned in Niagara River. In a few months the anti-Mason party was organized so effectively that it controlled not only municipal but State elections in New York and Vermont; holding the balance of power in Pennsylvania. There was, however, no proof that Morgan had been killed, though this was the firm conviction of a majority of the community. In October, 1827, thirteen months after Morgan's abduction, the dead body of a man was found on the beach of Lake Ontario, forty miles east of Fort Niagara. There is now no question that this was the body of Timothy Monroe, a Canadian farmer, who had been drowned in that vicinity a few days before, in consequence of the upsetting of his boat. This was afterwards shown by physical signs: by his clothes; by extrinsic facts; and there was nothing about the body to indicate a struggle with violence such as would have been necessary to cast him against his will in the water. No proof, however, of identity being then

Cautions in applying this inference to deceased persons. immediate change of countenance; and we notice instantaneously not only the loss of expressions we associated with the living person, but the starting forth of new expressions, constituting heretofore unperceived

produced, the coroner's inquest found the body to be that of a "person unknown." In the mean time a rumor was spread that the body was that of Morgan; and a second inquest was summoned, before which very extraordinary evidence was produced. The remains had been tampered with; the head and cheeks had been shaved; and a dentist was examined who produced two teeth he claimed to have extracted from Morgan's mouth, and which were said to fit into the mouth of the deceased. But confirmatory facts of this kind were not needed to back up the convictions of the numerous witnesses, who, under the strain of high party excitement, believed that they saw in the corpse the body of the murdered victim of Masonry. The second inquest found promptly that the body was that of Morgan; and this was followed by an immense funeral at Batavia, which was one of the most effective incidents in the political campaign. Not long afterwards, however, a third inquest took place. "There," so states a review of these remarkable proceedings in the New York Sun of May 16, 1880, "were the widow of Timothy Monroe, his son, and the man Cron, who was with him in the boat when he was drowned. They had been induced to come from Canada. The clothing of the dead man, which had been nailed up in a box when he was first buried, was submitted to the three witnesses. They each and all recognized every article as Timothy Monroe's. The wife, with great emotion, identified her mending and darning of some of the garments. The eking out of one leg of the trousers with a different piece of cloth, because the pattern bought by the son had been scant, was dwelt on by the son and his mother. A portion of the contents of the pockets were religious tracts in English typography, and bearing the imprint of the British Tract Society, such tracts as then were circulated only in Canada. All three testified to the drowned man's being full whiskered and heavily haired upon his crown. Then came the formal inquest at Batavia. All of the coroner's jury were anti-Masons except two. The jury sat in the midst of an immense concourse of people. Weed and his Morgan Committee were conspicuously absent. Monroe's widow, his son, and Cron positively identified the remains to be Timothy Monroe's. His clothing was identified by each of them. The tracts were put in evidence." The evidence of the dentist was met by the proof that the dead man had lost five of his teeth instead of two. "The Potters, father and son, proved that he was whiskered and not bald when found, and that when he was dug up, preparatory to the political inquest, he was whiskered, and not bald. The testimony was overwhelming. The verdict of the jury was unanimous." A pamphlet on this topic by Mr. Henry O'Rielly was published by the American News Company, in 1880.

After the death of Mr. Thurlow Weed, in November, 1882, a memorandum was found among his papers to the effect that Morgan had been actu-

likenesses with other members of the same family. From that moment "the effacing fingers" of time work rapidly.¹ There is but little continuity of appearance, and gradually all identification by expression is impossible. The eye, also, is gone; the mouth, even if the lips remain, retains no longer those undescrivable yet unmistakable peculiarities which distinguished the individual when living. We must then fall back upon the more undefaceable portions of the frame; the size of the body, the shape of the skull, the indications the skeleton offers of age. The hair and the teeth, however, form the chief means of recognition. The hair is chiefly valuable in disproving alleged identity, as where gray hair is found on a body claimed to be that of a person whose hair at death was as yet auburn or black; and cases are known, such as those of Lucrezia Borgia and of Cromwell, in which identification was claimed by comparing hair taken from a body after death, with a lock taken a short time before death from the living person.² But the chief mode of identification, when the features of the deceased have lost their shape, is by the teeth. Peculiarities as to the teeth, though by no means conclusive, since many persons may have teeth of the same kind, form admissible modes of identification. And proof of this kind is strengthened by artificial marks on teeth, produced by dentistry; and may be made still more cogent by the production of dentists' casts, and by the testimony of dentists by whom particular operations were effected.³

ally drowned by leading Masons, who communicated the fact to Mr. Weed. There are several objections to this statement. (1) It is hard to see why such a damaging statement should have been made to Mr. Weed, who led the anti-Masonic party. (2) If made to him, why did he suppress it? It would have given him a political engine of irresistible power. (3) By suppressing it, Mr. Weed exposed himself to risks which a person of his prudence would be unlikely to assume. He would, in truth, have been an accessory after the fact.

In Clewes's Case, there was an iden-

tification twenty-one years after burial. Burrill Cir. Ev. 681; 3 Whart. & St. Med. Jur. (4th ed.) §§ 627 *et seq.*

¹ See as to question of identity of a skull, *Gray v. Com.*, 101 Penn. St. 380, cited *supra*, § 633.

² *Supra*, § 779.

³ See generally on this topic, 2 Wh. & St. Med. Jur. §§ 321, 1022; *R. v. Cheverton*, 2 F. & F. 833; *Lindsay v. People*, 63 N. Y. 143; *Murphy v. People*, 63 N. Y. 590; *Foster v. People*, 63 N. Y. 619; *Hamby v. State*, 36 Tex. 523. For a case of identification of a head preserved in alcohol, see *State v. Vincent*, 24 Iowa, 570. *Supra*,

§ 805. We have already had occasion to observe that photographs, as well as pictures, are admissible, when duly verified, in

§ 326. See as to proof of autopsy, 3 Wharton & St. Med. Jur. 4th ed. (1884) §§ 702 *et seq.*

A brother of the deceased, on a trial for murder, testified that, five months after the alleged murder, he saw a body claimed to be the body of the deceased, and examined it; he testified to several points of resemblance. He was asked by the government whether it was, in his opinion, the body of the murdered man. It was held that the question was incompetent, the question being for the jury, the body having been much decomposed and he having stated all the points of resemblance. *People v. Wilson*, 3 Parker C. R. 199.

In *Lowenstein's Case* (Albany, 1874, p. 332), Judge Learned thus sums up the evidence of identity of the remains: "The question for you is, was that body John D. Weston's body? The facts are, first, that it was the body of a one-armed man; the same arm was gone in both cases. Another fact which the physicians testify to is the peculiar flexibility of the finger. There is some discrepancy as to whether it was the same finger in the body as with Weston, I think. The third peculiarity was the separation of the teeth; they were further apart than usual. That peculiarity is said to have existed in both. As to the size and mode of wearing a moustache, the man is said to be, I think, of such a size as to correspond with John D. Weston. Then you have the further fact about his coat, pantaloons, and vest, and I think the shoes and hat and the alpaca coat; they are all identified by John Weston's wife. You will remember if I am wrong in the details. She testified to shorten-

ing the pantaloons and to mending the coat. There is also a pair of eyeglasses which I think she identified. At any rate she says she fastened a similar pair to his suspenders."

In *Goldsborough's Case*, reported in Warren's *Miscellanies*, Blackwood's ed. 1845, p. 93, the evidence was that the murder of Huntley, the deceased, was committed in 1839. The body was found in 1841, by an open drain. The chief point of identification relied on was a peculiar tooth which Huntley had on one side of his head. Only one half of the bones of the supposed body were found, and none of the clothing was discovered. The skull was fractured and filled with dirt, and not a single particle of flesh or muscle remained. As to the tooth, Mr. Warren says (pp. 106-7):—

"When first discovered, it would appear certain that there was a very prominent tooth on the left side of the lower jaw, which arrested the attention of all those who saw it; but soon afterwards, owing to the inconceivable carelessness and stupidity of those intrusted with the custody of such all-important articles, and who permitted every idle visitor to have free access to them, the tooth in question, alas, was lost! I confess I have seldom experienced such a rising of indignation as when this remarkable deficiency of evidence was thus accounted for."

"He," the judge, "left it fairly to them," the jury, "to judge whether sufficient had been done to satisfy them beyond all reasonable doubt that the bones produced were those of Huntley, but accompanied by a strong expression of his own opinion that the evidence was of an unsatisfactory nature. Unless they were satisfied on

order to identify both living and dead.¹ Their weight, however, when admitted, depends largely upon extraneous circumstances. Not only must they be verified, as has just been noticed, but due allowance must be made for the fact that of some persons good photographs are rarely taken; that photographs taken of the same person in different lights or under different influences often do not resemble each other; and that photographs, as well as pictures, may be used as instruments of fraud. These considerations, however, go to the weight to be attached to the evidence when in. Of the admissibility of photographs of persons, supposing their fairness and relevancy to be established, and the negatives if required, produced, there is no question.² Photographs

Inference
as to photo-
graphs.

that head there was an end of the case; for the very first step failed proving that Huntley was dead. If, however, on the whole of the facts, they should feel satisfied in the affirmative, then came the two other great questions in the case had Huntley been murdered? And by the prisoner at the bar?" The defendants were properly acquitted.

As to identification by teeth, see further, *Com. v. Webster*, Bemis's Report; *Lindsay v. People*, 63 N. Y. 143; *Morgan's Case*, *supra*; and compare 2 Wh. & St. Med. Jur. §§ 289, 1218.

For identification by inspection, see *supra*, § 312.

In the 5th ed. of Casper's *Gericht. Med.* (Liman's ed. Berlin, 1871, Bd. II. s. 120), will be found several curious cases of identification which are given, as translated, in the 8th edition of this work, § 804.

Identification Twenty-one Years after Death.—Of this a case, dependent upon peculiarities of the teeth, and of certain articles of the deceased found near his body, is given in *R. v. Clewes*, 4 C. & P. 221.

In an interesting North Carolina case (*State v. Williams*, 7 Jones N. C. 446), where shortly after the disappearance of the deceased, a woman named Peggy Hilton, human bones, and hair-pins,

similar to some which she had shortly previously purchased, were found in a heap of burned logs near her house, it was held that there was evidence to go to the jury tending to establish the identity of the remains, and that their verdict establishing such identity would not be set aside.

Several instances of confusion of testimony as to the identity of a dead body are reported in 3 Wh. & St. Med. Jur. 4th ed. §§ 627 *et seq.* The trial of Uddersook, in West Chester, Pennsylvania, in November, 1873, for the murder of Goss, hinged on the question whether certain remains, found shortly after the disappearance of Goss, were those of Goss. The question of this identity, and the weight to be allowed to inferential evidence as to the identification of human remains, are discussed with remarkable clearness and accuracy by Judge Butler, in his charge to the jury—a charge which is given in full in the Appendix to Whart. on Hom.

¹ *Supra*, § 544. See as to pictures and photographs 3 Whart. & St. Med. Jur. 4th. ed (1884) § 670.

² *Supra*, § 544; *Ruloff v. People*, 45 N. Y. 213–25; *S. C.*, 5 Lansing, 261; and see, also, *Marcy v. Barnes*, 16 Gray, 161; *Taylor Will Case*, 10 Abb. N. S. 300; 7 Alb. L. J. 50; *Shaible v. Ins.*

of scenery, when verified, are also admissible, though dependent, even more than photographs of faces, on the standpoint from which they are taken, and the conditions of light and shade under which they were made. In the Tichborne perjury case, the defence put in evidence a photograph of a "grotto," the character of which was involved in the issue; and this photograph was so unreliable as to invoke the severe criticism of the court. But the question of accuracy is for the jury: the photograph, if proved to be fairly taken from the disputed object, is clearly admissible.¹

Identification by picture has been already noticed.²

§ 806. We have just noticed what may be called the objective conditions of identification; and of these the chief is that the object which it is sought to identify must have continued virtually the same during the time over which the witness's memory runs. We must, however, next remember, that the subjective conditions of identification—i. e., those depending upon the identifying witness—are to be considered before we come to a satisfactory result.

These conditions are as follows:—

1. *Opportunities of Observation.*³—A witness having but a casual acquaintance with a party is entitled to comparatively little weight after a short lapse of time. On the other hand, the most intimate acquaintance in former years will not insure accuracy in face of a powerful bias. Lady Tichborne was determined to find her lost child, and this determination so swayed her as to lead her to recognize an impostor as her son.

2. *Tenacity of Memory.*⁴—Memory in children is more tenacious than with adults, but less discriminating, seizing often on features peculiarly evanescent. With adults a good deal depends upon natural gifts of discrimination, a good deal upon the object which we have in view in studying a face. Some men rarely forget a face they have once seen; and it used to be stated of General Scott, that he recollected the faces, though not the names, of soldiers of

Co., 9 Phila. 136; 3 Whart. & St. Med. J. 670. As to fallibility of photographs, see Popular Science Monthly, April, 1875, p. 710; Morse's Famous Trials, 167; Uddersook v. Com., 76 Penn. St. 340; Appendix to Whart. on Hom. 670; *supra*, § 544.

¹ Morse's Famous Trials, 167.

² *Supra*, §§ 312, 544.

³ *Supra*, § 377. That hearsay is inadmissible proof of identification, see *Hopt v. People*, S. C. U. S. 1884.

⁴ *Supra*, § 378.

his command with whom his acquaintance was remote and slight. And there is no question that the power of distinguishing countenances may be excited by a particular crisis. We recollect faces on which our attention has been concentrated in proportion to the vividness of the concentration. And police officers sometimes acquire the power of catching a glimpse in a moment that enables them to identify the person thus seen though afterwards skilfully disguised.¹

3. *Capacity to make allowance for the Changes of Place and Time.*—We do not readily recognize persons in places in which we do not expect them to be. And we must allow for the fact that when several years have passed, expressions familiar to us disappear, and unfamiliar expressions take their place.²

4. *Freedom from Bias.*—The effect of bias, in this connection, has been already discussed.³

§ 807. That in question of identity we have after all to go back to opinion has been already shown. A witness says, "The person in question was A." This is opinion. A jury infers, from marks of identity or dissimilarity, that identity is proved or disproved. This, again, is opinion, but it is opinion more primary and more reliable than that of witnesses speaking from the impressions produced on themselves. And recollecting how easily opinions as to identity are affected by prejudice, we must conclude, when we rest on the opinions of witnesses as our authority, that the two great constituents of reliability are (1) familiarity with the person in controversy, and (2) freedom from personal or party prejudice.⁴

¹ See *supra*, §§ 373 *et seq.*

² See fully *supra*, §§ 13, 27, 373.

³ *Supra*, § 377.

⁴ In the Tichborne perjury prosecution (*R. v. Orton*, special report), before Cockburn, C. J., and the judges of the Queen's Bench, in 1876, the following distinctions were taken:—

Intimacy of acquaintance and closeness of relationship are not conclusive when there are strong family or social prejudices affecting the issue.

Opinions of witnesses are entitled to less weight than facts on which a jury

base an inference, *e. g.*, the size of the foot, as detailed by a shoemaker; marks on the body; habits and recollections of the claimant, as compared with those of the person whom he is supposed to simulate.

That identity rests upon opinion see *supra*, §§ 13, 17; and see, also, *Com. v. Cunningham*, 104 Mass. 545. For questions of identity see 3 Whart. & St. Med. Jur. 4th ed. §§ 620, 643, *et seq.*; Amos's Great Oyer, 206; Howell's St. Tr. vol. xxviii.; Gentleman's Mag. Oct. 1772; *ibid.* 1764, p. 404; *ibid.* 1749,

§ 808. A witness swearing to the identity of a person produced with a person whom the witness had seen on a prior occasion may be tested by presenting to him a third person, as to whose similarity with the person in controversy he may be asked. Mr. Amos¹ tells us, that a woman, on a trial for burglary in which her house and person had been plundered, swore directly to the prisoner being the offender; but when the verdict of guilty was almost rendered, upon the sheriff suggesting that a man tried a day or two before had very much the same appearance, the latter was brought into court, and the prosecutrix immediately transferred her "conviction" from the one to the other. But there must be a direct presentation of such second person to the witness in presence of the court and jury. It is ordinarily inadmissible, in order to discredit proof of identity, to prove that there are other persons looking like the party in question within observation at the same time, such evidence being secondary. And it has been held in Massachusetts that, after evidence has been introduced by the defendant in a trial for murder that the person alleged to have been murdered was seen alive afterwards, the government cannot call witnesses to prove that, about the time of the alleged murder, a person so strongly resembling the person alleged to have been murdered, as to have been mistaken for him by persons well acquainted with the latter, was seen in the neighborhood where the murder was alleged to have taken place.²

§ 809. By the English common law, as accepted generally in the United States, at the close of a continuous absence abroad of seven years, during which time nothing is heard of the absent person, by those most likely to have heard of him if alive, death is presumed, as a presumption of law open to be rebutted by proof or counter presumptions.³ But if there is no proof of unexplained absence, the

pp. 139, 186, 261; Spicer's Judicial Dramas, London, 1872, p. 114; Chambers's Misc. vol iv.; Lond. Med. Gazette, vol. viii.; Salome Muller's Case, Pamph. N. Orleans, 1846; Lord Aberdeen's Case, 3 Whart. & St. Med. Jur. (4th ed.) §§ 620 *et seq.*; Devlin v. People, 104 Ill. 504.

¹ Great Oyer, etc., 265. As to inspection see *supra*, § 312.

² Com. v. Webster, 5 Cush. 295.

³ Whart. on Ev. § 1274. As to meaning of the term "abroad," or "beyond seas," see Whart. Crim. Law, 8th ed. § 1691. That "honest belief" of the wife's death within the seven years is

mere lapse of time, even supposing that it would make the party eighty years old if living, is not by itself enough to prove death. It is otherwise when the party would have reached the limits beyond which life, according to ordinary observation, is improbable, though even when one hundred years is reached the conclusion is not absolute.¹ With other circumstances (*e. g.*, non-claimer of rights, or exposure to peculiar sickness or other calamity,² with disappearance), death at a far earlier period may be inferred. The presumption, in such cases, is of fact, not of law.³ And it is modified in modern times by the facility of travelling, which enables persons to suddenly escape observation by taking refuge in countries in which they may escape notice from prior acquaintances.⁴

§ 810. The presumption of continuance of life, which exists in cases where a person living a given time since is inferred to be living now, is necessarily variable, readily yielding to the presumption, already noticed, derivable from the expiration of a period beyond which the continuance of life is improbable.⁵ And the presumption of innocence, as has been already noticed, may be invoked in criminal prosecutions, to either weaken or strengthen the presumption that the life of a particular person continues.⁶

irrelevant, see *R. v. Bennett*, 14 Cox C. C. 45. Absence unheard of in another State of the American Union is equivalent to absence beyond seas. *Newman v. Jenkins*, 10 Pick. 515; *Innis v. Campbell*, 1 Rawle, 373. See cases cited in Whart. Crim. Law, 8th ed. § 1691. Cf. articles in Irish Law Times, reprinted in 14 Cent. L. J. 287, 302, 345. See, as to inferences of death, 3 Whart. & St. Med. Jur. 4th ed. (1884), §§ 540 *et seq.*

¹ See *Keller v. Stuck*, 4 Redf. (N. Y.) 294.

² *Lancaster v. Ins. Co.*, 62 Mo. 121.

³ Whart. on Ev. § 1275. As to presumption of survivorship see Whart. on Ev. § 1280; *Coye v. Leach*, 49 Mass. 371.

⁴ See remarks of Shadwell, V. C., in *Watson v. England*, 14 Sim. 281. See, also, *Corbishley's Trusts*, *In re*, 14

Ch. D. 846, and comments in London Law Times, May 1, 1880.

⁵ See *Bowden v. Henderson*, 2 Sm. & Giff. 360; *Shown v. McMackin*, 9 Lea, 601. *Supra*, § 809; *infra*, § 812.

⁶ *Supra*, § 171; *R. v. Twynning*, 2 B. & A. 386; *R. v. Lumley*, 1 L. R. C. C. 196; 38 L. J. M. C. 86; and 11 Cox, 274, S. C. See further *R. v. Jones*, 11 Cox, 358; compare, as to presumptions in bigamy prosecutions, *supra*, § 171; Whart. Crim. Law, 8th ed. §§ 1691 *et seq.*; *R. v. Harborne*, 2 A. & E. 540; *R. v. Mansfield*, 1 Q. B. 449. See, also, *Lapeley v. Grierson*, 1 H. L. C. 498; *Kelly v. Drew*, 12 Allen, 107; *Williams's Est.*, 8 Weekly Notes, 310. Presumption of continuance of the life of a first wife, in an indictment for bigamy, has been regarded, after two years, as neutralized by presumption of innocence. *R. v. Willshire*, 44 L. T. N. S.

§ 811. As we have just seen, if it is shown that a party, who has gone abroad, has not been heard from for seven years by those (if any) who, if he had been alive, would naturally have heard of him,¹ he is presumed to be dead, unless the circumstances are such as to account for his not being heard from without assuming his death.² But there is no presumption as to when, during the seven years, the party died;³ and the time of death is to be collected inferentially (supposing the seven years have elapsed as above stated) from all the facts of the case.⁴

222; 6 Q. B. D. 366; cited, *supra*, § 171; *Squire v. State*, 46 Ind. 458; *Com. v. Jackson*, 11 Bush, 679; *Hull v. State*, 7 Tex. Ap. 593; *People v. Feilen*, 58 Cal. 218. But see *Hyde Park v. Canton*, 130 Mass. 505. That the party when last heard of was suffering with an incurable disease of necessarily rapid termination may destroy the inference of continuance of life. *Ackerman, Ex parte*, 2 Redf. 521.

¹ That there must be inquiry at his last place of residence, see *Wentworth v. Wentworth*, 71 Me. 72.

² *Steph. Ev. art.* 99, adopted in *Davie v. Briggs*, 97 U. S. 628; *White v. Mann*, 26 Me. 361; *Eagle v. Emmet*, 4 Bradf. N. Y. 117; *Merritt v. Thompson*, 1 Hilton N. Y. 550; *Clarke v. Canfield*, 15 N. J. Ch. 119; *Garden v. Garden*, 2 Houst. 574; *Gibbes v. Vincent*, 11 Rich. 323; *Ross v. Clore*, 3 Dana, 189; *Puckett v. State*, 1 Sneed, 355; *State v. Henke*, 58 Iowa, 457. See *Burr v. Sim*, 4 Whart. 150, and article in 29 Alb. L. J. 346.

³ *Re Phene's Trusts*, L. R. 5 Ch. 150. See, to same effect, *Re Lewes's Trusts*, L. R. 11 Eq. 236; L. R. 6 Ch. Ap. 356, and 40 L. J. Ch. 602, S. C.; *Lambe v. Orton*, 29 L. J. Ch. 286; *Thomas v. Thomas*, 2 Drew. & Sm. 298; *In re Benham's Trusts*, 37 L. J. Ch. 265, per Rolt, L. J., reversing decision by Malins, V. C., as reported in 36 L. J. Ch. 502; L. R. 4 Eq. 416, S. C.; *In re*

Peck, 29 L. J. Pr. & Mat. 95; *Dunn v. Snowden*, 32 L. J. Ch. 104; 2 Drew. & Sm. 201, S. C.; *Doe v. Nepean*, 5 B. & Ad. 86; 2 N. & M. 219, S. C.; *Nepean v. Doe d. Knight*, 2 M. & W. 894, in Ex. Ch.; 2 Smith L. C. 476, 492, 577, S. C. In this case Lord Denman, in pronouncing the judgment of the court, observes: "Inconveniences may no doubt arise, but they do not warrant us in laying down a rule, that the party shall be presumed to have died on the last day of the seven years, which would manifestly be contrary to the fact in almost all instances." 2 M. & W. 913, 914. See *Hull v. State*, 7 Tex. Ap. 593.

⁴ *White v. Mann*, 26 Me. 370; *Smith v. Knowlton*, 11 N. H. 197; *Stouvenel v. Stephens*, 2 Daly (N. Y.), 319; *McCartee v. Camel*, 1 Barb. Ch. 456; *Whiting v. Nicholl*, 46 Ill. 241; *Tisdale v. Ins. Co.*, 26 Iowa, 171; 28 Iowa, 12; *State v. Moore*, 11 Ired. 70; *Spencer v. Roper*, 13 Ired. (L.) 333; *Hancock v. Ins. Co.*, 62 Mo. 26.

See as to survivorship, 3 Whart. & St. Med. Jur. 4th ed. (1884), §§ 721 *et seq.*

The return of a person, presumed to have been dead, after an absence of over seven years, during which he has not been heard from, avoids any acts done by his representatives without judicial authority. *Mayhugh v. Rosenthal*, 1 Cincin. 492. *Supra*, § 597; *infra*, § 813.

§ 812. It has been incidentally observed that, aside from the general presumption of death arising from unexplained absence abroad for seven years, certain facts have been noticed by the courts as affording grounds on which inferences of death, more or less strong, may rest.¹

Fact of death inferred from other facts.

Among these facts may be noticed: Presence on board a ship known to have been lost at sea, the inference of death increasing with the length of time elapsing since the shipwreck;² exposure to peculiar perils, to which the death may be imputed if the party has not been subsequently heard from; ignorance, as to such person, after due inquiry, of all persons likely to know of him if he were alive; cessation in writing of letters, and of communications with relatives, in which case the presumption rises and falls with the domestic attachments of the party. Thus, death may be inferred by a jury from the mere fact that a party who is domestic, attentive to his duties, and with a home to which he is attached, suddenly, finally, and without explanation, disappears. It is scarcely necessary to say that evidence tending to rebut such presumption (*e. g.*, proof that the alleged deceased had been heard from by letter, or was personally warned in a litigated suit) is always relevant for what it is worth. And in any view, death is a matter of inference, not of demonstration.³

¹ Best on Evidence (1870), § 409. See *R. v. Twining*, 2 B. & A. 386; *R. v. Harborne*, 2 A. & E. 540. In the latter case Lord Denman said: "I must take this opportunity of saying that nothing can be more absurd than the notion that there is to be any rigid presumption of law on such questions of facts, *without reference to accompanying circumstances, such, for instance, as the age or health of the party*. There can be no such strict presumption of law. It may be said: Suppose a party were shown to be alive within a few hours of the second marriage, is there no presumption then? The presumption of innocence cannot shut out such a presumption as that supposed. I think no one, under such circumstances, could presume that the party was not alive at

the time of the second marriage." Proof, therefore, that the party was alive twenty-five days before the second marriage, was held to overcome the presumption of innocence; which, on the other hand, prevailed in *R. v. Twining* against proof that the decedent had been heard of alive one year previous to the marriage. To the same effect is *Lapsley v. Grierson*, 1 H. L. C. 498.

² See Cockburn, C. J., charge in *R. v. Orton*, for an able exposition of this presumption. *Sillick v. Booth*, 1 Y. & C. 117; *Ommaney v. Stilwell*, 23 Beav. 328; *Patterson v. Black*, 2 Park. on Ins. 919; *Garry v. Post*, 13 How. Pr. 118; *Hudson v. Poindexter*, 42 Miss. 304. But see *Bowditch v. Jordan*, 131 Mass. 321.

³ See Whart. on Ev. § 1277 for cases.

§ 813. In all questions relating to the authority of the parties to whom letters testamentary or administrative are granted, such letters are *prima facie* proof of the death of the alleged decedent, and are conclusive in cases where there is "no plea in abatement denying the death of (the principal), and setting up the consequent invalidity of the letters of administration." Such letters, also, are conclusive as to parties and privies; but are nullities as to the alleged decedent supposing he should turn up alive.¹ And between strangers, when the fact of death is to be proved, letters of administration to his estate are *res inter alios acta*, and are inadmissible.²

§ 814. The question of death without issue is one of fact, to be determined on all the circumstances of the case.³

§ 815. The length of time after which it is to be presumed that a ship, which has been unheard of, is lost, is to be determined by the inferences to be drawn from the concrete case. As a basis of proof, mere rumors are not sufficient; there must be reliable information. If there are any indications of foundering,—*e. g.*, a violent storm at a particular point where the ship was, her unseaworthiness, remnants of wreck,—the loss may be put earlier than would be permissible if the ship had not been heard of at all. But there must be proof of the ship having left port.⁴

IX. PRESUMPTIONS OF UNIFORMITY AND CONTINUANCE.

§ 816. When a particular condition of things (*e. g.*, coverture), which has the capacity of endurance, is shown to exist, the burden is on the party who seeks to prove its termination, supposing such termination be claimed to have occurred prematurely. It is sometimes said that in such cases the law presumes the continuance of the condition. Such, however, is not the case. Some conditions, such as infancy, are by their nature transient, while others, such as the possession of wealth, are subject to such vicissitudes that their continuance can

¹ The cases will be found collected in § 1278; *Mayhugh v. Rosenthal*, *ut* Whart. on Ev. § 1278; *Lavin v. Emigrant Bank*, 9 Reporter, 541. *supra*.

² Whart. on Ev. § 1279.

³ See *supra*, § 597; Whart. on Ev.

⁴ See Whart. on Ev. § 815, for cases.

only be contingently assigned. The question, as to all things liable to change, is not one of legal presumption, but of burden of proof.¹ And the conclusion is that when I once establish a juridical relation in itself not so limited as to time as to have expired before suit instituted, it is not necessary for me to prove the continuance of the relation. The burden is on my antagonist to prove that the relation has ceased to exist; though, as has just been said, there is no presumption of law against him which, when the evidence is all in, can outweigh any preponderance in such evidence in his favor.² We are therefore to understand that the presumption of continuance, as it is called, is simply a mode of determining on which party lies the burden of proof. In this sense we are justified in holding that the continuance of an existing condition is a presumption of fact, dependent for its intensity on the circumstances of the particular case. The burden is on the party seeking to show change, and if he fails to show it, he loses his suit.³ But the question is one dependent on the relation of conditions to time. A state of war, for instance, existing yesterday, will in this sense be presumed to continue to-day; but it will not be presumed to continue after the lapse of ten years. I look at a block of houses in a large city, and I am justified in

¹ See *supra*, §§ 320-6.

² See Heffter, App. to Weber, 280; *Scales v. Key*, 11 A. & E. 819; *Meroer v. Cheese*, 4 M. & Gr. 804; *Price v. Price*, 16 M. & W. 232; *Lum v. State*, 11 Tex. Ap. 483. It is in this sense that we are to understand the term "presumption," as used in the following as well as in other opinions:—

"A partnership once established is presumed to continue. Life is presumed to exist. Possession is presumed to continue. The fact that a man was a gambler twenty months since, justifies the presumption that he continues to be one. An adulterous intercourse is presumed to continue. So of ownership and non-residence. *Walrod v. Ball*, 9 Barb. 271; *Cooper v. Dedrick*, 22 *ibid.* 616; *Smith v. Smith*, 4 Paige, 432; *McMahon v. Harrison*, 2 Seld. 443; *Sleeper v. Van Middlesworth*, 4 Denio, 431; *Nixon v. Palmer*, 10 Barb.

175. This analogy is fairly applicable to the present case, and justifies the admission of this evidence." *Hunt, C., Wilkins v. Earle*, 44 N. Y. 172. See, also, *R. v. Lilleshall*, 7 Q. B. 158. As to the inference of continuance of the arrangements of a "drinking saloon," see *Com. v. Collins*, 134 Mass. 203.

³ See Whart. on Ev. § 1284.

"A state of things once set up must be presumed to continue unless there is evidence to displace that presumption." *Coleridge, C. J., R. v. Jones*, 48 L. T. (N. S.) 768; a case of bigamy, when the life of the first wife was presumed to continue until the expiration of the seven years after she was last heard from. But the "evidence" referred to by Lord Coleridge, may, as the case shows, be a counter presumption, as well as an independent fact. See *supra*, § 810.

presuming that the same tenants that are in them to-day will be in them to-morrow. But it is otherwise when I look forward as far as twenty years. When the twenty years are past, it is not probable that a single one of these tenants will remain. Anger, directed to a particular person, once roused, will be presumed to continue during hot blood, but not during the snows of many years. In fact, so far from continuance being a legal presumption, the presumption, in things dependent upon human conditions, in the long run, is the other way. Man never continueth in one stay. Of what will happen ten years hence, the only presumption that can be offered with anything like certainty is, that there will be a change, at least in the actors in the drama, from what is happening to-day. The time required for the change depends upon the nature of the object. Fifty years ago the houses in one of our western cities did not exist. Ten minutes ago, the man whom I now see standing in front of one of those houses was in his counting-room, or in the cars. The presumption of wealth, which may be sought as the explanation of a murderous assault, may have obtained five years ago as to a man in good business, but cannot continue after a succession of commercial disasters. We cannot, therefore, speak of a legal presumption of continuance, when, if we are to draw any inference that would be permanently applicable, it would be that of change. And yet, for short calculations, so far as is consistent with the inductions of social science, we are justified in saying, as a means for adjusting the burden of proof, that the presumption is so far in favor of continuance, that the burden is on a party who seeks to show a change from a condition which, when we last heard from it, was settled, and which, from the nature of things, would probably exist to-day unchanged. But the presumption, as it is called, even as to short calculations, is a mere inference that that which has been, will be, all other things remaining the same.¹ This presumption extends

¹ "In a second class of cases, time will enter as a principal ground of similarity. When we hear a clock pendulum beat moment after moment, at equal intervals, and with a uniform sound, we confidently expect that the stroke will continue to be repeated uniformly. A comet having appeared several times at nearly equal intervals,

we infer that it will probably appear again at the end of another like interval. A man who has returned home evening after evening for many years, and found his house standing, may, on like grounds, expect that it will be standing the next evening, and on many succeeding evenings. Even the continuous existence of an object in an

to all established natural processes, among which that of human gestation may be specified.¹

§ 817. It has been also ruled as a presumption of fact, for the purpose, in like manner, of determining the burden of proof, that a party resides in the last place known to have been accepted by him as his residence, unless he has shown that he retains such residence no longer.²

Residence
presumed
to be con-
tinuous.

The same inference is applicable to the settlement of a pauper, and to domicil.³ Yet, as we have seen, presumptions of this class are purely artificial. It is necessary to place a person who has wandered away somewhere; and we, therefore, place him in the spot where he was last heard from, though the very evidence that shows he was in it shows he has left it.

§ 818. Occupation and possession, for the like purpose, are inferred to be continuous; the inference varying with the person occupying, the thing occupied, and the place and period of occupation.⁴ For the same purpose, also, ownership is presumed to continue until alienation.⁵ It is sufficient, therefore, in cases of larceny, to prove that the goods stolen belonged, a short time before the stealing, to the alleged owner. The burden to prove alienation will be on the defence.⁶

Occupancy
presumed
to be con-
tinuous.

§ 819. Habits of individuals may come up for comparison in issues of identity, it becoming a material question whether a claimant has the characteristic traits of the person with whom he pretends to be identical. In such cases "habits are a means of identification, though with strength in proportion to their peculiarity."⁷ Such admissibility rests on the fact that habits become a second nature, and that special aptitudes cannot readily be unlearned, special characteristics

Habit pre-
sumed to
be con-
tinuous.

unaltered state, or the finding again of that which we have hidden, is but a matter of inference to be decided by experience." Jevon's *Principles of Science*, i. 252.

¹ See 3 Whart. & St. Med. Jur. (4th ed.), §§ 41 *et seq.*; *Baker v. State*, 47 Wis. 111; *Cunningham v. State*, 65 Ind. 377; *Crawford v. State*, 7 Baxt. 41.

² *Ripley v. Hebron*, 60 Me. 379.

³ Whart. on Ev. § 1285.

⁴ *Smith v. Stapleton*, Plowd. 193; *Winkley v. Kaime*, 32 N. H. 268; *Currier v. Gale*, 9 Allen, 522; *Rhone v. Gale*, 12 Minn. 54.

⁵ Whart. Crim. Law, 8th ed. § 862; *Magee v. Scott*, 9 Cush. 148.

⁶ *Ibid.*

⁷ *Agnew, C. J., Udderzook v. Com.*, 76 Penn. St. 340.

cannot readily be extinguished, special tricks of manner cannot readily be overcome.¹ But questions of identity² are an exception to the general rule, which is, that evidence of habit is inadmissible for the purpose of showing that a particular person did or did not do a particular thing. Another exception is that when a series of writings of a particular person are in evidence, a litigated writing imputed to him may be tested by comparison with the writings proved to emanate from him.³ It has also, as we have seen,⁴ been held admissible to prove habit or system in order to rebut the defence of accident, or to infer *scienter*. We have a right, again, to infer, as a presumption of fact, that mental conditions continue unchanged, unless there be reasons to infer the contrary. It is on this ground that we infer the continuance of sanity and of chronic insanity,⁵ and of purposes once deliberately formed.⁶ The habit, also, of a writer, in using words in a particular sense, may be shown in certain cases of latent ambiguity.⁷

§ 820. As between parties still living, coverture, once proved, is inferred to continue;⁸ and, hence, when once established, its burdens and obligations will be regarded as existing until its dissolution be shown.⁹ But such inference does not operate retrospectively, so as to lead to the conclusion that the parties who were married a year ago had been married for an indefinite period of time previously.¹⁰

§ 821. Solvency¹¹ and insolvency, when established, are inferred to continue until the contrary is proved, or until from the lapse of time a change of condition is probable.¹² An adjudication of bankruptcy may, within a limited range of time, afford an inference of insolvency.¹³

¹ For a series of acute observations on this principle see the charge of Cookburn, C. J., in *R. v. Orton*.

² In *Udderzook v. Com.*, 76 Penn. St. 340, habits of intoxication were admitted among the means of identification.

³ *Supra*, § 556.

⁴ *Supra*, § 32.

⁵ See *supra*, § 730.

⁶ *Supra*, §§ 734 *et seq.*, 784.

⁷ Whart. on Ev. § 962.

⁸ *Erskine v. Davis*, 25 Ill. 251.

⁹ *Supra*, § 810.

¹⁰ *Murdock v. State*, 68 Ala. 567.

¹¹ *Wallace v. Hull*, 28 Ga. 68.

¹² Whart. on Ev. § 821. The presumption of insolvency from a return of *nulla bona* is elsewhere noticed. *Supra*, § 612.

¹³ *Safford v. Grout*, 120 Mass. 20.

§ 822. States whose political origin is homogeneous are presumed to possess laws substantially the same. This presumption, however, does not extend to States whose jurisprudence springs from a different system, nor can we impute to a foreign jurisprudence idiosyncrasies we know to be peculiar to ourselves. But in any view, if we wish to prove a foreign law as distinguished from our own, we must prove such law as a fact.¹

Foreign laws presumed to be similar to our own.

§ 823. What are called popularly the laws of nature may be inferred to be constant until the contrary be proved.² The seasons, for instance, pursue, in the long run, a regular course, so that we may be entitled as a general rule to say that winter is cold and summer is warm; though this is open to proof that in an exceptional season the winter is comparatively mild or the summer is comparatively cool. Of this uniformity parties are supposed to have notice. It may be that a particular winter night may be so mild that a child might be exposed to it safely without shelter; but this will be no defence to a person negligently exposing a child on a winter night in such a way that it is seriously injured. It may be that a freshet may so swell a river that its shallows may be safely passed at low tide; but this will be no defence to a pilot, who without sounding runs his vessel aground on low tide, thereby negligently destroying life. It may be that an engine may, when left to itself, enter on the proper track; but this will be no defence to a switch-tender who neglects his post so that an engine is wrecked. It may be that the defendant was prevented from performing a duty incumbent on him by a storm; but if so, this must be shown. Hence it is that *casus*, or the extraordinary interruption of natural laws, must be proved by the party averring such interruption.³ In order, also, to permit inferences from certain natural conditions, these conditions must first be established.⁴ But where the conditions are the same, evidence of systematic constant phenomena (*e. g.*, snow in one place to prove snow in another place in the immediate vicinity) is relevant.⁵

Constancy of nature presumed.

¹ Whart. on Ev. §§ 314 *et seq.* And see McKenzie v. Wardwell, 61 Me. 136; Com. v. Kenney, 120 Mass. 387.

² *Supra*, § 37.

³ See *supra*; Whart. on Ev. 363.

⁴ Hawks v. Inhabitants, 110 Mass. 110. As to inferences from system see §§ 32 *et seq.*; Mill's Logic, ch. xiv.

⁵ Brooks v. Acton, 117 Mass. 204.

See *supra*, § 37.

§ 824. We are, therefore, to regard the ordinary sequences of nature as among the contingencies to be expected by reasonable men. Among these we may specify the falling of water from a higher to a lower level;¹ the spreading of fire in inflammable material;² the continuous movement of a railway train over the track, and the fact that the shock on meeting an obstacle is in proportion to momentum;³ and the effect of water in extinguishing fire.⁴

Physical sequences to be presumed.

§ 825. It is also a presumption of fact, that animals will act in conformity with their nature.⁵ Thus it is probable that cattle will stray;⁶ that horses will take fright at extraordinary noises and sights;⁷ and that dogs, proved to be ferocious, will do mischief when let loose in places where travellers pass.⁸ The habits and temper of animals, however, cannot be shown by proof of habits or temper of particular animals of the same species.⁹

So of probable habits of animals.

¹ Collins v. Middle Level Com., L. R. 4 C. P. 279.

² L. 30. § 3; D. ad leg. Aquil.; Tuberville v. Stamp, 1 Salk. 13; Filiter v. Phippard, 11 Q. B. 347; Smith v. R. R., L. R. 5 C. P. 98; Perley v. R. R., 98 Mass. 414; Higgins v. Dewey, 107 Mass. 494; Calkins v. Barger, 44 Barb. 424; Collins v. Groseclose, 40 Ind. 414; Gagg v. Vetter, 41 Ind. 228; Hanlon v. Ingram, 3 Iowa, 81; Averitt v. Murrell, 4 Jones (N. C.), 223; Cleland v. Thornton, 43 Cal. 437.

³ See R. v. Pargeter, 3 Cox C. C. 191; Caswell v. R. R., 98 Mass. 194; Wilds v. R. R., 29 N. Y. 315; Jones v. R. R., 67 N. C. 125.

⁴ Metallic Comp. Co. v. R. R., 109 Mass. 277.

⁵ See Carlton v. Hescocx, 107 Mass. 410; Rowe v. Bird, 48 Vt. 578.

⁶ Lawrence v. Jenkins, L. R. 8 Q. B. 274.

⁷ R. v. Jones, 3 Camp. 230; Hill v. New River Co., 15 L. T. N. S. 555; Lake v. Milliken, 62 Me. 240; Jones v. R. R., 107 Mass. 261; Judd v. Fargo, 107 Mass. 265; People v. Cunningham,

1 Denio, 524; Congreve v. Morgan, 18 N. Y. 84; Loubz v. Hafner, 1 Dev. 185; Moreland v. Mitchell County, 40 Iowa, 394.

⁸ When the character of an animal comes into question, the general inference is that he will follow the natural bent of the species to which he belongs. See question discussed fully in Whart. on Neg. §§ 923-5. But when the burden is on a party to prove a *scienter* in the owner of a mischievous animal, it is admissible to put in evidence particular facts; Worth v. Gilling, L. R. 2 C. P. 1; Judge v. Cox, 1 Stark. 285; Kittredge v. Elliott, 16 N. H. 77; Whittier v. Franklin, 46 N. H. 23; Arnold v. Norton, 25 Conn. 92; Buckley v. Leonard, 4 Denio, 500; Cockerham v. Nixon, 11 Ired. 269; McCaskill v. Elliott, 5 Strobb. 196; as well as general reputation; Whart. on Neg. § 924; but as to general reputation, see *contra*, Heath v. West, 26 N. H. 191.

⁹ Collins v. Dorchester, 6 Cush. 396; Hawks v. Charlemon, 110 Mass. 110. See, however, Darling v. Westmoreland, 52 N. H. 401.

§ 826. Taking men in bodies, and contemplating their action as a mass, there are certain incidents which may be regarded as probable, and which, under certain conditions, are presumable.¹ Thus it is to be inferred that persons will be passing a thoroughfare in such numbers as to make it dangerous to discharge at random a gun towards such thoroughfare;² that a sudden alarm, resulting in injury, will be produced by a shock of any kind given to a crowd;³ and that persons in fright will act instinctively and convulsively.⁴ It is on this principle that persons inciting a riot are indictable for hurts which are the ordinary incidents of riots, and which follow in the particular riot such persons incite.⁵

X. PRESUMPTIONS OF REGULARITY.

§ 827. As we have elsewhere seen, when a man and woman have lived together as man and wife, and have been recognized as such in the community in which they live, their marriage will be held *prima facie* conformable, so far as concerns its solemnities, with the practice of the *lex loci contractus*.⁶ The inference from their cohabitation, and from the

So of conduct of men in masses.

Marriage presumed to have been regular.

¹ See Whart. on Neg. § 108.

² See *Burton's Case*, 1 Str. 481; *People v. Fuller*, 2 Parker C. R. 16; *Triscoll v. Newark Co.*, 37 N. Y. 637; *Sparks v. Com.*, 3 Bush. 111; *State v. Vance*, 17 Iowa, 138; *Bizzell v. Booker*, 16 Ark. 308.

³ *Scott v. Shepherd*, 2 W. B. 892; *Guille v. Swan*, 19 Johns. 381; *Fairbanks v. Kerr*, 70 Penn. St. 86.

⁴ *R. v. Pitts*, C. & M. 284; *Adams v. R. R.*, 4 L. R. C. P. 739; *Sears v. Dennis*, 105 Mass. 310; *Coulter v. Exp. Co.*, 5 Lansing, 67; *Buel v. R. R.*, 31 N. Y. 314; *Frink v. Potter*, 17 Ill. 406; *Greenleaf v. R. R.*, 29 Iowa, 47.

⁵ Whart. Crim. Law, 8th ed. §§ 220, 1533.

⁶ *Supra*, § 170; *infra*, § 835; *Harrod v. Harrod*, 1 K. & J. 15; *R. v. Brampton*, 10 East, 302; *Raynham v. Canton*, 3 Pick. 293; *Redgrave v. Redgrave*, 38 Md. 93.

In an English prosecution for bigamy, in 1876 (*R. v. Creswell*, 13 Cox

C. C. 126; L. R. 1 Q. B. D. 446), it was alleged that the first marriage was invalid, having been contracted under these circumstances: While the parish church was under repair, divine service had been several times performed by a clerk in holy orders in a chamber at a private hall, and the marriage of the prisoner with his wife was solemnized there. There was no evidence that the chamber at the hall was licensed for the performance of divine service or marriage. It was held, that the presumption was that the place was duly licensed, and that the marriage was valid. Lush, J., said: "The fact of the marriage service having been performed by a person acting in a public capacity is *prima facie* evidence as to the person's legal capacity to perform the service. So the fact of its having been performed in a place by a person acting in such capacity is also *prima facie* evidence that the place was properly licensed for marriages.

admissions it involves, is that they were duly married prior to the period in which cohabitation began. This inference may be met and overcome by counter inferences. It may be shown that the cohabitation was clandestine, and the recognition only occasional, and explicable by other hypotheses than that of marriage.¹ It may also, when the evidence is faint, be overcome by the presumption of innocence, by force of which it is necessary, in order to convict, that the ingredients of the offence should be proved beyond reasonable doubt.²

§ 827 *a*. When prior concubinage is proved, the inference is that it continues; and consequently in such case marriage must be substantively proved, if set up.³

Presump-
tion of con-
tinuance of
concubin-
age.

§ 828. Legitimacy is assigned, by a rebuttable presumption, to all persons living in civilized countries.⁴ A

The presumption covers both the person and the place." To this effect see Lord Lyndhurst in *Morris v. Davies*, 5 Cl. & Fin. 163; and Lord Cottenham in *Piers v. Piers*, 2 H. L. C. 362. Compare *Harrison v. Southampton*, 22 L. J. Ch. 722; *Breadalbane Case*, L. R. 1 H. L. Sc. 182; *Cunningham v. Cunningham*, 2 Dow, 507; *Campbell v. Campbell*, L. R. 1 Sc. App. 193; *Sichel v. Lambert*, 15 C. B. (N. S.) 781.

In *De Thoren v. Attorney-General*, L. R. 1 App. Cas. H. L. (Div.) 686, it was ruled by the lord chancellor (Lord Cairns), that the presumption of marriage is much stronger than the presumption in regard to other facts. Hence when a matrimonial ceremony took place in Scotland, the parties being ignorant of an impediment, and afterwards removed, and when, believing themselves to be validly married, they lived together continuously for years as husband and wife, and were regarded as such by all who knew them, the marriage was held to have been established by the force of habit and repute, without any proof of mutual consent by verbal declaration. The inference to be drawn was that the

matrimonial consent was interchanged as soon as the parties were enabled, by the removal of the impediment, to enter into the contract. The *onus* of rebutting a marriage by habit and repute, it was said, is thrown on those who deny it. See remarks *supra*, §§ 170-6, 686.

¹ See *Clayton v. Wardell*, 5 Barb. 214; S. C., 4 Comst. 230; *Senser v. Bower*, 1 Penn. Rep. 450; *Jones v. Jones*, 45 Md. 159; S. C., 48 Md. 391; *Williams v. Williams*, 46 Wis. 464, with note in 18 Am. Law Reg. § 469.

² *Supra*, § 171. Best's Ev. § 349. In *Kopke v. People*, 43 Mich. 41, *supra*, § 533, it was held that in bigamy, where the proof was that the alleged first marriage was irregularly solemnized in another State, and there was no cohabitation, there must be independent proof of consent of the parties to such marriage.

³ See cases cited in Whart. on Ev. § 1297; *Williams v. Williams*, 46 Wis. 464.

⁴ 5 Co. 98 b; *Morris v. Davies*, 5 Cl. & F. 163; *Banbury Peerage Case*, 1 Sim. & St. 153.

child born in wedlock, before any judicial separation of his parents, is presumed to be their legitimate child, no matter how soon the birth be after the marriage;¹ though this presumption, which is one to which the law attaches great force, may be overcome by strong proof that the husband was incapable, on ground either of impotence or absence, of being father of the child;² or by other evidence showing the extreme improbability of such intercourse.³ When access is proved, it requires peculiarly strong evidence of non-intercourse to justify a judgment of illegitimacy.⁴ Separation, however, by a court of competent jurisdiction, even though there be no divorce, destroys the presumption, and the children born to the woman after the separation are *prima facie* illegitimate.⁵ But adultery on the wife's part, no matter how clearly proved, will not have this effect, if the husband had access to the wife at the beginning of the period of gestation, unless there should be positive proof of non-intercourse.⁶

§ 829. When a judicial record, properly authenticated, is put in evidence, the burden is on the party who assails it on account of latent imperfections of fraud.⁷ It is sometimes said that the law

¹ Best's Ev. § 349; *Fleming v. Fleming*, 4 Bing. 266; *Reed v. Passer*, 1 Peake, 233; *Sichel v. Lambert*, 15 C. B. (N. S.) 781, 787; *Stegall v. Stegall*, 2 Brook. 256; *Canjolle v. Ferrie*, 23 N. Y. 90; *Danelli v. Danelli*, 4 Bush, 60; *State v. Romaine*, 58 Iowa, 46; *State v. Worthingham*, 23 Min. 528; *State v. Herman*, 13 Ired. 502.

² *Morris v. Davies*, 5 Cl. & F. 163; *R. v. Mansfield*, 1 Q. B. 444; *Atchley v. Sprigg*, 33 L. J. Ch. 345; *Strode v. Magowan*, 2 Bush, 621; *Ward v. Dulaney*, 23 Miss. 410; *Herring v. Goodson*, 43 Miss. 392.

³ *Hawes v. Draeger*, 48 L. T. N. S. 518; 23 Ch. Div. 173.

⁴ See cases cited in Whart. on Ev. § 828. That parents are incompetent to prove non-access see *supra*, § 518.

Sir J. F. Stephen (Evid. art. 98) states the law to be, that "declarations by either parent as to sexual intercourse are not regarded as relevant

facts when the legitimacy of the woman's child is in question, whether the mother or her husband can be called as a witness or not, provided that in applications for affiliation orders, when proof has been given of the non-access of the husband at any time when his wife's child could have been begotten, the wife may give evidence as to the person by whom it was begotten."

⁵ *Sidney v. Sidney*, 3 P. Wms. 275; *St. George's v. St. Margaret's*, 1 Salk. 123.

⁶ *Bury v. Phillpot*, 2 My. & K. 349; *Head v. Head*, 1 Sim. & S. 150; *Com. v. Shepherd*, 6 Binn. 283; *Com. v. Stricker*, 1 Br. App. xlvii.; *Com. v. Wentz*, 1 Ashm. 269; *State v. Pettaway*, 3 Hawks. 623. See, as to proof of illegitimacy, 3 Whart. & St. Med. Jur. 4th ed. (1884), § 666.

⁷ Thus it will be assumed that when a jury is recorded as sworn, that they were sworn correctly. *Mitchell v. State*,

presumes all such records to be correct. But the true view is that while the burden is on those who would assail a record on its face regular,¹ yet when the issue is made, *e. g.*, when it is alleged that a record was fraudulently concocted, the question (unless it be on an indictment against the parties charged with the fraud) is to be decided by a preponderance of proof. But when fraud is the gravamen of a prosecution, then, to convict, it must be proved beyond reasonable doubt.²

Burden on party assailing judicial records.

§ 830. It is otherwise when we come to the construction to be given by a court when called to decide as to the legal sufficiency of the records of other tribunals. In such cases, between two permissible constructions, that most favorable to the validity of the record will be accepted.³

In error, necessary facts will be presumed.

Thus after a verdict, a court in review will assume that all facts necessary for the support of the verdict were proved, unless the contrary appear in the record duly before the court.⁴ Whatever facts are necessary to the support of a record statement will be presumed to have been duly proved.⁵ It will also be presumed by a court of error, when there is a general verdict in the court below on a series of counts, and a sentence on one of them, that this sentence was on the count to which the evidence applied.⁶ But presumptions of this class do not extend to the supply of statements necessary to make a record complete, or which should be the subject of independent articulate averments.⁷ Thus the omission of an averment of arraignment cannot be supplied by an appellate court.⁸ Jurisdiction, also, cannot be inferred, as to courts of limited jurisdiction, but must appear on the record.⁹ But justices of the

58 Ala. 417; *Phillips v. State*, 68 Ala. 469. And so as to grand jury. *Lumpkin v. State*, 68 Ala. 56.

¹ *State v. Hanna*, 84 Ind. 183; *State v. Nichols*, 29 Minn. 357; *Jones v. State*, 18 Fla. 889; *Territory v. Webb*, 2 N. Mex. 147.

² Whart. on Ev. § 1304. *Supra*, §§ 570, 620. That a statement of fact in a charge by a court will be presumed to be correct, see *People v. Gilbert*, 60 Cal. 108.

³ *People v. Bork*, 2 N. Y. Crim. Rep. 56.

⁴ *R. v. Waters*, 1 Den. C. C. 356; *R. v. Bowen*, 13 Q. B. 790; *People v. Petrea*, 92 N. Y. 129; *Beale v. Com.*, 25 Penn. St. 11; *People v. Sing Lum*, 61 Cal. 538; *Powell on App. Jur.* 158. For civil cases see Whart. on Ev. § 1305.

⁵ Whart. on Ev. § 1304.

⁶ Whart. Cr. Pl. & Pr. §§ 907 *et seq.*; *Davis v. State*, 6 Tex. Ap. 196.

⁷ Whart. on Ev. § 1305.

⁸ Whart. Cr. Pl. & Pr. §§ 689, 777.

⁹ Whart. on Ev. § 1308.

peace, and other judicial officers, though of special and limited powers, will be presumed to have acted regularly, as to a matter within their jurisdiction, unless the record shows the contrary. And a warrant of conviction, purporting to be founded on a preceding conviction, has been sustained in England, though it does not state that the evidence was given on oath, or in the presence of the prisoner.¹

§ 831. The legislature, whether federal or state, when acting within its constitutional range, is presumed to act in conformity with law, whenever the contrary does not plainly and expressly appear. Hence we must *prima facie* hold that the respective houses, as component parts of a legislature, act within their jurisdiction and agreeably to parliamentary usages and the rules of law and justice. It has therefore been held that a warrant issued by the speaker of a legislative house, at the instance of the house, for the arrest of a witness, need not contain any recital of the grounds on which it was founded.²

Legislative proceedings presumed to be regular.

§ 832. Documents, on their face duly attested, are presumed to have been executed in conformity with the local law of the place of execution, so far as to throw the burden of proving the contrary on the assailing party. When the place of execution, however, is a foreign country, the way in which the execution is to be proved must be determined by the rules of private international law.³

Formalities of documents presumed to be correct.

§ 833. For the purpose of determining the question of the burden of proof, it is assumed that a person acting as a public officer is authorized to act as such.⁴ Where a policeman, for instance, is resisted when executing a warrant, the burden of showing the illegality of his appointment (when not on its face illegal) is on the party resisting; though that the presumption is satisfied when it determines the burden is shown by the fact that when the evidence is all in, the question is to be decided on the merits. The same distinction is applicable in cases where an alleged officer is indicted for killing when attempting an arrest. If, when the killing took place he was acting as an officer, the burden is on the prosecution to show that

Officer presumed to be regularly appointed.

¹ Whart. on Ev. § 1308.

² Whart. on Ev. §§ 831, 1309.

³ See Whart. on Ev. § 1313.

⁴ See Whart. Crim. Law, 8th ed. §§ 1570, 1589, 1617, 1671. *Supra*, § 164.

he was not duly commissioned. But this means only that the initiative is on the party contesting his authority; for it would be absurd to say that the law presumes that all private persons claiming to be officers are to have any vantage ground, when the case comes up on the merits, as against those whose rights they invade. In this sense we are to hold that a person acting as a public or *quasi* public officer is to be so far recognized as such, that his appointment is to be treated as regular until the contrary be proved.¹ The category of officers, in the sense above stated, includes justices of the peace;² soldiers engaged in recruiting;³ constables and policemen;⁴ attorneys;⁵ and post officers and their employés.⁶ Even when a party is indicted for misconduct in office, it is sufficient, *prima facie*, to show that he acted in the particular office in which the misconduct is supposed. In such case it is not necessary to produce, on the part of the prosecution, the record of his appointment.⁷ On the trial of an ex-county treasurer, therefore, for embezzling money received by him officially, due execution of his official bond need not be proved by the prosecution.⁸

This presumption, however, such as it is, does not apply to special private agents,⁹ though the fact that a general agent is recognized as such by his principal makes it unnecessary for the party

¹ *R. v. Borrett*, 6 C. & P. 124; *R. v. Verelst*, 3 Camp. 432; *Riley v. Packington*, L. R. 2 C. P. 53; *R. v. Gordon*, 2 Leach C. C. 581; *R. v. Howard*, 1 M. & Rob. 188; *McGahey v. Alston*, 2 M. & W. 188; *R. v. Roberts*, 14 Cox C. C. 101; *R. v. Roberts*, 38 L. T. N. S. 690; *Bank U. S. v. Dandridge*, 12 Wheat. 70; *Sheets v. Selden*, 2 Wall. 177; *Mech. Bk. v. Union Bk.*, 22 Wall. 276; *Cabot v. Given*, 45 Me. 144; *State v. Roberts*, 52 N. H. 492; *Briggs v. Taylor*, 35 Vt. 57; *Fay v. Richmond*, 43 Vt. 25; *Com. v. Fowler*, 10 Mass. 290; *Com. v. McCue*, 16 Gray, 226; *Nelson v. People*, 23 N. Y. 293; *State v. Perkins*, 4 Zab. 409; *Stevenson v. Hoy*, 43 Penn. St. 260; *Conolly v. Riley*, 25 Md. 402; *Strang, Ex parte*, 21 Oh. St. 610; *Druse v. Wheeler*, 22 Mich. 439; *State v. Mayberry*, 3 Strobb.

144; *State v. Hill*, 2 Speers, 150. Whart. on Agency, §§ 44, 121. See *supra*, § 164.

² *Berryman v. Wise*, 4 T. R. 366.

³ *Walton v. Gavin*, 16 Q. B. 48.

⁴ *Berryman v. Wise*, 4 T. R. 366; *Butler v. Ford*, C. & M. 662.

⁵ *Pearce v. Whale*, 5 B. & C. 38. See *R. v. Newton*, 1 C. & K. 480.

⁶ *R. v. Rees*, 6 C. & P. 606.

⁷ *Clay's Case*, 2 East P. C. 580; *R. v. Rees*, 6 C. & P. 606; *R. v. Goodwin*, 1 Lew. C. C. 100; *Com. v. Fowler*, 10 Mass. 290; *People v. Cook*, 4 Seld. 67; *State v. Perkins*, 4 Zab. 409; *Com. v. Rupp*, 9 Watts, 114; *State v. Hill*, 2 Speers, 150.

⁸ *State v. Mims*, 26 Minn. 123.

⁹ *Short v. Lee*, 2 Jac. & W. 468; *Best's Ev.* § 357.

relying on such agency to prove a formal authorization as against the principal.¹ And the presumption does not apply in cases in which the evidence shows that the alleged appointment under which the supposed officer acted was a nullity.²

§ 834. When a person claiming to be a professional man is indicted for negligence as such, it is not necessary for the prosecution to prove that he had a legal right to the professional status he assumed. Nor is it necessary, when an expert is examined as a professional man, to put in evidence his diploma. In all such cases the party himself is estopped from denying that he is that which he claims to be; and if the object be to dispute his authority, the burden is on the party assailing this authority.³

So of person exercising a profession or business.

§ 835. On the same reasoning the acts of administrative or judicial officers are presumed to be regular, so far as to throw the burden of proof on the party collaterally assailing such acts on the ground of irregularity.⁴ Where it is alleged, for instance, that a warrant under which a police officer makes an arrest is defective (the defect not being patent on the procedure), the burden is on the party setting up the defect. Nor in such cases is it necessary for the warrant or other authorizing record to assert specifically all antecedent steps of procedure, not in themselves essential to jurisdiction, the averment of the taking of which may be assumed to be contained in the averments actually expressed. In such case the burden is on the opposite side to show that these steps were not actually taken.⁵

Action of officers and other functionaries presumed to be regular.

¹ See Whart. on Ev. § 1316; Merchants' Bank v. State Bank, 10 Wall. 604; Faneuil Hall Bank v. Bank of Brighton, 16 Gray, 534; Reed v. R. R., 120 Mass. 43; Hughes v. R. R., 36 N. Y. Sup. Ct. 222.

² Lambert v. People, 76 N. Y. 220. In Lambert v. People, *supra*, it was held that to sustain the allegation of the official status of a notary, in an indictment for perjury, it is necessary to show that the officer was *de facto* or *de jure*; and evidence is admissible in such case to prove the incompetency of the alleged notary to hold the office.

³ *Supra*, § 833; Whart. on Ev. § 1317.

⁴ R. v. Hinckley, 12 East, 361; R. v. Catesby, 2 B. & C. 814; Gosset v. Howard, 10 Q. B. 411; R. v. Stainforth, 11 Q. B. 66; R. v. Broadhempston, 1 E. & R. 154; U. S. v. Weed, 5 Wall. 62; Rolland v. Com., 82 Penn. St. 306; and other cases cited Whart. on Ev. § 835; People v. Stevens, 5 Hill (N. Y.), 616; People v. Cook, 8 N. Y. 67; Hightower v. State, 58 Miss. 636; Perkins v. Nugent, 45 Mich. 156.

⁵ R. v. Stainforth, 11 Q. B. 66; and other cases cited Whart. on Ev. § 835; *supra*, § 833.

The presumption just given is not limited to officers of state. Thus, in a prosecution for bigamy, where the marriage was proved by the witnesses present to have taken place at the parish church, and to have been solemnized by the curate of the parish, it was held unnecessary to prove either the registration of the marriage, or the fact of any license having been granted.¹

This presumption, however, is not to be extended so as to make it cover substantive independent facts as distinguished from facts which are the mere incidents of others duly established.²

It must be further kept in mind, as to presumptions of this class, that to throw the burden on the objector, the conduct of the officer must be on its face regular.³

§ 836. Where a public officer is prosecuted for misconduct, then

Burden of proof is on party charging public officer with misconduct.

when the case goes to the jury, there is no presumption, as we have seen, of special official virtue in his favor, the only privilege that he has to claim in this respect being the privilege of all persons charged with crime, that his guilt should be proved beyond reasonable doubt.⁴

All that is meant by the presumption, as it is called, immediately before us, is that a public officer is so far assumed *prima facie* to do his duty, that the burden is on the party seeking to charge him with misconduct. And this is in full harmony with the general rule above given, that on the actor lies the burden. The

¹ R. v. Allison, R. & R. 109. See *supra*, § 827 for other cases.

² "The presumption that public officers have done their duty, like the presumption of innocence, is undoubtedly a legal presumption; but it does not supply proof of a substantive fact. Best, in his treatise on Evidence, § 300, says: 'The true principle intended to be asserted by the rule seems to be, that there is a general disposition in courts of justice to uphold judicial and other acts rather than to render them inoperative; and with this view, where there is general evidence of facts having been legally and regularly done, to dispense with proof of circumstances, strictly speaking, essential to the validity of those acts,

and by which they were probably accompanied in most instances, although in others the assumption may rest on grounds of public policy.' No where is the presumption held to be a substitute for proof of an independent and material fact." Strong, J., U. S. v. Ross, 92 U. S. 283, 284, 285.

³ Whart. on Ev. § 1304; Welsh v. Cochran, 63 N. Y. 181; Lambert v. People, 76 N. Y. 220. *Supra*, § 833.

⁴ R. v. Tracy, 6 Mod. 30; R. v. James, 1 T. & M. 300; 2 Den. C. C. 1; U. S. v. Ross, 92 U. S. 283; People v. Coon, 15 Wend. 277; State v. McEntyre, 3 Ired. 171. See Whart. Crim. Law, 8th ed. § 1583. *Supra*, §§ 833, 835.

same reasoning applies in cases where the conduct of the officer comes collaterally in question. The burden is on those assailing such conduct; and so far, the conduct of such officer is *prima facie* presumed to be right.¹

§ 836 *a*. When an official or corporate act has been executed, and when in consequence of it a condition of things has continued for a considerable period, which condition of things would probably not have been acquiesced in had it not been duly authorized, such authority will be presumed. Thus the fact that a corporation has maintained a bridge and draw over a stream for fifteen years is sufficient evidence, on an indictment against a person for interference with the bridge, to show that the bridge was legally erected and maintained.² That it is not necessary to prove the charter of a domestic corporation has been already noticed.³

Authority
for corporate
or
official act
presumed.

§ 837. The mailing a letter, properly addressed and stamped, to a person known to be doing business in a place where there is established a regular delivery of letters, is proof of the reception of the letter by the person to whom it is addressed.⁴ Such proof, however, is open to rebuttal, and ultimately the question of delivery will be decided on all the circumstances of the case.⁵ In cases of registered letters the presumption may be strengthened by a receipt;⁶ in cases of ordinary letters, where there is no mail delivery, there is no presumption at all,⁷ and delivery must be substantively proved.⁸ The rule

Mailing
letter
prima facie proof
of delivery.

¹ Whart. on Ev. § 1319.

² Com. v. Chase, 127 Mass. 7; citing Com. v. Bakeman, 105 Mass. 53.

³ *Supra*, § 164 *a*.

⁴ See cases cited in Whart. on Ev. § 1323.

⁵ *Ibid.*; Reidpath's Case, 40 L. J. Ch. 39; U. S. v. Babcock, 3 Dillon C. 571; Freeman v. Morey, 45 Me. 50; Greenfield Bank v. Crafts, 4 Allen, 447; First Nat. Bank v. McManigle, 69 Penn. St. 156; Foster v. Leeper, 29 Ga. 294. See Tate v. Sullivan, 30 Md. 464; Lyon v. Guild, 5 Heisk. 175.

⁶ Best's Ev. § 403.

⁷ Billberry v. Branch, 19 Grat. 393;

James v. Wade, 21 La. An. 548.

⁸ First Nat. Bank of Bellefonte v. McManigle, 69 Penn. St. 159.

"Upon the subject of the admissibility of letters, by one person addressed to another, by name, at his known post-office addressed, prepaid, and actually deposited in the post-office, we concur, both of us, in the conclusion, adopting the language of Chief Justice Bigelow, in Com. v. Jeffries, 7 Allen, 563, that this 'is evidence tending to show that such letters reached their destination, and

as to letters, however, applies only to letters mailed at points other than that at which the party written to resides. Notices of local transactions, to persons living in the same place as that from which the notice is issued, should, it seems, be served personally.¹ To enable the presumption, in any case, to operate, it is essential that the letter should be addressed with specific correctness. Thus, it has been held that no presumption of delivery attached to a letter addressed, "Mr. Haynes, Bristol."²—The same inference from regularity, under the same limitations, may be drawn as to the delivery of telegraphic despatches;³ though ordinarily the original message should be produced.⁴

§ 838. A letter duly stamped and mailed is inferred, by a presumption of fact, to be delivered at the usual period for such delivery.⁵

§ 839. The post-mark on a letter, if decipherable, raises a presumption that the letter was in the post at the time and place specified in such post-mark, but this again is a rebuttable presumption.⁶

were received by the persons to whom they were addressed.' This is not a conclusive presumption; and it does not even create a legal presumption that such letters were actually received; it is evidence tending, if credited by the jury, to show the receipt of such letters. 'A fact,' says Agnew, J., *Tanner v. Hughes*, 33 Penn. St. 290, 'in connection with other circumstances, to be referred to the jury,' under appropriate instructions, as its value will depend upon all the circumstances of the particular case.' *Dillon, C. J.*, *U. S. v. Babcock*, 3 Dillon, 573.

¹ *Shelburne Bank v. Townsley*, 102 Mass. 177; *Ransom v. Mack*, 2 Hill, 587; *Sheldon v. Benham*, 4 Hill, 129.

² *Walter v. Haynes*, Ry. & M. 149. And see, as narrowing the rule, *Allen v. Blunt*, 2 Wood. & M. 121. *Cf. Phillips v. Scott*, 43 Mo. 86.

³ *Com. v. Jeffries*, 7 Allen, 548; *U. S. v. Babcock*, 3 Dillon, 571.

⁴ *Howley v. Whipple*, 48 N. H. 487. See *supra*, § 162.

⁵ See cases in Whart. on Ev. § 1324.

⁶ *Powell's Evidence*, 4th ed. 88; *R. v. Johnson*, 7 East, 65; *Fletcher v. Braddyl*, 3 Stark. 64; *Archangelo v. Thompson*, 2 Camp. 623; *Shipley v. Todhunter*, 7 C. & P. 680; *Stocken v. Collen*, 7 M. & W. 515; *Butler v. Mountgarrett*, 7 H. L. C. 633; *S. C.*, 6 Ir. Law R. (N. S.) 77; *U. S. v. Noelke*, 17 Blatch. C. C. 554; *New Haven Bk. v. Mitchell*, 15 Conn. 206; *Callan v. Gaylord*, 3 Watts, 321. See *Brand v. U. S.*, 18 Blatch. 384.

It is doubted whether the post-mark is evidence of date of forwarding in *Shelburne Bk. v. Townsley*, 102 Mass. 177.

§ 840. To other modes of settled and regular business delivery the same presumption applies.¹ Hence, where it was proved to be the usage of a hotel for letters addressed to guests to be deposited in an urn at the bar, and then to be sent, about every fifteen minutes, to the rooms of the guests to whom such letters were addressed, it was held to be a presumption of fact that a letter addressed to one of the guests, and left at the bar, was received by such guest.² In case of a denial, by the party addressed, of reception, then the case goes to the jury as a question of fact. Delivery to a servant, within the range of his duties, is also, it may be added, *prima facie* proof of delivery to the servant's master.³

Letters delivered presumed to have been received.

§ 841. If I should mail a letter to B., addressing him at his residence, and I should receive by mail an answer purporting to come from B., the fact that such an answer is so received makes a *prima facie* case in favor of the genuineness of the answer. The subalterns of the post-office are government officials, whose action is presumed to be regular; and if I can prove that B. lived at the place where he was addressed, then the burden is on him to show that he did not receive the letter, and that the reply mailed in response was not genuine.⁴

Letter in answer to one mailed to the writer presumed to be genuine.

§ 842. It is otherwise, so has it been argued, as to telegraphic despatches, when forwarded not in original but in copy, and by private, not public agents.⁵

But not telegrams.

§ 843. Testimony by a clerk that it was his invariable custom to carry certain classes of letters to the post-office, of which class the letter in question is shown to have been one, though he had no recollection as to such letter specifically, has been held sufficient to admit a copy of the letter in evidence, after notice to the other side to produce.⁶

Presumption from habits of forwarding letters.

¹ See *supra*, § 837; New Haven Bk. v. Mitchell, 15 Conn. 206. See Crandall v. Clark, 7 Barb. 169.

² Dana v. Kemble, 19 Pick. 112.

³ Whart. on Ev. § 1326.

⁴ For cases see Whart. on Ev. § 1328.

⁵ Howley v. Whipple, 48 N. H. 488.

⁶ See cases in Whart. on Ev. § 843.

XI. DISTINCTIVE INFERENCES IN FORGERY.

§ 844. Genuineness of handwriting is eminently a matter of inference, the constituents of which have been already examined. Among the tests to be applied we may recur to the following:—

Opinion of writer. § 845. (1) Opinion of the alleged writer himself as to the genuineness of the writing.¹

Of those who know his hand. § 846. (2) Opinion of those who have seen him write or who are familiar with his hand.²

Of experts. § 847. (3) Opinion of experts, based on the writing by itself, or on it as compared with other writings.³

Chemical and microscopic tests. § 848. Chemical and microscopic tests should be resorted to where it is desired to restore the legibility of faded writings,⁴ and where it is suspected that writing has been destroyed by chlorine or other substances which it is desirable to detect. Microscopic tests, also, are admissible to prove marks of tracing.⁵

¹ See *supra*, §§ 549, 550.

² *Supra*, § 551.

³ *Supra*, § 559. See, also, *Com. v. Nefus*, 135 Mass. 533.

On this topic the evidence of Mr. Gould in the Webster Case was: "In all the practice that I have ever had in writing, I have never been able to satisfy myself that I could make two letters precisely alike; so perfectly similar as to correspond throughout, if placed one upon the other. And yet, I never saw two handwritings that I could not distinguish. There is some peculiarity in every one's writing which enables a person to identify it; and it is next to impossible to get rid of that peculiarity when the attempt is made to disguise it. Every man who undertakes to disguise his hand must do it either by *carelessness* or *carefulness*; by *carelessly* letting his hand play entirely loose as in mere flourishing; or, by *carefully* guarding every stroke which he makes, in order to prevent its being seen to be his. In this latter mode it is next to impossible for any person to

continue his observation for any great length of time, or through any considerable amount of writing, without making some of those letters which are peculiar to himself, or making them in that peculiar manner which he has been accustomed to do. Frequently these will consist only of a single particle, or character, but which will yet furnish a key for the detection of the real writer." *Bemis's Webster Case*, 202. As to admissibility of such testimony see *supra*, § 559. As to illustrations of "disguise," see *Merivale's Life of Sir P. Francis*, London, 1867.

A notice of an interesting trial (*Robinson v. Mandell*) involving the issues in the text will be found *supra*, § 9, note. As to identification by misspelling see *U. S. v. Chamberlain*, 12 Blatch. 390, and cases cited *infra*, § 851.

⁴ *Devergie, Méd. Lég.* ii. p. 887; *Duverger, Manual*, ii. p. 385.

⁵ *Robinson v. Mandell*, noticed *supra*, in note to § 9. And see an article by Mr. R. U. Piper in *Am. Law Reg.* for May, 1869.

§ 849. In determining the genuineness of writings alleged to be forged it is important to inquire if there is any discrepancy between the date of a writing and the *anno Domini* water-mark in the fabric of the paper;¹ though that this cannot always be relied upon is illustrated by an instance mentioned by Mr. Wills, of a commissioner of the insolvent debtor's court sitting at Wakefield, in 1836, who discovered that the paper he was then using, which had been issued by the government stationer, bore the water-mark of 1837.² Extrinsic proof, also, may be adduced to show that the paper used had not, at the date in question, been manufactured.³ When post-marks are

Inferences
from cir-
cumjacent
tests.

¹ *Crisp v. Walpole*, 2 Hagg. 531. See Whart. Crim. Law, 8th ed. § 726.

² Wills on Circum. Ev. p. 114.

³ See Report in Dickerson's Case, N. Y. World, Jan. 13, 1880.

Erasures may be detected by microscopic examination, under which inequalities or transparencies may be brought out. Erased portions of a paper, also, will more greedily absorb water than other parts, being in the nature of a blotter. If varnish has been placed over the erasure, this may sometimes be discovered by its change of color on treatment with a weak iodine solution. And "in the vast majority of instances where an erasure has been attempted, the application of a solution of galls will at once reveal the remains of the iron of the original writing ink. . . . If an acid has been used to remove the ink, its presence may be detected by the use of litmus, unless an alkali has been afterwards employed to neutralize it." 1 Tidy, Leg. Med. (1883) 242.

It has been recently stated that the Bank of France has almost entirely abandoned chemical tests in favor of the camera for detecting forgeries. The sensitive plate not only proclaims forthwith the doing of the eraser or pen-knife, but frequently shows, under the bold figures of the forger, the sum ori-

ginally borne by the check. So ready is the camera to detect ink marks that a *carte de visite* inclosed in a letter may to the eye appear without blemish, while a copy of it in the camera will probably exhibit traces of writing across the face, where it has merely been in contact with the written page.

Priestman v. Thomas, reported in the London Spectator of December 8, 1883, was a case of forgery of the will of a man named Whalley, the principal legatee being the defendant Thomas. The will was written on white paper, and there had been a prior will written on blue paper in favor of Priestman, the plaintiff, an illegitimate son of Whalley. Thomas's mode of forgery is thus described: "He induced Whalley to dictate a pencil letter to Priestman, and then to write his name at the bottom in ink. Here, then, was the signature he wanted. He had now the most essential part of a will, and it only remained to add the incidental details relating to the distribution of the property. The pencil writing was rubbed out, and what purported to be Whalley's last will written in ink above his signature. Possibly, Thomas thought that by not imitating the signature he was protecting himself against a charge of forgery; at all events, he knew that it would be the

relied on to prove authenticity, these may serve, also, as indications of falsification. The same may be noticed in respect to stamps,

signature that would be most closely scrutinized, and if that was beyond doubt genuine, it was not likely that suspicion would go any further. Nor but for the quarrel with the witnesses—or rather with one of the witnesses, for the other sided with Thomas—would it have gone any further. The theory that the signature to the 'white' will had originally been affixed to a letter written in pencil, and that upon this letter, as on a palimpsest, the 'white' will had been written, rested, in the first instance, on the testimony of the repentant or dissatisfied accomplice.

"When once the theory had been set up, however, confirmatory evidence was not long wanting. First, there was the will itself. Though the signature was beyond question, there were undoubtedly traces of pencil-marks underlying the ink in which the will was written, and these pencil-marks bore out the explanation given by the witness. They were in Thomas's handwriting, and the words that could be deciphered seemed to have formed part of a letter addressed to Priestman. Thomas seems to have thought that these very facts might bring him safety. Why should he have left this damning record against himself, when it was in his power to destroy it? A man who is rubbing out pencil-marks as a preliminary to giving himself a fortune, could hardly be so careless as to leave whole words still visible. The great difficulty in the way of this theory was the fact that the 'white' will had never passed out of Thomas's own keeping, until it had been placed in the Registry of Wills at Hereford; and under any circumstances, the jury

would probably have refused to believe that the will had been tampered with, and the suspicious pencil-traces introduced while the will was in official custody. As it turned out, however, they were not left without a perfectly adequate explanation of the facts. Mr. Holmes, the Queen's Librarian, states that pencil-marks are not completely erased by bread-crumbs. What happens is that the fibres of the paper are raised up so as to cover them. After a time, they get smoothed down again, and then the concealed marks come partially to light once more. Further and most complete corroboration to Priestman's case was furnished by a letter which his sister had received from Whalley, written a month after the date of the 'white' will, and telling her that he had left all his money to Priestman, and none to her. Thomas maintained that this letter was forged, but in favor of this theory he had nothing to show, except that the letter had not been produced until late in the day. This, however, was explained in its turn by the fact that the letter contained a reference to an incident only known to Whalley and his daughter, which she would naturally desire to keep concealed. The whole story was thus unravelled, and the jury had no difficulty in coming to the conclusion that the 'white' will was Thomas's composition, though the signature to it was Whalley's. It is not a pleasant story, for every one concerned in it seems to have been quite ready to suspect every one else of perjury and fraud, without apparently there being any antecedent improbability in the suspicion. But there is no reason to doubt that the verdict given by the

which may be shown to have been forged, or to have been fraudulently attached, by proving that such stamps were not in existence at the time of the alleged date. The condition of the paper may serve to identify it with a particular party.¹

jury describes with substantial accuracy what actually took place."

Questions of a similar character have arisen in Sharon's Case, on trial in San Francisco, in May, 1884, while these pages are passing through the press.

¹ In April, 1880, a cadet named Whitaker, a pupil in the Military Institute at West Point, was found in his bed tied and bruised. He stated that the previous night he had been attacked and maltreated by three disguised assailants; and he exhibited an anonymous note of warning which he claimed to have received a few days before. Suspicion having been cast on his story, a court of inquiry was held in May, 1880, under circumstances which invested the case with no little political interest. In order to determine the authorship of the letter of warning, papers emanating from three hundred cadets were submitted to five eminent experts in penmanship, the papers being identified and distinguished only by numbers. These experts, acting separately, concurred, with more or less certainty, in reporting that the note of warning was in the same handwriting as written exercises, of which Whitaker was the unquestionable author. In addition we have the following remarkable incident, as given in the telegraphic reports in the New York papers of May 17, 1880:—

"‘You will no doubt be surprised,’ expert Southworth stated in his report, ‘when I tell you that I have a sheet which I have marked “A” in two places, out of set No. 1, from which the paper on which the anonymous note is written was torn. The fact is

easily discernible to ordinary vision with the naked eye. This paper out of set No. 1, marked by me “A” twice with blue pencil, has subject matter connected with another sheet which I have marked “B” twice in blue. The sheet “B” is torn from another sheet which I have marked “C” twice. Thus, by a fact mathematically demonstrable, the anonymous note is one of four links, three of which are papers of set 1. I have great satisfaction in discovering this point, which discovery will do much toward settling this whole affair as far as the authority of the anonymous note is concerned.

“‘I have to the best of my ability arranged two frames of glass so as to exhibit my discovery to any one who may properly examine it.’ Mr. Southworth added, ‘No. 1 is the questioned note placed in juxtaposition with the part of the sheet from set 1, marked “A” in two places. We first notice the cut of the papers on the top as arranged, cut at the paper mill; next the ruling, and then the ragged edges in juxtaposition where it was separated, perhaps with the paper cutter, no matter in what way, so long as an indented spot on one edge has its corresponding tooth opposite.’

“The Recorder as he read this exhibited the two panes of glass containing the anonymous note fitted to a sheet on which Whitaker had begun to write the letter to his mother which was found in his room. The Recorder read from expert Gayler's report of an examination of these papers by microscope. Mr. Gayler believed ‘the two to be parts of the same sheet.’ Expert Ames found that the same blue ruling

Forgeries, also, have been detected by the plate from which the printed part of the document was taken, proving to be subsequent in origination to the date of the alleged writing; and in a case heretofore cited exposure was based on the fact that the witness to the forgery (that of a will) volunteered, in his cross-examination, the statement that the testator had placed a sixpence under his wax seal, which sixpence turned out to be subsequent in date to the will.¹

lines were on each paper, and that the paper in each appeared to be the same when examined under a glass of high power, but Mr. Ames reported that he did not consider himself to be an expert in paper by any means. The Recorder read from Mr. Southworth's evidence that that expert spent two days in a paper-mill and made many experiments in cutting and tearing paper and then observing the edges when joined before he made his discovery known."

¹ The following narrative is given by Mr. Warren in his sketch of Lord Sterling's Case (Warren's Miscellanies, pp. 256, 257, 258): "We have now to record as remarkable an incident as ever occurred in the course of a judicial inquiry. As already stated, one of the two documents *pasted* on the back of the map was the alleged tombstone inscription. As the map was lying on the table of the densely crowded court, owing to either the heat or some other cause, one of the corners of the paper on which the inscription was written curled up a little—just far enough to disclose some writing underneath it, on the back of the map. On the attention of the solicitor-general being directed to the circumstance, he immediately applied to the court for its permission to detach from the map the paper on which the tombstone inscription was written. Having been duly sworn, he withdrew for that purpose, and soon

afterwards returned, having executed his mission very skilfully, without injury to either paper. That on which the inscription was written proved to be itself a portion of another copy of the map of Canada, and the writing *which it covered* was as follows, but in French: 'There has just been shown to me a *letter of Fenelon*, written in 1698, having reference to this grandson of Lord Stirling, who was in France during that year, and with regard to whom he expresses himself as follows: "I request that you will see this amiable and good Irishman, Mr. John Alexander, whose acquaintance I made some years ago. He is a man of real merit, and whom every one sees with pleasure *at court*, and in the best circles of the capital." These were the initials, as far as they are legible, "E. Sh."' This was represented by the solicitor-general as palpably an inchoate abortive forgery; and Lord Meadowbank pointed out to the jury the evident and partially successful effort which had been made to *tear off* that portion of the surface of the map on which the above had been written. 'That effort failing,' said he, 'the only precaution that remained to prevent its appearing was to cover it over; for which purpose the parties used the inscription. But then the apprehension of its appearing, if the map were held between the light and the eye, seems to have come across the minds of the

In the controversy as to the genuineness of the letters implicating Mary Queen of Scots in the murder of Darnley, the issue is mainly dependent on what may be called circumjacent tests.¹

§ 850. "The critical examination of the internal contents of written instruments," says Mr. Wills, "perhaps of all others, affords the most satisfactory means of disproving their genuineness and authenticity, especially if they profess to be the productions of an anterior age. It is scarcely possible that a forger, however artful in the execution of his design, should be able to frame a spurious composition without betraying its fraudulent origin by some statement or illusion not in harmony with the known character, opinions, and feelings of the pretended writer, or with events or circumstances which must have been known to him, or by a reference to facts or modes of thought characteristic of a later or a different age from that to which the writing relates."² A deed bearing date the 13th of November, in the second and third years of Philip and Mary, in which they were called "King and Queen of Spain and both Sicilies, and dukes of Burgundy, Milan, and Brabant," was shown to be fabricated by the fact that at the alleged date Philip and Mary were formally styled "*princes* of Spain and Sicily," and Burgundy was never put before Milan, and they did not assume the title of king and queen of Spain and the Two Sicilies, until Trinity term following.³ A great point against the so-called Forged Decretals consists in the fact that they contain what are supposed to be covert illusions to events subse-

Inference
from fal-
sity of con-
tents.

parties engaged in the operation, and hence, with a very singular degree of foresight, expertness, and precaution, they used for their cover that by which the eye of the inquirer might be misled in his investigation; for you have seen that the lines and words of the map forming the *back* of the inscription were exactly such as would naturally fall in with those on the *front* of the map of Canada, from which the extract from the pretended letter of Fenelon had refused to be separated. Accordingly the invention, it would appear, had proved hitherto most successful; for though this map had been examined

over and over again by persons of the first skill and talent, and scrutinized with the most minute attention, the writing which was thus covered up escaped detection, till, by the extreme heat of the court-house yesterday, or some other cause of a similar nature, a corner of this inscription separated from the map and revealed to our observation that which was hidden below."

¹ See Froude's Hist. of England, vol. vii.

² Wills Cir. Ev. p. 111.

³ Mossam v. Ivy, 10 St. Tr. 616.

quent to the period of their alleged publication. Bishop Hefele, in his *Geschichte Concilien*, applies this test with singular sagacity for the purpose of determining which decrees of the later councils are genuine and which are not. It is difficult for a forger to prepare a paper for a use long subsequent to its alleged date, without in some way betraying the purpose. Under our recording system tests of this kind are rarely necessary, since few deeds are operative unless recorded immediately after their execution. It is otherwise, however, as to ancient histories or letters, which are without value unless emanating from the period in which they bear date. At the same time, we must keep in mind that to all truthful narratives errors of detail are incident.¹

§ 851. Proof that a certain document is in the handwriting of a particular person may be met by proof that it was written by another person. In the Webster trial, a part of the case of the prosecution was that certain letters, purporting to have been written by third parties, were written by the defendant. Great stress, also, in the Tichborne prosecution, was laid on the fact that letters claimed by the defence to be by the lost heir were really concocted by the claimant, and exhibited his idiosyncrasies of penmanship and spelling. Lord Meadowbank, in his charge to the jury in Humphrey's case, mentioned a remarkable instance of this nature. A tailor in Ayr, of the name of Alexander, having learned that a person of the same name had died, leaving considerable property without any apparent heirs existing, obtained access to a garret in the family mansion, and it was said found there a collection of old letters about the family. These he carried off, and with their aid fabricated a mass of similar productions, which, he claimed, clearly proved his connection with the family of the deceased. When the case came to be tried, it appeared that there were a number of words in the letters, purporting to be from different individuals, spelt, or rather misspelt, in the same way, and some of them so very peculiar that, on examining them minutely, there was no doubt that they were all written by the same hand. The case attracted the attention of the Inner House. The party was brought to the clerk's table and examined in the presence of the court. He was desired to write a dictation

Proof of
writing by
third
party.

¹ *Supra*, §§ 380-1.

of the Lord Justice Clerk, and he misspelt all the words that were misspelt in the letters precisely the same way; and this and other circumstances proved that he had fabricated all of them himself. He then confessed the truth of his having written the letters on old paper, which he had found in the garret; and, according to Mr. Wills, this result was arrived at in the teeth of half a dozen engravers, all saying that they thought the letters were written by different hands.¹

¹ Wills on Cir. Ev. 117, 118.

TABLE OF CASES.

[THE FIGURES REFER TO SECTIONS.]

A.		SECTION	SECTION
AARON v. State, 1 Ala. Sel. Cas. 12	96	Adams v. Tiernan, 5 Dana, 394	594
v. State, 37 Ala. 106,	96,	Addatte, U. S. v. 6 Blatchf. 76	392
	649, 672	Addington, State v. 2 Bailey, 516	365
v. State, 39 Ala. 75	573	Addis, R. v. 6 C. & P. 388	442
Abbey v. Lill, 5 Bing. 299	304, 415	Adey, R. v. 1 M. & Rob. 94	465
State v. 29 Vt. 60	173	Adler v. State, 55 Ala. 16	538
Abbott v. Abbott, 29 L. J. Pr. &		Ady, R. v. 7 C. & P. 140	131, 393
Mat. 57; 4 Swab. & Trist.		Ah Choy, People v. 1 Idaho, N. S.	
254	530		317 752
Com. v. 130 Mass. 472	784, 785	Ah Chuey, State v. 14 Nev. 79;	
v. People, 75 N. Y. 602	643,	11 Cent. L. J. 111	315, 463
	666	Ah Chung, People v. 54 Cal. 398	1
People v. 19 Wend. 192	474,	Ah Dat, People v. 49 Cal. 652	281
	487	Ah Duck, People v. 61 Cal. 387	446,
State v. 8 W. Va. 741	691, 757		756, 767, 769
Abel v. Fitch, 20 Conn. 90	382	Ah Fat, People v. 48 Cal. 62	491
v. Potts, 3 Esp. 242	526	Ah How, People v. 34 Cal. 218	637
v. Shields, 7 Mo. 120	483	Ah Ki, People v. 20 Cal. 177	757, 759
Abernethy v. Com., 101 Penn. St.		Ah Kong, People v. 49 Cal. 7	334
322	69, 74, 756	Ah Lee, People v. 60 Cal. 85	262, 266
Able, State v. 65 Mo. 357	227	State v. 7 Or. 237	291, 297
Abraham, R. v. 2 C. & K. 550	263	State v. 8 Or. 214	302, 312,
Ackerman, Ex parte, 2 Redf. 521	810		797
Ackert, Com. v. 133 Mass. 402	658,	Ah Sam, State v. 7 Or. 477	120 a
	674 a, 689	Ah Sing, People v. 51 Cal. 372	1
Ackley v. People, 9 Barb. 609	62	People v. 59 Cal. 400	763
Adams, Com. v. 4 Gray, 27	104	Ah Wee, People v. 48 Cal. 236	224,
Com. v. 7 Met. 50	114		449
Com. v. 127 Mass. 15	24, 139	Ah Woo, People v. 28 Cal. 205	114
v. Field, 21 Vt. 256	557	Ah Yute, People v. 53 Cal. 613;	
v. Lloyd, 3 H. & N. 351	468	54 Cal. 89	266, 688, 751
People v. 1 Comst. 173; 3		People v. 56 Cal. 119	231
Denio, 190	112	People v. 60 Cal. 95	483
v. People, 16 N. Y. Sup.		Ahitbol v. Beneditto, 2 Taunt. 401	96
Ct. 89	749	Aickles, R. v. 1 Leach, 294	216, 365,
v. People, 86 N. Y. 460	68		526
v. People, 47 Ill. 376	304	Ainsworth v. Greenlee, 1 Hawks,	
R. v. 3 C. & P. 600	758	190	160, 550, 552
v. R. R., 4 L. R. C. P. 739	826	Ake v. State, 31 Tex. 416	699
State v. 1 Hayw. 463	758	v. State, 6 Tex. Ap. 398	361, 366
v. State, 42 Ind. 373	333	Alabama R. R. v. Burkett, 42 Ala.	
State v. 20 Kans. 311	32, 442,	83	460
	698	Albin v. State, 63 Ind. 598	333
State v. 76 Mo. 355	756,	Albright v. State, 6 Wis. 74	65
	757, 801	Albright v. Cobb, 30 Mich. 361	833
		v. Corley, 40 Tex. 105	459

TABLE OF CASES.

	SECTION		SECTION
Alderman, Com. v. 4 Mass. 477	571,	Am. Life & Trust Co. v. Rosenagle,	
	594, 595	77 Penn. St. 507	173, 530, 535
v. People, 4 Mich. 414	443,	American Middlings Co. v. Chris-	
	444, 470	tian, 4 Dill. 459	420
Alderson v. Clay, 1 Stark. R. 405,	164	Ames' Will, 51 Iowa, 596	418
Aleck, People v. 61 Cal. 137	698	Ames v. Snider, 69 Ill. 376	457, 460
Alexander, State v. 66 Mo. 148	757 a,	Amherst Bank v. Root, 2 Met. 522	
	764		552, 560
Alford, State v. 31 Conn. 40	494, 756	Ammons, State v. 3 Murph. 123	120 a
Algheri v. State, 25 Miss. 584	10, 329	Amos, R. v. 2 Den. C. C. 65; 1 Eng.	
Alibez, People v. 49 Cal. 452	584	L. & Eq. 592; T. & M. 465	123
Alivetree, People v. 55 Cal. 263	757	Amphlit, R. v. 6 D. & R. 126	158
Alivon v. Furnival, 1 C., M. & R.		Anable v. Anable, 24 (N. Y.) Pr.	
277	199, 535	92	430
Allan v. Royden, 43 L. J. (C. P.)		Anderson v. Cox, 6 La. An. 9	603
206	505	v. Gill, 3 Macqueen S. C.	
Allemann v. Stepp, 52 Iowa, 626	378	Cas. 197	730
Allen v. Blunt, 2 Woodb. & M.		v. Hamilton, 2 B. & B.	
121	837	156	513
Com. v. 128 Mass. 46	24, 550,	In re, 20 Up. Can. Q. B. 288	
	628	v. Maberry, 2 Heisk.	
v. Harrison, 30 Vt. 219	502	653	361
v. Parish, 3 Ohio, 107	199	People v. 2 Wheel. C. C.	
People v. 1 Parker C. R.		390	285
445	580	R. v. 2 How. St. Tr. 874	509
v. Public Administrator, 1		v. State, 34 Ark. 257	486
Bradf. (N. Y.) 221	516	State v. 2 Bailey, 565	551
R. v. 1 Den. 364; 2 C. & K.		v. State, 42 Ga. 9	493
869, S. C.	801	v. State, 63 Ga. 675	602
R. v. 1 Mood. C. C. 154	274,	v. State, 3 Heisk. 86	764
	329, 330	v. State, 1 Houst. C. C.	
v. State, 60 Ala. 19	2c3	38	721
v. State, 71 Ala. 5	761	v. State, 26 Ind. 89	664
v. State, 21 Ga. 217	204	v. State, 25 Minn. 66	116 a,
State v. 1 Hawks, 6	555		122
v. State, 3 Humph. 367	552	v. State, 7 Ohio (part ii.),	
v. State, 57 Iowa, 431	442	250	464
State v. 1 McCord, 525	52	v. State, 10 Oregon, 448	
State v. 8 Tex. Ap. 360	124		418, 690
v. Taylor, 26 Vt. 599	100	State v. 3 Rich. 172	99
U. S. v. 10 Biss. 90	66	v. State, 11 Tex. Ap.	
Allison v. Barrow, 3 Cold. 414	398	576	691
R. v. R. & R. 109	835	Andre v. Bodman, 13 Md. 241	359
v. State, 42 Ind. 354	707	Andrews v. Andrews, 2 Johns. Cas.	
v. State, 14 Tex. Ap. 122	440	109	348
All Saints, R. v. 6 M. & S. 194	396,	Com. v. 2 Mass. 14	111
	402, 463	Com. v. 2 Mass. 409	588
Alphonse, State v. 34 La. An. 9	658	Com. v. Wh. on Hom. §	
Alsabrook v. State, 52 Ala. 24	35	627	83, 418, 757
Alston v. Grantham, 26 Ga. 374	679	cited 1 Wh. & St.	
v. State, 63 Ala. 178	225	Med. Jur. 375	731
v. State, 41 Tex. 39	664	v. Frye, 104 Mass. 234	
Alviso, People v. 55 Cal. 230	324, 756		463, 478, 679
Amanacus, People v. 50 Cal. 233	491	v. Simms, 33 Ark. 771	497
Amann v. State, 76 Ill. 188	96	State v. 27 Mo. 267	154, 593
Ambergate, R. v. 17 Q. B. 957	566	v. Vanduzer, 11 Johns. 38	60
American Ex. Co. v. Spellman, 90		Angell, U. S. v. 11 Fed. Rep. 34	229,
Ill. 455	312		282, 454 a
American Fur Co. v. U. S., 2 Peters,		Angelo v. People, 96 Ill. 209	801
358	698	v. State, 32 La. An. 407	483

TABLE OF CASES.

	SECTION		SECTION
Anglea v. Com., 10 Grant, 696	489	Ashworth v. Kittridge, 12 Cush.	
Anglesey v. Hatherton, 10 M. & W.		193	538
235	24	Aspden v. Nixon, 4 How. 467	593
Angus, R. v. Burnett C. L. 595	627	Atcheson v. Everitt, Cowp. 382	364
v. Smith, M. & M. 473	483	Atchley v. Sprigg, 33 L. J. Ch.	
Ann, The, 1 Gallis, 62	723	345	828
v. State, 11 Humph. 159	646	Atkins v. State, 16 Ark. 568	757
Annesley v. Anglesea, 11 How. St.		State v. 1 Overt. 229	227
Tr. 1220	402, 503, 504, 743	Atkinson, People v. 40 Cal. 284	500,
Annis, Com. v. 15 Gray, 197	20		502
People v. 13 Mich. 511	487	State v. 9 Humph. 677	595
Anon. 6 C. & P. 408	95	Attwood v. Taylor, 1 M. & Gr.	
1 Hill (S. C.), 251	486	289	607
2 Pen. (N. J.) 390	366	Atty. Gen. v. Briant, 15 M. & W.	
cited Phil. Ev. 25	615	181	513
Skin. 404	508	In re, 104 Mass. 537 420, 427	
v. Anon., 22 Beav. 481	518	v. Parmer, 6 Bro. P.	
R. v. 2 C. & P. 459	758	C. 486	336, 730
Anshicks v. State, 6 Tex. Ap. 524	511	v. Radloff, 10 Ex. R.	
Anthony, People v. 56 Cal. 397	1	88	465
State v. 1 McCord, 285	392	v. Stephens, 1 Kay & J.	
v. State, 1 Meigs, 265		748	625
	277, 282	v. Whitwood Local Bd.,	
U. S. v. 11 Blatch. 200	723	40 L. J. Ch. 590	567
Antle v. State, 6 Tex. Ap. 202	64	v. Windsor, 24 Beav.	
Apgar, People v. 85 Cal. 389	584	679	749
Apothecaries' Co. v. Bentley, 1 C.		Atwell v. Milton, 4 Hen. & M. 253	602
& P. 538; R. & M. 159	341, 342	v. State, 63 Ala. 61	483, 690
Appleby, R. v. 3 Stark. 33	680, 681,	Atwood's Case, 1 Leach, 464	441
	699	Atwood, Com. v. 11 Mass. 93	146
Apthorp v. Comstock, 2 Paige, 482	698	v. Welton, 7 Conn. 66 361, 362	
Arangelo v. Thompson, 2 Camp.		v. Winterport, 60 Me. 250 155	
623	839	Auchterarder, Presbytery of, v.	
Ardesco v. Gilson, 63 Penn. St.		Kinnoul, 5 Cl. & F. 698	379
146	458	Audley's Case, 4 St. Tr. 402	393
Armor v. State, 63 Ala. 173	66, 457	Augsburg v. People, 1 N. Y. Cr.	
Armory v. Delamirie, 1 Str. 505	749	Rep. 299	418
Armstrong v. Huffstutler, 19 Ala.		Angur v. Whittier, 118 Mass. 532	199
51	483	Auld v. Walton, 12 La. An. 129	382
State v. 4 Minn. 335	172	Aumick v. Mitchell, 82 Penn. St.	
U. S. v. 2 Curtis C. C.		211	557
446	110, 738, 764	Aurora v. Cobb, 21 Ind. 492	487
Arnd v. Amling, 53 Md. 192	362	Austin, People v. 1 Parker C. R.	
Arnold v. Arnold, 13 Vt. 363	361	154	485
Com. v. 4 Pick. 251	138, 142	v. State, 14 Ark. 556	661
v. Norton, 25 Conn. 92	54, 825	Austine v. People, 51 Ill. 236 650, 655	
People v. 40 Mich. 710	429,	Antauga Co. v. Davis, 32 Ala. 703	460
	436, 465	Avary v. Searoy, 50 Ala. 54	458
People v. 43 Mich. 303	430,	Averitt v. Murrell, 4 Jones (N. C.),	
	433, 664, 751	223	824
People v. 46 Mich. 268	699	Avery, R. v. 8 C. & P. 596	497, 504
v. State, 53 Ga. 574	169, 172	State v. 44 N. H. 392	460
State v. 48 Iowa, 566	699	State v. 10 Tex. Ap. 199 698, 700	
State v. 13 Ired. 184	312	Aveson v. Kinnaird, 6 East, 188	271,
v. State, 9 Tex. Ap. 435	752	272, 288, 399, 757 b	
State v. 50 Vt. 731	429	Aycock v. State, 2 Tex. Ap. 381	756
Ashe, People v. 44 Cal. 288	66	Ayers v. State, 88 Ind. 275	96, 441
Ashland v. Marlboro, 99 Mass. 47	271,	Aylett, R. v. 1 T. R. 63	103
	457	Ayres v. Wattson, 57 Penn. St. 360	681
Ashton's Case, 7 Q. B. 169	352	Azire's Case, 1 Strange, 633	393
48		753	

TABLE OF CASES.

B.		SECTION
Babb, State v. 76 Mo. 501	459, 762	Ballard v. Noaks, 2 Pike, 45 445
Babcock v. People, 15 Hun, 347	431	v. Perry, 28 Tex. 347 555
U. S. v. 3 Dillon, 581	837	v. Way, 1 M. & W. 329 523
Baccigalupi v. Com., 33 Grat. 807	337	Ballen v. Clark, 2 Ired. L. 23 730
Baccio v. People, 41 N. Y. 265	273	Balls, R. v. L. R. 1 C. C. 328; 40 L.
Bach v. Cohn, 3 La. An. 103	707	J. M. C. 148 46
Bachelor, Com. v. 4 Am. Jur. 79	362	R. v. 1 Mood. C. C. 470 39
Bacon v. Chariton, 7 Cush. 581	271	Balt. & Oh. R. R. v. State, 33 Md.
v. Frisbie, 80 N. Y. 394	496	542 539
v. Towne, 4 Cush. 234	573	v. State, 15 W.
v. Williams, 13 Gray, 525	559	Va. 363 164 a, 370
Badgely, People v. 16 Wend. 53	118,	Banbury Peerage Case, 1 Sim. & St.
199, 214, 216, 631		153 828
Badger v. Story, 16 N. H. 168	360	Banfield v. Parker, 36 N. H. 353 272
Bagley, Com. v. 7 Pick. 279	102, 723	Bank v. Donaldson, 6 Penn. St. 179 608
Bailey's Case, 1 Va. Cas. 258	571	v. Hogendobles, 3 Penn. L.
Bailey, Com. v. 1 Mass. 62	114	J. 37; S. C., 4 Penn. L. J.
R. v. R. & R. 1	723, 736	392 539
State v. 11 Foster, 521	138	v. Jacobs, 1 Penn. R. 161 559
v. State, 52 Ind. 462	758	v. Mersereau, 3 Barb. Ch. 528 504
v. State, 54 Iowa, 414	460, 463	Bank Cases, R. & R. 378 205, 549
State v. 1 Penn. (N. J.) 304	472	Bank of Com. v. Mudgett, 44 N. Y.
v. Woods, 17 N. H. 365	679	514; S. C., 45 Barb. 663 552, 556
Bain v. Case, 3 C. & P. 496	526	Bank of Lancaster v. Whitehill, 10
v. State, 61 Ala. 75	236	S. & R. 110 557
Bainbridge v. State, 30 Oh. St. 264	32	Bank of Penns. v. Haldeman, 1
Bakeman, Com. v. 105 Mass. 53	580,	Penn. 161 555, 560
587, 836 a		Bank of Salina v. Henry, 2 Denio,
v. Rose, 18 Wend. 146	486	155 464, 466
Baker v. Brill, 15 Johns. 260	154	Bank of U. S. v. Dandridge, 12
v. Haines, 6 Whart. 284	557	Wheat. 70 164, 833
v. Mygatt, 14 Iowa, 131	557	Banker, People v. 2 Parker C. R.
v. People, 105 Ill. 452	30,	26 664
103, 104, 435 a		Banks v. State, 28 Tex. 644 124
v. State, 7 Tex. Ap. 612	698 a	v. State, 13 Tex. Ap. 182
R. v. 2 M. & R. 53	699, 702	412, 700
v. R. R., 3 C. P. 91	280, 288	Barber v. Lyon, 22 Barb. 622 749
v. Ray, 2 Russell, 73	748	v. Merriam, 11 Allen, 322 412
State v. 20 Mo. 338	510	v. State, 13 Fla. 675 432, 436,
State v. 24 Mo. 437	227	470
State v. 63 N. C. 279	417	v. State, 50 Md. 161 148
v. State, 12 Oh. St. 214	573	Barous v. State, 49 Miss. 17 149, 764
v. State, 47 Wis. 111	816	Barker v. Coleman, 35 Ala. 221 460
Balbo, People v. 80 N. Y. 484	661, 662,	v. Kuhn, 36 Iowa, 395 496, 499
672		R. v. 1 F. & F. 326 214
Baldry, R. v. 12 Eng. L. & Eq. 591;		State v. 18 Vt. 195 128
5 Cox C. C. 523; 2 Den. C. C.		U. S. v. 4 Wash. C. C. 464 225
430	649, 651	Barkman v. State, 13 Ark. 703 97
Baldwin v. Parker, 99 Mass. 79	398	Barley R. v. 2 Cox C. C. 191 448
v. Soule, 6 Gray, 321	52	Barnacle, Com. v. 134 Mass. 216 69, 83
v. State, 12 Mo. 223	417	Barnard, R. v. 7 C. & P. 784 223
Bales v. State, 63 Ala. 30	538	Barnes's Case, 20 Alb. L. J. 110 506
Ball, People v. 42 Barb. 324	106	Barnes v. Harris, 7 Cush. 576 497
R. v. 8 C. & P. 745	454	v. Ingalls, 39 Ala. 193 415, 460
R. v. R. & R. 132	34, 39, 46	v. People, 48 Cal. 551 30
Ballantine v. White, 77 Penn. St.		v. People, 18 Ill. 52 96
20	402, 559, 560	v. State, 19 Conn. 398 725
Ballard v. Lookwood, 1 Daly, 158	456	State v. 32 Me. 530 592
		v. State, 36 Tex. 356 646, 677,
		689

TABLE OF CASES.

	SECTION		SECTION
Barnett v. People, 54 Ill. 325	227,	Baxter v. R. R., 102 Mass. 385	401
	293, 584	State v. 82 N. C. 602,	29, 750
v. State, 54 Ala. 579	573	Baylis v. Lawrence, 10 A. & E. 925	739
Barnum v. Barnum, 42 Me. 251	171	Baynton's Case, 14 How. St. Tr.	
Barnwell, State v. 80 N. C. 466	784	630	312
Barrett, <i>In re</i> , 28 Up. Can. Q. B.		Bayonne, State v. 23 La. An. 78	441
561	331	Beach, People v. 87 N. Y. 508	225
v. Long, 3 H. L. Cas. 395,		v. R. R. 37 N. Y. 457	162, 646
414	52	Beal v. State, 15 Ind. 378	111
People v. 2 Caines, 304	573	v. State, 68 Ind. 345	429
People v. 1 Johns. 66	107,	Beale's Case, 3 Whart. & St. Med.	
	579, 580	Jur. § 245	369
R. v. 9 C. & P. 387	586	Beale v. Com., 25 Penn. St. 11	830
v. Williamson, 4 McLean,		Beam v. Link, 27 Mo. 261	510
589	373, 377	Beaman, Com. v. 8 Gray, 497	124
Barric, People v. 49 Cal. 342	440, 650	Bean, Com. v. 111 Mass. 438	482
Barron v. Daniel, Cr. & D. Abr. C.		State v. 19 Vt. 530	96, 114
283	184	Beany, R. v. R. & R. 416	124, 130
v. People, 1 Comst. 386	227	Bearce v. Jackson, 4 Mass. 408	539
v. People, 73 Ill. 256	750	Beard, State v. 1 Ind. 460	523
State v. 37 Vt. 57	749	Beardslee v. Richardson, 11 Wend.	
Barronet's Case, 1 E. & B. 1;		25	691
Pearce & D. 51	723	Beardsley v. Wildman, 41 Conn.	
Barrow v. Humphreys, 3 B. & A.		515	485
598	350	Beardsly v. Foot, 2 Root, 399	361
Barry, People v. 31 Cal. 357	764	Beardstown v. Virginia, 76 Ill. 44	
Bartholomew v. People, 104 Ill. 601			342
153, 363, 429, 489, 596 a		Bearss v. Copley, 10 N. Y. 93	482
Bartholomew v. Stephens, 8 C. &		Beasley v. People, 89 Ill. 572	142, 405,
P. 728	168		477
Bartlett v. Deereet, 4 Gray, 111	254,	v. State, 71 Ala. 328	427
	257	Beates v. Retallick, 23 Penn. St.	
v. Mayo, 33 Me. 518	644	288	534
R. v. 7 C. & P. 832	662, 678,	Beatson v. Skene, 5 H. & N. 838	513
	679	Beatty, State v. 30 La. An. 1266	750
State v. 47 Me. 396	185	Beaubien v. Cicotte, 12 Mich. 459	417,
State v. 55 Me. 200	435		482
State v. 43 N. H. 224	339	Beauchamp v. State, 6 Blackf. 299	492
State v. 11 Vt. 650	111	Beaufort v. Smith, 4 Ex. R. 450	523
Barton, R. v. 1 Mood. C. C. 141	114	Beaumont v. Perkins, 1 Phillim. 78	
v. State, 18 Ohio, 221	30		555
Barwick v. Wood, 3 Jones L. 306	553	Beavan v. McDonnell, 10 Ex. R.	
Bassford v. Blakesley, 6 Beav. 131		188	55
	504	Beavers v. State, 58 Ind. 530	21, 108,
Bastin v. Carow, Ry. & M. 127	454		134, 435, 544
Batdorff v. Bank, 61 Penn. St. 183	488	Beebe v. People, 5 Hill (N. Y.), 32	227
Bate v. Kinsey, 1 C. M. & R. 88	498	Beck, People v. 58 Cal. 212	1, 433
Bateman, R. v. 4 F. & F. 1068	664	v. State, 44 Tex. 430	758
Bates v. Ableman, 13 Wis. 644	266	Beckwith v. Benner, 6 C. & P. 681	503
v. Barber, 4 Cush. 197	487	Bedingfield, R. v. 14 Cox C. C. 341	
v. State, 63 Ala. 30	538		252, 263, 295, 296
Bathwick, R. v. 2 B. & A. 639	390,	Beebe, State v. 17 Minn. 241	510
	395, 396, 402	Beeler v. Young, 3 Bibb, 520	163
Batt, R. v. 6 C. & P. 329	135, 740	Beerman, U. S. v. 5 Cranch C. C.	
Batten v. State, 80 Ind. 394	412, 750	412	588
Bathews v. Galindo, 4 Bing. 610;		Beers v. Jackman, 103 Mass. 192	312,
S. C., 3 C. & P. 238	390		544
Baum v. Clause, 5 Hill, 196	489	Beets v. State. 1 Meigs, 108	295
Baxter v. Abbott, 7 Gray, 71	412,	Beggarly v. State, 8 Baxt. 520	669, 677
	417, 493, 731	Behelmer v. State, 20 Oh. St. 579	584

TABLE OF CASES.

	SECTION		SECTION
Bejarano v. State, 6 Tex. Ap. 265	679	Bennifield v. Hypres, 38 Ind. 498	401
Belcher, State v. 13 S. C. 459	286	Benoit, State v. 16 La. An. 273	365
Belden v. Meeker, 2 Lansing, 470	603	Benson v. Olive, 3 Str. 920	228
Bell v. Frankis, 4 M. & Gr. 446	748	R. v. 2 Camp. 508 378, 550, 552	
v. Hearne, 10 La. An. 515	748	Bently, R. v. 6 C. & P. 148	668
People v. 49 Cal. 486 66, 160, 338,	777	Benziger v. Miller, 50 Ala. 207	679
R. v. 5 C. & P. 162	667	Bergen v. People, 17 Ill. 426	225,
v. Rinner, 16 Oh. St. 45	371		229, 632
v. State, 44 Ala. 393	446	Bergin, State v. 31 Oh. St. 111	338
v. State, 70 Mo. 633	384	Berigan, R. v. 1 Irish Cir. R. 177	651
v. State, 57 Md. 168 84, 40, 596 a		Berkeley Peerage Case, cited 2 Ph.	
State v. 65 N. C. 313 94, 95, 99		Ev. 445	492
v. State, 1 Tex. Ap. 81	108	Berlin, State v. 42 Mo. 572	390, 393
v. Troy, 35 Ala. 104 461, 462		Bernadotti, R. v. 11 Cox C. C. 316	284
Bellamy, R. v. Ry. & M. 172; 21 R.		Bernard, R. v. 1 F. & F. 240	440
C. L. R.	603	State v. 45 Iowa, 234	401
Bellefonte v. McManigle, 69 Penn.		Berner v. Mittnacht, 2 Sweeny, 582	476
St. 159	837	Berney v. Mitchell, 34 N. J. L. 337	
Bellerophon, The, 23 W. R. 248;			229
41 L. J. Adm. 5	513	v. State, 69 Ala. 220	24, 268
Bellville, State v. 7 Baxt. 548	138	Berriman, R. v. 5 C. & P. 601	94, 95
Belote v. State, 36 Miss. 96	678, 758	Berry v. Com., 10 Bush, 15	646, 680,
Belt v. Lawes (London, 1884)	9, 312,		689
	420	v. People, 1 N. Y. Cr. R. 43,	
Beltzhoover v. Blackstock, 3 Watts,		57	261, 440
20	497	v. U. S. Col. T. 186	646
Ben v. State, 22 Ala. 9	588, 590	Berryman v. Wise, 4 T. R. 366	164, 833
v. State, 37 Ala. 103	278, 294	Bertin, State v. 24 La. An. 46	312, 797
Benavides v. State, 31 Tex. 579	276	Bertrand, State v. 3 Oregon, 61	334, 764
Benaway v. Conynne, 3 Chandl. 214		Bestor v. Roberts, 58 Ala. 33	556, 557
	446	Beswick, State v. 13 R. I. 211	715 a
Benedict v. 43 Heineburg, Vt. 231	607	Betsall, State v. 11 W. Va. 703	441
Benfield, R. v. 2 Burr. 983	590	Betts v. Loan Co., 21 Wis. 80	644
Benford v. Zanner, 40 Penn. St. 9		R. v. 8 Cox, 140	53
	162, 645	v. State, 66 Ga. 508	446 748, 762
Benham, State v. 7 Conn. 414	580, 587	Bevan v. McMahon, 2 Sw. & Tr. 55	494
Benham's Trusts, 37 L. J. Ch. 265;		Bevans, People v. 52 Cal. 470	107
36 L. J. Ch. 502; 4 L. R. Eq.		Beverly v. Craven, 2 M. & Rob.	
416	811	140	188
Benner, State v. 64 Me. 267	484,	Beverly, State v. 88 N. C. 682	29
	510, 743	Bevins v. Cline, 21 Ind. 371	400, 401
Bennet v. Hartford, Sty. 233	511	Beyer, People v. 86 N. Y. 369	734
State v. 2 Tread. Const. R.		Bibb, State, v. 68 Mo. 286	96, 114
692	758	Bickel v. Fasig, 33 Penn. St. 463	363
Bennett v. Fall, 26 Ala. 605	460	Bickley v. Com., 2 J. J. Marsh. 572	
v. Matthews, 5 So. Car. 478			352
	557, 560	Biebusch, U. S. v. 1 McCrary, 42	153,
Bennett v. O'Byrne, 23 Ind. 604	483		363
People v. 96 Ill. 602	691, 761	Bienvenu, R. v. 15 Low. C. J. 181	395
People v. 39 Mich. 208	170	Bieroe v. Stocking, 11 Gray, 174	413
People v. 49 N. Y. 137	324,	Bigelow v. Benedict, 70 N. Y. 561	727
	325, 329, 631	v. Collamore, 5 Cush. 226	457
R. v. 14 Cox C. C. 45	809	Com. v. 8 Met. 235	34, 42
v. State, 52 Ala. 371	45, 382	v. Young, 30 Ga. 121	494
v. State, 8 Humph. 118	61	Bigler v. Reyher, 43 Ind. 112	499
State v. 14 Iowa, 479	111	Bilansky, State v. 3 Minn. 246	465
State v. 31 Iowa, 24	390, 401	Bilberry v. Branch, 19 Grat. 393	837
U. S. v. 17 Blatch. C. C.		Bill, People v. 10 Johns. 95	445
357	116 a, 122	Billings v. State, 68 Ala. 486	785

TABLE OF CASES.

	SECTION		SECTION
Billings's Case, 18 Alb. L. J. 261	771, 796	Blackwell, State v. 9 Ala. 79	573
Billings, Com. v. 97 Mass. 405	486, 487	State v. 67 Ga. 76	315
Bills v. Ottumwa, 35 Iowa, 107	406	v. State, 11 Ind. 196	366
Bilmore, R. v. 1 Hale P. C. 305	445	Blain v. Patterson, 48 N. H. 151	390
Bingham v. Dickie, 5 Taunt. 814	96	Blair, Com. v. 123 Mass. 242	29
v. State, 6 Tex. Ap. 169,		Com. v. 126 Mass. 40	50, 744,
505	457, 641		799
Binns v. State, 46 Ind. 311	294, 295,	v. Hum, 2 Rawle, 104	521
	333	v. Pelham, 118 Mass. 420	54,
v. State, 57 Ind. 46	263, 264,		544, 545
	785	v. Seaver, 26 Penn. St. 274	361
v. State, 66 Ind. 428	264, 785	State v. (Newark, N. J.	
Birch v. Ridgway, 1 F. & F. 270	555	1879)	312
R. v. 3 Q. B. 431	603	Blaisdell, State v. 33 N. H. 388	365
Bird v. Bird, 40 Me. 292	200	Blake v. Damon, 103 Mass. 199	691
v. Com. 21 Grat. 800	171, 172, 173	v. Ins. Co., 14 Cox C. C. 246;	
v. Davis, 14 N. J. Eq. 467	390	L. R. 4 Q. B. D. 99; 40 L.	
v. Miller, 1 McM. 125	557, 560	T. (N. S.) 211	34, 53
R. v. 12 Cox, 257; 27 L. T. N.		People v. 1 City Hall Rec.	
S. 800	123	100	71
R. v. 2 Den. C. C. 94; T. & M.		v. People, 73 N. Y. 586	460
437; 5 Cox, 11	92, 148, 154,	v. Pilford, 1 M. & Rob. 198	514
	584, 586, 593	State v. 25 Me. 350	463
v. State, 50 Ga. 585	446	Blakeley, People v. 4 Parker C. R.	
Birdsall v. Dunn, 16 Wis. 235	400	176	474, 504
Birdsong v. State, 47 Ala. 68	690	Blanchard v. Hodgkins, 62 Me.	
Birkett, R. v. R. & Ry. 251	441	120	681
R. v. 8 C. & P. 732	442	v. N. J. S., 59 N. Y.	
Bishop v. Spinning, 38 Ind. 143	418	292	24
v. State, 30 Ala. 34	555	People v. 90 N. Y.	
v. State, 55 Md. 138	34	314	131
Bissell v. Bissell, 55 Barb. 325	395	Bland v. State, 2 Carter (Ind.),	
v. Cornell, 24 Wend. 354	487	608	690, 691
v. Wert, 35 Ind. 54	460	Blanding, Com. v. 3 Pick. 304	113
Bixbie v. State, 6 Ohio, 86	445	Blandy, R. v. 18 How. St. Tr.	
Bizzell v. Booker, 16 Ark. 308	826	1135	271
Black v. Black, 38 Ala. 111	379	Blane v. Rogers, 49 Cal. 15	365
v. Black, 63 Ala. 329	263	Blankenship, State v. 21 Mo. 504	96
v. Black, 26 N. J. Eq. 431	389	Blare, State v. 69 Mo. 317	91
v. State, 36 Ga. 447	579	Blatch v. Archer, Cowper, 66	331, 749
v. State, 57 Ind. 109	96	Blanfus v. People, 69 N. Y. 107	363
v. State, 2 Md. 376	148	Bleasdale, R. v. 2 C. & K. 765	47, 589
State v. 63 Me. 210	401	Blennerhasset, State v. 1 Walker,	
v. State, 1 Tex. Ap. 368	231,	7	445, 575
	301, 324, 331	Blevins v. Pope, 7 Ala. 371	748
v. State, 8 Tex. Ap. 329	263	Blewitt v. Tregoning, 3 A. & E.	
State v. 31 Tex. 560	99	554	492
v. Ward, 27 Mich. 191	723	Blick, R. v. 4 C. & P. 377	98
v. Woodrow, 39 Md. 194	231	Blight v. Goodliffe, 18 C. B. (N. S.)	
Blackburn v. Com., 12 Bush, 181	391,	757	504
	625, 627	Bliss v. Brainard, 41 N. H. 256	342
v. Crawfords, 3 Wall.		v. Franklin, 13 Allen, 244	401
175	532	R. v. 8 C. & P. 773	97
v. State, 71 Ala. 319	427	Block v. Hicks, 27 Ga. 522	679
State v. 80 N. C. 474	298	Blocker v. Burness, 2 Ala. 354	361
v. State, 23 Oh. St. 146		Blodget v. State, 3 Ind. 403	97
24, 688, 757 a, 787		Blood, Com. v. 4 Gray, 31	97, 99
Blackman v. Johnson, 35 Ala.		Bloom, State v. 68 Ind. 54	60
252	460	Bloomer v. State, 48 Md. 521	32, 111,
			112

TABLE OF CASES.

	SECTION		SECTION
Bloomgart, U. S. v. 2 Benedict,		Bost v. Beresford, 2 Camp. 511	257
356	632	Bostick, State v. 4 Harr. (Del.)	
Blount v. State, 49 Ala. 381	698	563	508, 680
Blower v. Hollis, 1 C. & M. 396	607	Bostock v. State, 61 Ga. 635	312, 797
Bluck v. Rackman, 5 Moo. P. C.		Boston, etc. R. R. Com. v. 126	
305	342	Mass. 66	329
Bluitt v. State, 12 Tex. Ap. 89	486	Boswell v. Com., 20 Grat. 860	336, 729
Blunt v. State, 19 Tex. Ap. 234	477	R. v. C. & M. 584	671
Boardman, State v. 64 Me. 523	261	v. State, 63 Ala. 307	337, 338
Bob, Resp. v. 4 Dall. 145	756, 764	State v. 2 Dev. 209	486
v. State, 32 Ala. 560	680	Bosworth, Com. v. 113 Mass. 200	571
Bobo v. Bryson, 21 Ark. 387	499	Com. v. 22 Pick. 397	441
Boddy v. Boddy, 30 L. J. Pr. & M.		R. v. Strange, 1114	354
(N. S.) 23	35	Botelar v. Bell, 1 Md. 173	52
Bode, State v. 6 Tex. Ap. 424	431	Boteler v. State, 8 Gill & J. 359	605
Bodine, People v. 1 Denio, 281	60, 62,	Bott, U. S. v. 11 Blatch. C. C. 346	440
	418	v. Wood, 56 Miss. 136	741
People v. 1 Edm. Sel. Cas.		Bottomly v. U. S., 1 Story, 135	46, 53
36	331, 373	Bottoms v. Kent, 3 Jones (N. C.),	
Bodkin, R. v. 9 Cox, 403	662	154	74
Bodle, R. v. 6 C. & P. 186	448	Boucher, R. v. 4 C. & P. 562	52
Boggins v. State, 34 Ga. 278	556, 557	R. v. 1 F. & F. 486	118
Bogle v. Kreitzer, 46 Penn. St.		R. v. 3 F. & F. 285	230
465	487	Bouldin v. State, 8 Tex. Ap. 332	
Bohan, State v. 15 Kans. 407	280, 288	24, 314, 751, 796	
Boileau v. Rutlin, 2 Ex. 680	615	Boulter, R. v. 5 Cox, 543; 3 C. &	
Boissy v. Lacou, 10 La. An. 29	385	K. 236; 2 Den. 396	387
Boit v. Barlow, Doug. 172	530	Bowden v. Henderson, 2 Sm. &	
Boles v. State, 46 Ala. 204	476	Giff. 360	810
Bolif v. State, 9 Lea, 516	290, 297,	Bowditch v. Jordan, 131 Mass.	
	302	321	812
Bolkom, Com. v. 3 Pick. 281	142, 605	Bowen, People v. 43 Cal. 439	365
Boman v. Plunkett, 2 McC. 518	557	People v. 49 Cal. 654	30
Bond v. Bank, 2 Ga. 92	158, 160	R. v. C. & M. 149	740
v. Douglas, 7 C. & P. 626	52	R. v. 13 Q. B. 790	830
R. v. 4 Cox, 231; 1 Den. C.		State v. 1 Houst. C. C. 91	764
C. 517	123, 126, 667	v. U. S., 3 MacArthur, 64	98
Bond v. State, 23 Oh. St. 349	338	Bower v. State, 5 Mo. 364	688
Bonett v. Stowell, 37 Vt. 258	394	Bowers, Com. v. 3 Brewst. 350	96, 350
Bonfante v. State, 2 Minn. 123	337	Com. v. 121 Mass. 45	35
Bonner, Com. v. 97 Mass. 587	432,	v. State, 29 Oh. St. 542	496
	433, 474	Bowie v. Maddox, 29 Ga. 285	690
R. v. 6 C. & P. 386; 25 E.		Bowler v. State, 41 Miss. 570	1, 20, 329
C. L. R.	276, 282	v. State, 58 Ala. 335	75
State v. 2 Head, 135	468	Bowles v. State, 58 Ala. 335	68, 74
Bonney, State v. 34 Me. 383	114	Bowling v. Com., 74 Ky. 604	441, 698
Bonsall v. Isett, 14 Iowa, 309	594	Bowman, R. v. Allison C. L. 314	758
v. State, 35 Ind. 460	30	R. v. 6 C. & P. 337	571, 594
Boon, State v. 80 N. C. 461	225	v. Smith, 1 Strobb. 246	362
Boorn's Case,	325, 634	State v. 78 N. C. 509	418
Boott, Com. v. Thach. C. C. 390	695	State v. 80 N. C. 426	422,
Borden v. Fitch, 15 Johns. 121	594		679, 764
Borger, U. S. v. 12 Rep. 134	376	v. Torr, 3 Iowa, 571	407, 538
Bork, People v. 2 N. Y. Cr. Rep.		U. S. v. 2 Wash. C. C.	
56	830	328	103 a, 115
Borland v. Walrath, 33 Iowa, 130	563	v. Woods, 1 Green	
Bornheimer v. Baldwin, 42 Cal.		(Iowa), 441	538
27	225	Boyd v. Bolton, Irish Rep. 8 Eq.	
Borrett, R. v. 6 C. & P. 124	833	113	680
Boscovitch, People v. 20 Cal. 436	446	v. Com., 36 Penn. St. 355	605

TABLE OF CASES.

	SECTION		SECTION
Boyd v. Petrie, L. R. 3 Ch. Ap.		Braithwaite, R. v. 8 Cox, 254; 1	
818; qualifying S. C., L.		F. & F. 639	387
R. 5 Eq. 290	567	Brakefield v. State, 1 Sneed	
State v. 2 Hill (S. C.), 288	393	(Tenn.), 215	281, 282
v. State, 2 Humph. 39	646, 650	Bramley, R. v. 6 T. R. 330	390, 395
	651, 690	Brampton, R. v. 10 East, 282	827
v. Turner, L. R. 3 Ch. Ap.		Bramwell v. Lucas, 2 B. & C. 743	502,
818; overruling S. C., L.			503
R. 5 Eq. 290	566	Brand v. Brand, 39 How. Pr. 193	496
U. S. v. 5 How. 29	164	v. U. S., 18 Blatch. 384	839
Boyer, Com. v. 7 Allen, 306	331	Brandby, State v. 84 N. O. 760	784
Com. v. 1 Binn. 201	116	Brandon v. People, 42 N. Y. 265	432
Boyes, R. v. 1 B. & S. 311; 9 Cox,		State v. 8 Jones (N. C.),	
32; 2 F. & F. 157; 30 L. T. Q.		463	336, 338, 729
B. 301 440, 441, 465, 466, 469, 471,	473	Brandreth, R. v. 32 How. St. Tr.	
Boyington, State v. 56 Me. 512	128	857	698
Boykin v. Boykin, 70 N. C. 262	518	Brandt v. Com., 94 Penn. St. 290	23,
v. State, 34 Ark. 443	758		24, 698, 784
v. State, Sup. Ct. Wis.		Branham, State v. 13 S. C. 389	103,
1883	538		667, 669
Boyland, State v. 24 Kan. 186	30	Brannan, R. v. 6 C. & P. 326	331
State v. 13 R. I. 537	225, 733	Branstetter, State v. 65 Mo. 149	688
State v. Sup. Ct. Wis.		Brant, State v. 14 Iowa, 180	490
1883	407, 539	Brantley, State v. 63 N. C. 518	380
Boyle v. Colman, 13 Barb. 42	552	Brasheers v. State, 58 Md. 563	429
v. Wiseman, 10 Ex. 647	465,	Braynell, R. v. 4 Cox, 402	664
	535	Brazier, R. v. 1 Leach, 199; S. C.,	
Boylston v. Baine, 90 Ill. 283	383	1 East P. C. 443	273, 366
Boynton, Com. v. 116 Mass. 343	440	Breadalbane Case, L. R. 1 H. L.	
Brabbitts v. R. R., 38 Wis. 290	406	So. 182	827
Brackett v. Edgerton, 14 Minn.		Breckenridge v. State, 33 La. An.	
174	460	310	66
v. Hoitt, 20 N. H. 257	186	Breed v. Pratt, 18 Pick. 115	730
v. Weeks, 43 Me. 291	482	Breeden, State v. 58 Mo. 507	486
Bradford v. Barclay, 39 Ala. 33	483	Breese v. State, 12 Oh. St. 146	763
Com. v. 126 Mass. 42	36,	Brehm v. R. R. 34 Barb. 256	420
46, 643, 664, 753, 799	342	Brennan v. People, 15 Ill. 511	380,
Bradford Com. v. 9 Met. 268			459, 584
v. Haggerthy, 11 Ala.	679	Bressant, Com. v. 126 Mass. 246	573
698		Brewer v. Ferguson, 11 Humph.	
v. Williams, 2 Md. Ch.		565	399
1	398	R. v. 6 C. & P. 363	504
Bradley v. Arthur, 4 B. & C. 295	404	v. State, 59 Ind. 101	170
v. Bradley, 2 Fairf. 367	570,	Brewster v. Doane, 2 Hill, 537	536
	615, 638	v. Sewell, 3 B. & A. 303	199
Com. v. 134 Mass. 530	680	v. State, 63 Ga. 639	1
People v. 4 Parker C. R.		Brice, R. v. R. & R. 450	734
245	116 a	Briceland v. Com., 74 Penn. St. 463	334
State v. 1 Hayw. 403	120 a	Brick, State v. 2 Harring. 530	646,
v. State, 31 Ind. 492	339, 764		678
Bradshaw v. Com., 10 Bush, 576	263	Bridge v. Eggleston, 14 Mass. 250	698
v. Murphy, 7 C. & P. 612	566	Bridgman, State v. 49 Vt. 202	35, 38,
Bradsher v. Brooks, 71 N. C. 322	401		396
Brady, State v. 27 Iowa, 126	758	Brien, State v. 3 Vroom, 414	439
Bragg v. Colwell, 19 Oh. St. 407	557	Brier v. Woodbury, 1 Pick. 362	154
Brailley, Com. v. 134 Mass. 527	121	Briggs, Com. v. 11 Met. 573	103 b, 104
Brain, R. v. 6 C. & P. 349	327	Com. v. 7 Pick. 177	573
Brainard v. Fowler, 119 Mass. 262	603	v. Dorr, 19 Johns. 95	640
Brainerd, Com. v. Thach. C. C. 146	469	v. MacKellar, 2 Abb. (Pr.)	
		30	344

TABLE OF CASES.

	SECTION		SECTION
Briggs R. v. 2 M. & R. 199	24, 47	Broughton, State v. 7 Ired. 96	510, 664
State v. 9 R. I. 361	396, 402, 440	Brown's Case, 9 Leigh, 633	688
v. Taylor, 35 Vt. 57	482, 833	Brown v. Bellows, 4 Pick. 188	483
Bright, Com. v. 78 Ky. 238	571	v. Brown, 5 Mass. 320	463
Brill v. Flagler, 23 Wend. 354	418	v. Com., 14 Bush. 398	417, 418
Brindle v. McIlvain, 10 S. & R. 285	378	Com. v. 2 Gray, 358	94
Brink v. Ins. Co., 80 N. Y. 108	460	Com. v. 14 Gray, 414	312, 698
Brinyea, State v. 5 Ala. 241	336, 730	v. Com., 11 Leigh, 711	444
Brisco v. State, 4 Tex. Ap. 219	121	Com. v. 103 Mass. 422	443
Briscoe v. Stephens, 2 Bing. 213;	121	Com. v. 121 Mass. 69	312, 407, 538, 679, 799
9 Moore, 413	594	Com. v. 124 Mass. 318	163
Brister v. State, 26 Ala. 107	102, 616, 632, 690	Com. v. 130 Mass. 279	439
State v. 1 Houst. C. C. 150	667	v. Com., 73 Penn. St. 321	227, 231, 276, 280, 461
Britain v. State, 3 Humph. 203	102	v. Com., 76 Penn. St. 319	13, 32, 154, 263, 627, 629, 760, 803
Brite v. State, 10 Tex. Ap. 368	483	v. Com., 28 P. F. Smith, 122	339
Britt, State v. 78 N. C. 439	312	<i>Ex parte</i> , 72 Mo. 83; Cent. L. J. May 9, 1879	506
Brittleton, R. v. 50 L. T. (N. S.) 276; L. R. 12 Q. B. D. 266	400	v. Foster, 1 H. & N. 736	503
Britton, Com. v. 1 Legal Gaz. R. 513	281	v. Foster, 113 Mass. 136	312
v. Lorenz, 45 N. Y. 57	496	v. Gisborne, 2 Dowl. N. S. 263	351
R. v. 1 F. & F. 354	796	v. Jewett, 120 Mass. 215	503
R. v. 1 M. & Rob. 297	664	v. Lester, Ga. Dec. part i. 877	460
State v. 4 McCord, 256	171	v. Mooers, 6 Gray, 451	225, 491
U. S. v. 2 Mason, 464	118, 199	v. Munger, 16 Vt. 12	521
Broad v. Pitt, 3 C. & P. 519	508	People v. 48 Cal. 253	761
Broadhead v. Wiltse, 35 Iowa, 429	538	People v. 53 Cal. 66	435 a
Broadhempston, R. v. 1 E. & E. 154	835	People v. 59 Cal. 345	296, 698
Brobaton v. Cahill, 64 Ill. 358	555, 556, 557	People v. 91 Ill. 506	646, 658
Brook v. State, 26 Ala. 104	29, 30	v. People, 16 N. Y. Sup. Ct. 562	474
Brockins, U. S. v. 3 Wash. C. C. R. 99	363	People v. 72 N. Y. 571	412, 432
Brogan, R. v. cited 2 Russ. C. & M. 887	666	v. Philpot, 2 M. & Rob. 285	321
Broggy v. Com., 10 Grat. 772	227, 229	v. R. R., 66 Mo. 588	380
Bromage v. Prosser, 4 B. & C. 247	739	R. v. 9 Cox C. C. 281	504
v. Rice, 7 C. & P. 548	555	R. v. 10 Cox, 453; S. C., L. R. 1 C. C. 70	486, 487
Bromwich, R. v. 1 Salk. 180, 281	227	R. v. 9 Cox C. C. 281	564
Bronson v. Bronson, 8 Phila. R. 261	389	R. v. 17 L. J. M. C. 145	638
Brookbank v. State, 55 Ind. 169	492	R. v. M. M. 163	103, 105
Brooke v. Winters, 39 Md. 505	24	v. Shook, 77 Penn. St. 471	52, 53, 803
Brooks v. Acton, 117 Mass. 204	823	v. Shook, 46 Ala. 63, 184	63, 148, 175
Com. v. 9 Gray, 299	441	v. State, 47 Ala. 47	570
v. Crosby, 22 Cal. 42	359	v. State, 52 Ala. 338	169, 172
People v. 1 Denio, 457	725	v. State, 24 Ark. 626	445
U. S. v. 3 MacArthur, 315	319	State v. 16 Conn. 54	571, 579, 595
Brookshire, State v. 2 Ala. 303	446	v. State, 60 Ga. 210	786
Brotherton, People v. 8 Cal. 444	698	v. State, 61 Ga. 311	763
People v. 47 Cal. 388	227, 413	State v. 1 Hayw. 100	111
v. People, 75 N. Y. 159	276, 281, 294, 338, 339	State v. 8 Humph. 89	138
Broughton, People v. 49 Mich. 339	152, 170, 484	State v. 71 Ind. 470	667
		State v. 25 Iowa, 561	742, 758

TABLE OF CASES.

	SECTION		SECTION
Brown, State v. 48 Iowa, 382	631	Bryant v. Glidden, 39 Me. 458	457
State v. 22 Kan. 222	757	v. State, 7 Baxt. 67	330
State v. 28 La. An. 279	390	State v. 14 Mo. 340	97
v. State, 32 Miss. 433	281	State v. 55 Mo. 75	69, 80
v. State, 57 Miss. 474	24, 609, 699	Bryce v. Butler, 70 N. C. 585	698
State v. 1 Mo. Ap. 86	625	Bryne v. State, 47 Conn. 465	273
State v. 64 Mo. 367	264, 690, 691, 756	Buchanan, People v. 1 Idaho, N. S. 681	141, 147, 261
State v. 75 Mo. 317	758	Bucher v. Jarrett, 3 B. & P. 145	118
State v. 9 Neb. 157	738	Buchman v. State, 59 Ind. 1	426
State v. 76 N. C. 222	380	Buck v. Ashbrook, 51 Mo. 539	401
v. State, 18 Oh. St. 496	363, 441, 445	Buckingham Js. R. v. 8 B. & C. 375	566
v. State, 26 Oh. St. 176	32	Buckland v. Com., 8 Leigh, 72	114, 117
v. State, 7 Oregon, 186	721	People v. 13 Wend. 592	596 a, 602
State v. 3 Strobh. 508	441	Buckles, State v. 26 Kan. 237	124
v. State, 1 Tex. Ap. 154	324	Buckley v. Leonard, 4 Denio, 500	54, 825
v. State, 2 Tex. Ap. 139	688	R. v. 13 Cox C. C. 293	526
v. State, 4 Tex. Ap. 27	735	State v. 40 Conn. 246	255, 261
v. State, 6 Tex. Ap. 287	366	State v. 72 N. C. 358	370
v. State, 9 Tex. Ap. 81	31, 32	Bucklin v. State, 20 Ohio, 18	487
U. S. v. 4 Cranch C. C. 508	680	Buckman, State v. 8 N. H. 203	147
U. S. v. 3 McLean, 233	146	Buckner v. Beck, Dudley (S. C.) 168	575
U. S. v. 1 Sawyer, 531	471	v. Com., 14 Bush, 60	736
v. Wright, 5 Ga. 29	602	Buel v. R. R., 31 N. Y. 314	826
Browne v. Byrne, 2 E. & B. 713	9	Buffington, State v. 20 Kans. 599	398
R. v. 3 C. & P. 572	570, 604	Buford v. Hickman, 1 Hempst. 232	608
Brownell v. People, 38 Mich. 732	61, 69, 77, 408, 460, 757	Bull, R. v. 9 C. & P. 22	448
Browning v. R. R. 2 Daly, 117	460	R. v. 12 Cox. 31	230
v. State, 30 Miss. 656	698	Bullard v. Lambert, 40 Ala. 204	487
v. State, 33 Miss. 48	695	Bulliner, People v. 95 Ill. 394	446
Broyles v. State, 47 Ind. 251	680	Bullock v. Koon, 3 Cow. 30	353
Brubacker v. Taylor, 76 Penn. St. 83	430, 433, 685	Bulson v. People, 31 Ill. 409	595
Bruce v. Nicolupolo, 11 Ex. 129	168, 266, 830	Bumpus v. Fisher, 21 Tex. 561	726
State v. 48 Iowa, 336	338	Bundy, State v. 64 Me. 507	95
State v. 33 La. An. 186	650, 655	Bunnell v. Butler, 23 Conn. 65	487
State v. 24 Me. 71	486	Bunside, State v. 37 Mo. 343	392
Brundred v. Del Hoyo, 20 N. J. L. 328	540	Burchfield v. State, 82 Ind. 580	382
Brunell, State v. 29 Wis. 435	261	Burden v. People, 26 Mich. 162	430
Brunet v. State, 12 Tex. Ap. 521	69, 263, 602 a, 696	Burdett, R. v. 4 B. & Ad. 95	113, 324, 329, 331, 440, 707, 749, 762
Brunetto, State v. 13 La. An. 45	276, 457	R. v. Dears. 431	427
Brunker, State v. 46 Conn. 327	106	R. v. 1 Ld. Raym. 148	132
Brunswick v. Harmer, 14 Q. B. 185	158, 440, 443	R. v. 4 B. & Ald. 179	682
Brunton, R. v. R. & R. 454; Burn, 212	443	v. State, 9 Tex. 43	571, 595
Bruzzo, People v. 24 Cal. 41	443	Burdick v. Hunt, 43 Ind. 381	482, 510, 555
Bryan v. Forsyth, 19 How. U. S. 334	525	v. People, 58 Barb. 51	432, 438, 470
v. Forsyth, 62 Ga. 179	763	Burdock, R. v. Best on Pres. § 196	784
State v. 74 N. C. 351	676	Burgamy v. State, 4 Tex. Ap. 572	96
v. Walton, 14 Ga. 185	483	Burgess, Com. v. 2 Va. Cas. 484	756
v. Wagstaff, Ry. & M. 327; 2 C. & P. 123	214	People v. 35 Cal. 115	106
		State v. 75 Me. 541	107
		Burghart v. Angerstein, 6 C. & P. 690	532

TABLE OF CASES.

	SECTION		SECTION
Burke, Com. v. 12 Allen, 182	128	Butler, People v. 8 Cal. 435	81
Com. v. 16 Gray, 33	357, 361, 362, 475	v. State, 22 Ala. 43	46, 117
v. Savage, 13 Allen, 408	401	v. State, 34 Ark. 480	138, 477, 484, 690
v. State, 71 Ala. 377	734, 756	v. Tubbs, 13 Me. 302	447
Burkholder v. Plank, 69 Penn. St. 235	560	U. S. v. 1 Cranch C. C. 422	352
Burley, R. v. 1 Phil. Evid. 104	670	v. Watkins, 13 Wall. 457	24
Burlingham, State v. 15 Me. 104	391	Butterfield, State v. 75 Mo. 297	761
Burnett v. Phalon, 11 Abb. (N. Y.) Pr. 157	473	Butterick, Com. v. 100 Mass. 1	53
Burnham v. Hatfield, 5 Blackf. 21	510	Butterworth, R. v. R. & R. 520	136
Burns v. McCabe, 72 Penn. St. 309	698	Buttery R. v. R. & R. 342	598
v. People, 1 Parker C. R. 182	585	Buttle, R. v. 11 Cox, 566	471
v. State, 49 Ala. 370	757	Button, R. v. 11 Q. B. 929	585
v. State, 61 Ga. 192	296	Butts, Com. v. 124 Mass. 449	116 a
State v. 30 La. An. part i. 679	69	v. Swartwood, 2 Cowen, 431	361
State v. 48 Mo. 438	107	Buzzell, Com. v. 16 Pick. 153	484
U. S. v. 5 McLean, 23	33, 43	Byass v. Sullivan, 21 How. (N. Y.) Pr. 50	463, 566
Burnside v. R. R., 47 N. H. 554	695	Byers, State v. 80 N. C. 426	334
Burr v. Sim, 4 Whart. 150	811	Bykerdyke, R. v. 1 M. & Rob. 179	133
Burrell v. State, 18 Tex. 713	491	Byrd v. State, 68 Ga. 66	691
Burress v. Com., 27 Grat. 934	552, 555, 559, 562, 578	v. State, 31 La. An. 419	584
Burris v. State, 38 Ark. 221	750	v. State, 57 Miss. 243	390, 401
Burroughs, U. S. v. 3 McLean, 405	114, 116, 142	Byrne, State v. 47 Conn. 465	273
v. State, 17 Fla. 643	454		
Burrows R. v. 1 Cox, 363	427	C.	
Burson v. Huntington, 21 Mich. 415	231	C. v. A. B., 2 Weekly Notes, 291	52
Burst v. State, 89 Ind. 133	107	Cabot v. Gwen, 45 Me. 144	164, 833
Burt, R. v. 5 Cox, 284	61	Cadogan, R. v. 5 B. & A. 902; 1 D. & R. 550	566
State v. 25 Vt. 373	138, 142, 144	Cadwell v. State, 17 Conn. 467	261
Burton's Case, 1 Strange, 481	826	Cady v. State, 44 Miss. 333	647, 648, 677
Burton v. Driggs, 20 Wall. 133	166, 200, 203, 205	Cahill, Com. v. 12 Allen, 540	116, 116 a, 127
R. v. 1 Dears. C. C. 282	326, 758, 760	Cain, R. v. 1 Crawf. & D. 37	673, 678
R. v. 24 Eng. L. & Eq. 551; 6 Cox, 293	324	v. State, 18 Tex. 387	689
Bury v. Philpot, 2 Mylne & K. 349	828	State v. 9 W. Va. 559	360
Bush, Com. v. 2 Duv. 264	365	Caleb v. State, 39 Miss. 721	406, 417, 418
Com. v. 80 Ky. 244	361	Calkins v. Barger, 44 Barb. 424	824
R. v. R. & R. 372	97, 98	v. State, 14 Oh. St. 222	556, 557, 559
v. State, 65 Ga. 658	1	v. State, 18 Oh. St. 366	53
Bushell v. Barratt, Ry. & M. 434	363	102 a, 164 a, 435 a	
Bushnell v. Bank, 20 La. An. 464	698	Call, Com. v. 21 Pick. 515	29, 35, 102, 679
Buswell v. Davis, 10 N. H. 413	960	State v. 48 N. H. 126	53
Butler's Case, 13 Co. 55; 3 Inst. 113	111	Callaghan, R. v. 1 M'Nally, 385	295
Butler, Com. v. 1 Allen, 4	733	Callan v. Gaylord, 3 Watts, 321	839
v. Com., 2 Duv. 435	646	Callanan v. Shaw, 24 Iowa, 441	156
v. Ford, 1 C. & M. 662	833	Callen v. Ellison, 13 Oh. St. 446	594
v. Moore, M'Nally's Ev. 253, 508		Calley v. Richards, 19 Beav. 401	498
v. Mountgarrett, 7 H. L. Cas. 633; 6 Ir. Law R. (N. S.) 77	839	Calvert v. State, 8 Tex. App. 174	538
	762	v. State, 14 Tex. App. 154	455
		Calvin, State v. Charlton, 161	108, 114, 445

TABLE OF CASES.

	SECTION		SECTION
Calvin, State v. 2 Zab. 207	116 a	Carey, Com. v. 2 Brewst. 401	66, 366,
Cambioso v. Maffett, 2 Wash. C. C.			492
98	723	Com. v. 2 Pick. 47	552
Cameron v. Peck, 37 Conn. 555	177	v. Phil. Co., 33 Cal. 694	521
v. School District, 42 Vt.		v. Pitt, Peake's Add. Cas.	
507	153	130	552
v. State, 14 Ala. 546	171, 457	Carillo, People v. 54 Cal. 63	707
v. State, 13 Ark. 712	142,	Carleton v. Ins. Co., 35 N. H. 162	594
144, 148, 584		Carlisle v. State, 32 Ind. 55	109
v. State, 9 Tex. Ap. 332	241	State v. 57 Mo. 102	649
State v. 40 Vt. 555	125, 132,	Carlton v. Hescocx, 107 Mass. 410	825
435, 588		People v. 57 Cal. 83	68, 757
Camoy's Peerage Case, 6 Cl. & F.		Carmichael v. State, 12 Oh. St. 553	
801	544		171
Campan v. North, 39 Mich. 606	516	v. State, 36 Ala. 514	417
Campbell v. Campbell, L. R. 1 Sc.		Carnes v. Platt, 36 N. Y. Sup. Ct.	
App. 193	827	360; 15 Abb. Pr. (N. S.) 337	499
Com. v. 7 Allen, 541	29	Carotti v. State, 42 Miss. 344	172
Com. v. 103 Mass. 436	103,	Carpenter v. Blake, 2 Lans. 206	418
	120	v. Carpenter, 8 Bush,	
v. Com. 84 Penn. St. 187	32,	283	730
	440	v. Crane, 5 Blackf. 119	445
Ex parte, L. R. 5 Ch. Ap.		v. Dexter, 8 Wall. 513	198
703	503	v. Groff, 5 S. & R. 162	229
v. Gullatt, 43 Ala. 57	170	v. Nixon, 5 Hill, 260	363,
v. People, 59 Cal. 241	757		489
v. People, 16 Ill. 17	68, 757	People v. 9 Barb. 580	393
v. People, 8 Wend. 636	354	v. State, 23 Ala. 84	144,
R. v. 1 C. & K. 82	97		584
v. State, 23 Ala. 44	12, 363,	v. Wall, 11 Ad. & El.	
370, 371, 460, 472, 487, 493,		803	486
690, 751, 752, 796		Carpmael v. Powis, 1 Ph. 687	503
v. State, 55 Ala. 80	679, 796	Carr, State v. 5 N. H. 367	114, 552
v. State, 38 Ark. 498	169,		556, 560
	276, 357	State v. 37 Vt. 191	677
v. State, 11 Ga. 354	277, 297	Carrack, State v. 16 Nev. 120	631, 632
State v. 76 N. C. 281	121	Carrick v. Armstrong, 2 Cold. 265	603
v. State, 35 Ohio St. 70	146	Carrier v. Hampton, 11 Ired. L.	
State v. 1 Rich. 124	227	311	551, 560
State v. 8 Tex. Ap. 84,	29,	v. People, 46 Mich. 442	24
	225	Carillo v. People, 54 Cal. 63	707
v. Twemlow, 1 Price, 31	390	Carrington, R. v. 8 C. & P. 109	652
Canada v. Curry, 73 Ind. 246	472	Carroll, Com. v. 15 Gray, 409	103
Cancemi v. People, 16 N. Y. 501	66	v. Com., 84 Penn. St. 107	
Candell v. Pratt, 1 M. & M. 108	473		31, 441, 442
Candler, State v. 3 Hawks, 393	363,	People v. 3 Park. C. R. 73	
	552		470
Cannady v. Lynch, 27 Minn. 435	370	v. State, 23 Ala. 28	663
Cannell v. Ins. Co., 59 Me. 582	460	v. State. 31 La. An. 860	700
Canney, State v. 19 N. H. 135	146	v. State, 5 Neb. 31	439
Cannon v. State, 57 Miss. 147	48	Carskadden v. Poorman, 10 Watts,	
Canoll v. State, 3 Humph. 315	60	82	163, 532
Canon v. Abbot, 1 Root, 251	601	Carson, R. v. R. & R. 303	132, 588
Canter v. People, 38 How. (N. Y.)		v. State, 50 Ala. 135	60
Pr. 91	580	v. State, 69 Ala. 235	405, 460
Cantey v. Platt, 2 McCord (S. C.),		Carter v. Boehm, 1 Sm. Lead. Cas.	
260	548	a.	411
Card v. Card, 39 N. Y. 317	396	v. Com., 2 Va. Cas. 354	63, 64
Cardose, Com. v. 119 Mass. 210	261	v. People, 2 Hill (N. Y.)	
Cardoza v. State, 11 S. C. 195	698, 698 a	317	302

TABLE OF CASES.

	SECTION		SECTION
Carter v. State, 63 Ala. 52	361, 368	Center, State v. 35 Vt. 378	281, 398
State v. 3 Dutch. 500	110	Central Mil. R. R. v. Rockafellow,	
v. State, 56 Ga. 463	338	17 Ill. 541	361, 362
State v. 1 Houst. C. C. 402	60	Cesure v. State, 1 Tex. Ap. 19	29, 30
v. State, 2 Ind. 617	254, 407, 538	Chabbock, Com. v. 1 Mass. 144	646, 677
v. State, 8 Tex. Ap. 372	757	Chaffee v. U. S. 18 Wall. 516	341, 344, 720
v. Stone, 56 Ala. 52	361	Chaffin, State v. 2 Swan. 493	584
Cartwright v. Cartwright, 1 Phil-		Chahoon v. Com., 21 Grat. 822	496
imore, 100	730	Chalkley, R. v. R. & R. 258	124
v. Green, 8 Ves. 405	396, 463	Chamberlain's Case, 4 Cow. 49	348
Carty, R. v. McNally's Ev. p. 45	667	Chamberlain v. Gaillard, 26 Ala.	
Carver v. People, 39 Mich. 786	34	504	593
Caryl, People v. 12 Wend. 547	560	v. People, 23 N. Y.	
Casborus, People v. 13 Johns. 351	795	85	396, 518
Case v. People, 76 N. Y. 242	322 a, 329	U. S. v. 12 Blatch.	
Casey, Com. v. 11 Cush. 417	293, 300, 303	390 556, 558, 560, 847	
People v. 53 Cal. 360	60	v. Wilson, 12 Vt. 491	463
v. People, 72 N. Y. 393	134, 138, 432	Chamberlin v. Ball, 15 Gray, 352	188
v. State, 37 Ark. 67	391, 439, 698	v. Man. Co. 118 Mass.	
v. State v. Busbee, 209	595	532	199
Cashiel, U. S. v. 1 Hughes, 552	575	Chambers v. Hill. 34 Mich. 523	382
Casper, R. v. 2 Mood. C. C. 101	98	People v. 18 Cal. 383	757, 761
Cass, R. v. 1 Leach, 293, n.	651	People v. 105 Ill. 409	429
Cassety, State v. 1 Rich. 91	140	R. v. L. R. 1 C. C. 341	116 a
Cassidy, R. v. 1 F. & F. 79	448	v. State, 26 Ala. 59	688
Castell Careinlon, R. v. 8 East, 77	363	State v. 39 Iowa, 179	677
Castle v. Bullard, 23 Howard, 172	53	State v. 70 Mo. 625	526
v. State, 75 Ind. 146	1	Champ v. Com. 2 Metc. (Ky.) 27	774
Castleton, R. v. 6 T. R. 236; B. N.		Champagne, U. S. v. 1 Ben. 241	552, 644, 670
P. 254	199	Champney's Case, 2 Lew. C. C. 258	
Castner v. Sliker, 33 N. J. L. 95,			387
507	408, 412, 417	Champneys, R. v. 2 M. & R. 26	578, 580, 585, 587
Castro, R. v. L. R. 9 Q. B. 350 (see		Chance v. R. R., 32 Ind. 472	555
Tichborne Case)	558	Chancellor, State v. 1 Strobh. 347	365
Caswell v. Howard, 16 Pick. 567	225	Chandler v. Barrett, 21 La. An. 58	412
v. R. R. 98 Mass. 194	824		
Cates v. Hardacre, 3 Taunt. 424	463, 466	v. Com., 1 Bush, 41	445
Catesby, R. v. 2 B. & C. 814	835	v. Horne, 2 M. & R. 423	446
Cathcart v. Com., 37 Penn. St. 108	60	v. Hough, 7 La. An. 441	379
In re, L. R. 5 Ch. 703	503	v. Le Barron, 45 Me. 534	550
Catherine Maria, The, L. R. I Ad.		State v. 5 La. An. 489	82
& Ec. 53	528	Chaney v. State, 31 Ala. 342	264
Caton, U. S. v. 1 Cranch C. C. 150	450	Chant v. Brown, 7 Hare, 79	498
Canjolle v. Ferrie, 23 N. Y. 90	828	Chapin v. Marlborough, 9 Gray,	
Cavanah v. State, 56 Miss. 299	156	244	272
Cavanaugh, People v. 62 How. Pr.		v. Siger, 4 McL. 378	202
187	92	Chaplin v. State, 7 Tex. Ap. 87	785
Cavendish v. Troy, 41 Vt. 99	607	Chapman v. Coffin, 14 Gray, 454	482
Caveness, State v. 78 N. C. 484	487	Com. v. 11 Cush. 422	102
Caw v. People, 3 Neb. 357	269	v. Davis, 3 M. & G. 609;	
Cayford's Case, 7 Greenl. 57	171	S. C., 4 Scott N. R.	
Cazenove v. Vaughan, 1 M. & S. 4	227	319	346, 451
		v. People, 39 Mich. 357	109

TABLE OF CASES.

	SECTION		SECTION
Chapman, R. v. 8 C. & P. 558	448, 454	Chittem, State v. 2 Dev. 49	602
v. State, 18 Ga. 736	96	Choate, Com. v. 105 Mass. 451	442
Chappell v. State, 71 Ala. 322	427	Choen v. State, 52 Ind. 347	99
Chard, R. v. R. & R. 488	124	Choise v. State, 31 Ga. 424	417, 418,
Charity, State v. 2 Dev. 543	517		460, 731
Charles v. Huber, 78 Penn. St. 449		Cholmondeley v. Clinton, 19 Ves.	
	598	268	498
U. S. v. 2 Cranch C. C. 76	510	Chopin, State v. 10 La. An. 458	82
Charlesworth, R. v. 2 F. & F. 326	450,	Chouteau v. Chevalier, 1 Mo. 343	530,
	471		535
Charlton v. Coombes, 4 Giff. 372	498,	Christian v. Com., 13 Bush, 264	445
	504	R. v. C. & M. 388	178, 570
Charnook v. Devings, 8 C. & P. 378		Christie, People v. 2 Parker C. R.	
	446	579	477, 515
Chartered Bank of India v. Rich,		R. v. Car. C. L. 232, O. B.	
32 L. J. Q. B. 300, 306	504	1821	284
Chartrand, Terr. v. 1 Dak. 379	261	Christmas v. State, 53 Ga. 81	572
Chase v. Blodgett, 10 N. H. 22	363	State v. 6 Jones (N. C.),	
Com. v. 127 Mass. 7	836 a	471	731
v. People, 40 Ill. 352	339	Christopher, R. v. 1 Den. C. C.	
v. State, 46 Miss. 683	69	536; 2 C. & K. 994	231
Chavis, State v. 80 N. C. 353	68, 73	Christy v. Clarke, 45 Barb. 529	395
Cheatham v. State, 59 Ala. 40	363	Chubb v. Salomons, 3 C. & K. 75	513,
Chee Kee, People v. 61 Cal. 404	539,		514
	644	v. State, 14 Tex. Ap. 192	402
Cheek v. State, 38 Ala. 227	97	Chung Ah Chue, People v. 57 Cal.	
v. State, 35 Ind. 492	225, 262	567	231
State v. 13 Ired. 114	559	Church v. Milwaukee, 31 Wis. 512	544
Cheeseman, R. v. 7 C. & P. 455	764	Churchill, Com. v. 11 Met. 530	486
Cheney v. State, 7 Ohio, 222	65	v. Corker, 25 Ga. 479	385
Cheong Foon, People v. 61 Cal. 527	322	v. Smith, 16 Vt. 560	225
Cherry v. State, 68 Ala. 29	236	Churchill, Ld. v. Hunt, 2 B. & A.	
State v. 63 N. C. 493	490, 491	685	139
Chesley v. Chesley, 54 Mo. 347	398,	Chute v. State, 19 Minn. 271	109, 312,
	401		454, 797
Com. v. 107 Mass. 223	592	Cicero v. State, 54 Ga. 156	667
Chester, R. v. 1 W. Bl. 25	594	Clair, Com. v. 7 Allen, 525	579
Chester v. Wortley, 7 C. & B. 410;		Clampitt v. State, 9 Tex. Ap. 27	756
1 Burr's Trial, 244	463	Clancy's Case, Fortesc. R. 208	363
Cheverton, R. v. 2 F. & F. 833; 2		Clanton v. State, 13 Tex. Ap. 139	510
Russ. on Cr. 824	13, 662, 677, 804	Clapham, R. v. 4 C. & P. 29	532
Chicago v. Greer, 9 Wall, 726	458	Clapp v. Fullerton, 34 N. Y. 190	417
R. R. v. Collins, 56 Ill.		Clark v. Bigelow, 16 Me. 246	462
212	698	v. Bond, 29 Ind. 555	492
v. George, 19 Ill.		v. Bryan, 16 Md. 171	594
510	163	v. Crego, 47 Barb. 599	521
v. Triplett, 38 Ill.		v. Field, 12 Vt. 485	512
482	373	v. Freeman, 25 Penn. St.	
Chidley & Cummins, R. v. 8 Cox,		133	553
365	664	v. Hougham, 2 B. & C. 149	685
Child v. Grace, 2 C. & P. 193	680, 681	v. Irvin, 9 Ham. 131	615
Childers v. State, 52 Ga. 106		People v. 33 Mich. 112	405
	441, 442	People v. 7 N. Y. 385	764
Childress v. State, 10 Tex. App.		R. v. B. & B. 473	579
698	691	R. v. R. & R. 358	95
Chin, People v. 51 Cal. 597	291, 299,	v. Reese, 35 Cal. 89	432, 465,
	474		471, 473
Chirac v. Reinicker, 11 Wheat.		v. Rhodes, 2 Helsk. 206	555
280; S. C., 2 Pet. 613	503	v. Richards, 3 E. D. Smith,	
Chisholm v. State, 45 Ala. 66	20	89	503

TABLE OF CASES.

	SECTION		SECTION
Clark, State v. 32 Ark. 231	698	Clivinger, R. v. 2 Ld. Ray. 752	390
State v. 3 Foster (N. H.), 429	143	R. v. 2 T. R. 263	402
v. State, 12 Ga. 131	420, 584	Close v. Olney, 1 Denio, 319	417
State v. 12 Ired. 151	412	Clube, R. v. 3 Jur. N. P. S. 698	118
State v. 54 N. H. 456	173	Cluck v. State, 40 Ind. 263	62, 108
v. State, 12 Ohio, 483	337, 417, 420	Clue, Com. v. 3 Rawle, 498	574
v. State, 9 Oregon, 466	487	Cluggage v. Swan, 4 Binney, 150	510
v. State, 15 S. C. 403	412	Clunnes v. Pezzy, 1 Camp. 8	743
v. State, 8 Tex. Ap. 350	338	Coale v. R. R., 60 Mo. 232	54
v. Trinity Church, 5 W. & S. 266	532	Cobbett, <i>Ex parte</i> , 4 Jur. N. S. 145	351
v. Wyatt, 15 Ind. 271	555	v. Hudson, 1 E. & B. 11	385, 446
Clark's Lessee v. Hall, 2 Har. & M'Hen. 378	363	v. Kilminster, 4 F. & F. 490	550, 555
Clarke v. Page, 1 Har. & J. 318	521	Cobden, R. v. 3 F. & F. 833	31, 32, 734
v. Panfield, 15 N. J. Ch. 119	811	Cobia v. State, 16 Ala. 781	573
R. v. 2 Stark. 241	60, 273, 491	Coble v. State, 31 Oh. St. 100	30
v. Saffery, Ry. & M. 126	454	Coburn v. Odell, 30 N. H. 540	463
v. State, 35 Ga. 75	690, 764	Cochran v. Butterfield, 18 N. H. 115	552
v. State, 23 Miss. 261	573	v. Miller, 13 Iowa, 128	460
Clary v. Clary, 2 Ired. L. 78	417	Cochrane v. State, 6 Md. 400	579
Claviger, R. v. 2 T. R. 268	396	Cock, People v. 4 Seld. 67	833
Clawson v. State, 14 Oh. St. 234	698	Cockburn, R. v. D. & B. 203; 7	230
Clay v. Anderson, 10 W. Va. 50	555	Cox, 265	135
Clay's Case, 2 East P. C. 580	833	Cocker, State v. 3 Harring. 554	135
Clayton v. Wardell, 5 Barb. 214; 4 Comst. 230	171, 827	Cockerham v. Nixon, 11 Ired. L. 269	54, 825
Claytor v. Anthony, 6 Rand. (Va.) 285	698	Cockfield, State v. 15 Rich. 316	121
Clearwater v. Brill, 61 N. Y. 625	458	Cockin, R. v. 1 Lew. C. C. 235	758
Cleary, R. v. 2 F. & F. 850	284	Cocks v. Purday, 2 C. & K. 270	407, 538
Cleaves, State v. 59 Mo. 298	435, 679, 733	Coe, Com. v. 115 Mass. 481	544, 552, 556, 557, 558
Cleland v. Thornton, 43 Cal. 437	824	Coffee v. Neely, 2 Heisk. 304	803
Clem v. State, 31 Ind. 480	764	v. State, 1 Tex. Ap. 548	60
v. State, 33 Ind. 419	491	v. State, 3 Yerg. 283	721, 764
v. State, 42 Ind. 420	587, 592	Coffeen v. Hammond, 3 Greene, (Iowa), 241	204
Clemens v. Murphy, 40 Mo. 121	593	Coffey, State v. N. C. Term R. 272	120 a
Clement v. Cureton, 36 Ala. 120	456	Coffin v. Anderson, 4 Blackf. 395	492
Clementine v. State, 14 Mo. 112	261, 473	v. Jones, 13 Pick. 444	399
Clements v. Brooks, 13 N. H. 92	153, 474	v. Knott, 2 Greene (Iowa), 582	640
v. State, 50 Ala. 117	764	Coffman v. Com., 10 Bush, 495	20
U. S. v. 3 Hughes, 509	438, 445	People v. 24 Cal. 230	338
Clemons v. State, 4 Lea, 23	678	Cogan, R. v. 1 Leach, 443	578
Cleveland, People v. 49 Cal. 578	442, 761	Conea v. State, 11 Tex. Ap. 153	698
v. Newsom, 45 Mich. 62	276	Cohen, Com. v. 127 Mass. 282	440
Clewes, R. v. 4 C. & P. 221	32, 325, 688, 804	R. v. 11 Cox, 99	733
Clifton, State v. 30 La. An. 951	24	v. State, 50 Ala. 108	1
v. U. S. 4 How. 242	344, 749	Coit v. Haven, 30 Conn. 190	594
Cline, People v. 44 Mich. 291	556, 557	Cokely v. State, 4 Iowa, 477	484
Clinton v. Estes, 20 Ark. 216	699	Coker v. State, 20 Ark. 51	757
State v. 67 Mo. 380	430, 557	Colburn v. Bancroft, 23 Pick. 575	96
Cliquot's Champagne, 3 Wall. 114	695	Colby, State v. 51 Vt. 291	35, 173 a, 440
		Colclough v. Rhodus, 2 Rich. (S. C.) 76	494
		Cole's Case, Cent. L. J. Aug. 1, 1879; 8 Weekly Notes, 114	504

TABLE OF CASES.

	SECTION		SECTION
Cole's Lessee v. Hall, 1 Har. & Johns. 572	363	Combs v. Winchester, 49 N. H. 13	482
Cole, Com. v. 5 Grat. 696		Comfort v. People, 54 Ill. 404	263, 758
	24, 30, 46, 51	Commander v. State, 60 Ala. 1	784
People v. 43 N. Y. 508	494	Commis. People v. 16 N. Y. Sup. Ct. 212	401
R. v. 1 R. C. & M. 939	65	Commissioners v. Washington Park, 52 N. Y. 131	521
State v. 22 Kan. 474	698	Compton, R. v. 3 C. & P. 418	130
State v. 48 Mo. 70	595	v. State, 13 Tex. Ap. 275	396, 401
U. S. v. 5 McLean, 513	698	Comstock v. Crawford, 3 Wall. 397	594
v. Varner, 31 Ala. 244	460	v. State, 14 Neb. 205	233, 681
Colee, Com. v. 6 Gray, 650	382, 457	Condry, State v. 5 Jones (N. C.), 418	443
v. State, 75 Ind. 511		Coney, R. v. 8 Q. B. D. 534; 15 Cox C. C. 46	440, 698
Coleman v. Com., 25 Grat. 865	369, 370, 371	Confer v. McNeal, 74 Penn. St. 112	698
v. Dobbins, 8 Ind. 156	524	Congreve v. Morgan, 18 N. Y. 84	825
v. People, 55 N. Y. 81	30, 32, 44	Conkey v. People, 5 Parker C. R. 31	487, 492
v. People, 1 N. Y. Cr. Rep. 1	338	Conley v. Meekes, 85 N. Y. 618	486
v. State, 59 Ala. 52	7	Conly, R. v. 8 Q. B. D. 534; 15 Cox C. C. 440	698
State v. 27 La. An. 691	338, 417	Conn. Ins. Co. v. Ellis, 89 Ill. 516	538
State v. 59 Miss. 48	67	Connell, R. v. 1 C. & K. 190	122
State v. 6 Rich. (N. S.) 185	736	Connolly, Com. v. 1 Browne (Pa.), 284	518
v. State, 97 U. S. 509	576	Conner v. State, 25 Ga. 515	449
Coles v. Perry, 7 Tex. 109	382	v. State, 6 Tex. Ap. 457, 459	758
State v. 22 Kan. 474	698	Connery v. Brooke, 73 Penn. St. 80	591
Coley, R. v. 10 Cox, 536	662	Connor's Case, 50 N. Y. 240	432
Collender v. Dinsmore, 55 N. Y. 200	559	Connor, State v. 5 Cold. 311	573
Collier v. Com., 134 Mass. 203	27, 405, 413, 816	v. State, 34 Tex. 659	20, 693, 694
v. Simpson, 5 C. & P. 73	407, 538	v. State, 6 Tex. Ap. 455	459, 460
Collins v. Com., 12 Bush, 271	229, 294	Connors v. People, 50 N. Y. 240	432, 470
Com. v. 134 Mass. 263	816	Conolly v. Riley, 25 Md. 402	833
v. Dorchester, 6 Cush. 396	825	Conradi v. Conradi, L. R. 1 P. & D. 514	231
v. Groseclose, 40 Ind. 414	824	Consolidated Co. v. Cashow, 41 Md. 59	408
v. Middle Level Com. L. R. 4 C. P. 279	824	Continental Insurance Co. v. Del-peuch, 3 Weekly Notes, 277	726
People v. 48 Cal. 277	24, 699	Conwell v. State, 66 Ga. 309	784
v. People, 39 Ill. 233	127	Conyers v. State, 50 Ga. 103	342
v. People, 98 Ill. 584	11, 441	Coode v. Coode, 1 Curtis, 765	530, 535
State v. 20 Iowa, 85	1, 20, 743	Cook v. Brown, 34 N. H. 460	483
State v. 32 Iowa, 36	79, 757	v. Castner, 9 Cush. 266	408
State v. 15 S. C. 373	203, 261 a	Com. v. 6 S. & R. 577	136, 574
v. Waters, 54 Ill. 485	271	v. Middlesex, 2 Dutcher, 326	489
Colman v. Truman, 3 Hurl. & N. 871	505	v. Mix, 11 Conn. 432	357
Colmer, R. v. 9 Cox, 506	664	v. Moore, 11 Cush. 216	53
Colquitt v. State, 34 Tex. 550	691	People v. 14 Barb. 259	99, 100
Colston, State v. 53 N. H. 483	32, 54	v. State, 11 Ga. 53	171
Colucci, R. v. 3 F. & F. 103	118, 120, 199, 564		
Colvin, State v. 11 Humph. 599	573, 595, 638		
Combe v. London, 1 Russ. 631	499		
v. Pitt, 3 Burr. 1586	143		
Combs v. State, 75 Ind. 215	759		

TABLE OF CASES.

	SECTION		SECTION
Cook, State v. 17 Kans. 392	413	Cornelius, R. v. 2 Str. 1210; 1 Wils.	
State v. 20 La. An. 145	439	142, S. C.	566
State v. 23 La. An. 347	227, 385	Cornell, U. S. v. 2 Mason, 91	764
v. State, 24 N. J. L. 843	405, 412	v. Vanartsdalen, 4 Penn.	
State v. 15 Rich. S. C. 29	672	St. 364	399
Cooke v. Banks, 2 C. & P. 478	526	Cornet v. Bertelsmann, 61 Mo. 118	
v. Curtis, 6 H. & J. 86	492		379
v. Maxwell, 2 Stark. 83	603	Corp v. Lowell, 15 Gray, 106	615
R. v. 1 C. & P. 321	348	Corrigan, State v. 24 Conn. 286	138
R. v. 2 East P. C. 616	124	Corse v. Patterson, 6 Har. & J. 153	390
v. Wildes, 5 E. & B. 328	739	Corsell, State v. 12 Nev. 337	24
Cooley, Com. v. 6 Gray, 350	382, 457	Corser v. Paul, 41 N. H. 24	679
Coolidge, U. S. v. 2 Gall. 364	355, 450	Corsi v. Maretzek, 4 R. D. Smith 1	412
Coombs, State v. 32 Me. 527	581, 591	Cory v. Silcox, 6 Ind. 39	407, 538
Coon, People v. 45 Cal. 672	125	Cossey v. R. R., L. R., 5 C. P. 146	516
People v. 99 Ill. 368	366, 368, 454	Costello v. Costello, 41 Ga. 613	398,
People v. 15 Wend. 277	836	People v. 1 Denio, 83	400, 401
Cooper's Case, Whart. St. Tr. 662	513	Costley, Com. v. 118 Masa. 1	1, 6, 23,
Cooper, Com. v. 5 Allen, 495	264, 286, 302, 378	24, 51, 108, 325, 334, 753, 785	
v. Day, 1 Rich. S. C. Eq. 26	200	v. State, 48 Md. 175	786
v. Dedrich, 22 Barb. 516	816	Cotta, People v. 49 Cal. 166	494, 698
v. Gibbons, 3 Camp. 363	749	Cotton v. Jones, 37 Tex. 34	494
v. Maddan, 6 Ala. 431	208	R. v. 12 Cox, 400	51
R. v. 3 Cox, 547	46, 52, 620	State v. 62 Ala. 12	390
R. v. 5 C. & P. 535	677	State v. 4 Foster, 143	109, 638
R. v. L. R. 1 Q. B. D. 19	645	v. State, 31 Miss. 504	69, 75
v. Slade, 6 H. L. C. 746	696	v. State, 4 Tex. 260	96
v. State, 63 Ala. 80	262, 263	Cottrell, People v. 18 Johns, 115	736
State v. 1 Green (N. J.), 361	571, 580, 586, 594, 736	Coughlin v. People, 18 Ill. 266	382
v. State, 32 La. An. 1084	757	Couillard v. Duncan, 6 Allen, 440	482
v. State, 59 Miss. 269	203, 261 a	Coulter v. Exp. Co., 5 Lansing, 67	826
v. State, 71 Mo. 436	429, 491	Council, State v. 1 Overt. 305	736
v. State, 23 Tex. 331	412, 459	Coupland v. Arrowsmith, 18 Law Times (N. S.), 75	645
v. State, 7 Tex. Ap. 194	153	Court, R. v. 7 C. & P. 486	658, 673
Coote, R. v. 12 Cox, 557; 4 Moore P. C. C. 483	664	Courtney, People v. 28 Hun, 589; S. C., 94 N. Y. 490; 1 N. Y. Cr. Rep. 557, 573	429, 432, 441, 435, 484
R. v. L. R. 4 P. C. 599	665	Courvoisier, R. v. Wills on Circ. Ev. 241; 9 C. & P. 362	762
Cope v. Cope, 1 M. & Rob. 272	518, 532	Cousins v. Jackson, 52 Ala. 262	434
Copous v. Kauffman, 8 Paige, 583	390	State v. 58 Iowa, 250	749
Copp, State v. 15 N. H. 212	146	Covanhoven v. Hart, 21 Penn. St. 495	494
Coppenberg, State v. 2 Strobh. 273	138	Covington v. Ludlow, 1 Metc. (Ky.) 295	524
Copperman v. People, 56 N. Y. 591	44	Cowan v. Beall, 1 MacArthur, 270	563
Coppull, R. v. 2 East, 25	150, 152	State v. 7 Ired. 239	379, 632
Corbett v. State, 31 Ala. 329	690	Cowell v. Chambers, 21 Beav. 619	523
v. Territory, 3 Mont. 50	516	State v. 4 Ired. 231	144
Corbin, People v. 56 N. Y. 363	30, 34	State v. 12 Nev. 337	32
Corbishley's Trusts, 14 Ch. D. 846	846	Cowen, State v. 7 Ired. 239	669
Corlies, Com. v. 3 Brewst. 375; 8 Phila. 450	111	Cowles v. Bacon, 21 Conn. 451	429
Cornelius v. Com., 15 B. Monr. 539	698	Cowley v. People, 83 N. Y. 464; S. C., 21 Hun. 415	412, 418, 544
v. Com., 3 Metc. (Ky.) 481	392	Cox v. People, 80 N. Y. 500	93, 662, 663, 672, 747

TABLE OF CASES.

	SECTION		SECTION
Cox v. Pruitt, 25 Ind. 90	487	Cresswell, R. v. 13 Cox, 126; L. R.	
R. v. R. & R. 362	135, 740	1 Q. B. D. 446	827
v. State, 64 Ga. 374	264	Creswell v. Jackson, 2 F. & F. 24	555
State v. 65 Mo. 29	440, 624	Crews v. Threadgill, 35 Ala. 334	461
v. State, 67 Mo. 392	429, 433	Crichton v. People, 6 Parker C. R.	
v. State, 8 Tex. App. 254	147,	363	138, 141, 486
	263, 688, 698	Crilley v. State, 20 Wis. 231	329, 330,
v. Whitfield, 18 Ala. 738	457		758
Coxhead v. Richards, 2 C. B. 569	739	Crisp v. Anderson, 1 Stark. 35	749
Coxwell v. State, 66 Ga. 309	58, 427,	v. Walpole, 2 Hagg. 531	849
	784	Crissie, People v. 4 Denio, 525	626
Coy, State v. 2 Aiken, 181	144, 584	Crist v. State, 21 Ala. 137	557
Coye v. Leach, 8 Metc. (Mass.) 371	809	Crocker, R. v. 2 New Rep. 87; R.	
Coyle, R. v. 7 Cox, 74	680	& R. 97, n.	108
Cozen, R. v. 2 Russ. by Greaves,		v. State, Meigs, 127	510
948 (a)	348	Crockett, R. v. 4 C. & P. 544	276, 281
Cozens, State v. 6 Ired. 82	138	Crofts, R. v. 9 C. & P. 219	592, 593
Cozzens, <i>Ex parte</i> , Buck. 531	470	Croft v. Ferry Co., 36 Barb. 201	457
v. Higgins, 1 Abb. (N.		Crogan, State v. 8 Iowa, 523	109
Y.) App. 451	544	Cromack v. Heathcote, 2 B. & B. 4	496
Craft v. Com., 80 Ky. 349	442	Cronin, Com. v. 1 Quart. L. Jour.	
v. State, 3 Kans. 450	441	128	508
Craig v. State, 5 Ohio St. 605	486	People v. 34 Cal. 191	20, 429
U. S. v. 4 Wash. C. C. 729	39,	Crookham v. State, 5 W. Va. 510	235,
	263, 555		288, 296, 750
Cram v. Cram, 33 Vt. 15	400, 417	Cross v. Bell, 34 N. H. 83	749
Cramp, R. v. 14 Cox C. C. 390; 5		v. People, 47 Ill. 152	264, 551
Q. B. D. 307	442, 679	R. v. 1 Ld. Raym. 711; 3	
Crane v. R. v. Salk. 385; 2 Stark.		Salk. 193	148
Kv. 1571	109	Crouch, R. v. 4 Cox, 163	551
Crandall v. Clark, 7 Barb. 169	840	Croncher, People v. 2 Wheel. C. C.	
v. People, 2 Lansing, 309		42	273
	435 a	Crouse, People v. 86 N. C. 617	484
U. S. v. 4 Cranch C. C.		Crow, U. S. v. 1 Bond, 51	551
683	52, 682	Crowell v. Bank, 3 Ohio St. 406	462
Crane v. Morris, 6 Peters, 598	344	State v. 25 Me. 171	331, 342
v. Northfield, 33 Vt. 124	457	Crowhurst, R. v. 1 C. & K. 370	691,
v. Thayer, 18 Vt. 162	486		761
Crank, State v. 2 Bailey, 66	648, 654,	Crowley v. Page, 7 C. & P. 789	483
	678	State v. 13 Ala. 172	35
Crapo v. People, 76 N. Y. 242, 288;		State v. 33 La. Ann. 782	24,
S. C., 15 Hun, 269	363, 432, 434,		439, 756, 784
	472	Crowninshield, Com. v. 10 Pick.	
Crary v. Sprague, 12 Wend. 41	229	497	698
Craven's Case, 2 East P. C. 601	116	Crowther v. Hopwood, 3 Stark. Rep.	
Craven, R. v. 1 Lew. C. C. 77	284	321	363
R. v. R. & R. 14	116 a, 123	Cruger v. Dougherty, 43 N. Y.	
Crawford v. Gould, 2 Barr, 89	384 a	121	153.
v. Howard, 30 Me. 422	594	Cruikshank v. Comyns, 24 Ill. 602	96
v. State, 4 Cold. 190	688	Cruise v. Clancy, 8 Irish Eq. 552	553
v. State, 7 Baxt. 41	816	Cruiser v. State, 3 Harr. 205	147
State v. 11 Kans. 32	339	Crusen v. State, 10 Ohio St. 258	387
v. Wolf, 29 Iowa, 567	418	Cubblison v. McCreary, 2 W. & S.	
Greamer v. State, 34 Tex. 173	401	262	361
Creed v. State, 81 Ill. 565	333	Cuffee, Com. v. 108 Mass. 285	646, 661
Crenshaw, State v. 32 La. An.		Culkins, R. v. 5 C. & P. 521	102
406	412	Cullen, Com. v. 111 Mass. 435	677
Creson, State v. 38 Mo. 372	64, 758	Culver, Com. v. 126 Mass. 464	673, 689
Crespin, R. v. 11 Ad. & Ell. N. S.		v. Dwight, 6 Gray, 444	460.
914	138	Cummings, People v. 57 Cal. 88	114

TABLE OF CASES.

	SECTION		SECTION
Cummings, <i>People v.</i> 42 Mich.	142	Dalton, <i>State v.</i> 27 Mo.	12 60
	432, 433, 474, 750	Daly v. Maguire, 6 Blatch.	137 544
<i>People v.</i> 47 Mich.	334 474	Dam, <i>Com. v.</i> 107 Mass.	210 494
<i>v. State</i> , 1 Har. & J.		Dame, <i>Com. v.</i> 8 Cush.	384 363
	340 111	<i>State v.</i> 11 N. H.	271 91
Cundell v. Pratt, M. & M.	108 476	Damery, <i>State v.</i> 48 Me.	327 359
Cunningham v. Bank, 21 Wend.		Damon, <i>Com. v.</i> 17 Rep.	559 431
	557 552	<i>State v.</i> 2 Tyler,	390 587
<i>v. Com.</i> , 9 Bush,	149 632	Dan v. Eley, 2 Hem. & M.	725 505
<i>Com. v.</i> 13 Mass.	245 571, 580	Dana's Case, 7 Ben.	1 113
<i>Com. v.</i> 104 Mass.		Dana v. Bryant, 1 Gilm.	104 640
	545 13, 807	<i>Com. v.</i> 2 Met.	340 329, 330
<i>v. Cunningham</i> , 2		<i>v. Kemble</i> , 19 Pick.	112 840
Dow, 507	825, 827	<i>v. State</i> , 2 Ohio St.	91 114
<i>v. State</i> , 65 Ind.	377 816	Danelli v. Danelli, 4 Bush,	60 828
<i>v. State</i> , 56 Miss.	269 339	Danenhoffer v. <i>State</i> , 79 Ind.	75 24
<i>v. L. R.</i> 1 C. C.	1 171	Danforth, <i>State v.</i> 48 Iowa,	43 312
Curgerwen, R. v. L. R.	1 C. C. 1 171	D'Anglade's Case, 5 Lond. Leg.	
Curlewis v. Cerfield, 1 Q. B.	814 748	Obs.	231 762
Curling, <i>People v.</i> 1 Johns.	320 40,	Daniel v. Daniel, 39 Penn. St.	191 503
	102, 135, 740	<i>v. State</i> , 63 Ga.	339 632
<i>v. Perring</i> , 2 Myl. & K.		<i>v. State</i> , 65 Ga.	199 225
	380 505	<i>State v.</i> 31 La. An.	91 281, 286
Curran, <i>Com. v.</i> 119 Mass.	206 342	<i>v. State</i> , 8 Sm. & M.	401 721
<i>State v.</i> 51 Iowa,	112 388, 753	<i>v. Toney</i> , 2 Metc. (Ky.)	523 559
<i>State v.</i> 18 Mo.	320 96, 102	Daniels, <i>State v.</i> 44 N. H.	383 537
Currier v. Gale, 9 Allen,	522 818	Dann v. Kingdom, 1 N. Y. Sup. Ct.	
<i>v. R. R.</i> , 34 N. H.	498 460		492 396
Curry, R. v. 2 Mood. C. C.	218 161 a	Dantz v. <i>State</i> , 87 Ind.	398 638
<i>v. State</i> , 7 Tex. Ap.	267 751	Danville Bank v. Waddell,	31 Grat.
Curtis v. Cochran, 50 N. H.	244 489		469 698, 699
<i>Com. v.</i> 97 Mass.	574 430, 432,	Darby v. Ousley, 1 H. & N.	1 407, 537,
	473, 674		538
<i>v. Knox</i> , 2 Denio,	341 464	Dark, <i>State v.</i> 8 Blackf.	526 579
<i>v. State</i> , 6 Cold.	9 758	Darling v. Westmoreland,	52 N. H.
Curtiss v. Strong, 4 Day,	51 362		401 825
Cushman v. Loker, 2 Mass.	108 363	Darnell, <i>State v.</i> 1 Houst. C. C.	
Cutler, <i>Com. v.</i> 9 Allen,	486 570, 581		321 659
<i>v. State</i> , 36 N. J. L.	125 723	Darrett v. Donnelly, 38 Me.	492 690
Cutts v. Pickering, 1 Ventr.	197 497	Dart v. Walker, 3 Daly,	138 698
		Dartmouth v. Holdsworth,	10 Sim.
			476 500
D.		Daubert, <i>State v.</i> 42 Mo.	239 698
Dabney's Case, 1 Robinson,	696 443,	Dave v. <i>State</i> , 22 Ala.	23 487
	656	Davenport, <i>Com. v.</i> 2 Allen,	299 261
Dacey, <i>Com. v.</i> 107 Mass.	206 103	<i>v. Ogg</i> , 15 Kans.	363 446
Daegling v. <i>State</i> , 56 Wis.	586 412	David v. R. R., 41 Ga.	223 539
Daffin v. <i>State</i> , 11 Tex. Ap.	46 391	Davidson v. Murphy, 13 Conn.	213 603
	401, 477	<i>v. People</i> , 4 Col.	145 80, 757
Dailey v. Grimes, 27 Md.	440 460	<i>State v.</i> 77 N. C.	522 393
Daley, <i>Com. v.</i> Appen. to Whart.		<i>v. State</i> , 39 Tex.	129 366
on Hom.	256, 262	<i>State v.</i> 30 Vt.	377 333, 632
<i>Com. v.</i> 4 Gray,	209 593	Davie v. Briggs, 97 U. S.	628 811
<i>v. State</i> , 28 Ind.	285 435 a, 492	Davies v. Lowndes, 1 Bing. N. C.	
<i>State v.</i> 41 Vt.	564 20		607 570
<i>State v.</i> 53 Vt.	442 66, 263,	Davis & Carter's Case, 2 Salk.	461 364
	272, 691	Davis, <i>Com. v.</i> 11 Gray,	48 261
Dallinger, <i>Com. v.</i> 118 Mass.	439 116 a	<i>v. Frank</i> , 33 Grat.	413 487
		<i>v. Keyes</i> , 112 Mass.	436 486
		<i>v. Mason</i> , 4 Pick.	156 414, 559

TABLE OF CASES.

	SECTION		SECTION
Davis, <i>People v.</i> 61 Cal. 536	387	De Berenger, <i>R. v.</i> 3 M. & S. 67	522
<i>People v.</i> 56 N. Y. 95	264, 288	De Bernie v. State, 19 Ala. 23	181
<i>v. People</i> , 1 Parker C. R.		Decklots, <i>State v.</i> 19 Iowa, 447	764
447	758, 761, 763	Dee, <i>State v.</i> 14 Minn. 35	476
<i>v. People</i> , 2 Thomp. & C.		Deeley, <i>R. v.</i> 1 Mood. C. C. 303; 4	
212	281	C & P. 579	101, 123
<i>People v.</i> 21 Wend. 309	441, 491	Deer v. State, 14 Mo. 348	363
<i>People v.</i> 56 N. Y. 102	262	De Foe v. People, 22 Mich. 224	427, 436
<i>R. v.</i> 1 C. & P. 306	135, 740	De Forest v. State, 21 Ind. 23	69, 757
<i>R. v.</i> 6 C. & P. 177	44, 664, 668	Defrese v. State, 3 Heisk. 53	49
<i>R. v.</i> 2 Den. C. C. 231	96	De Gaillon v. L'Aigle, 1 B. & P. 368	640
<i>R. v.</i> 5 Mod. 74	363	De Graffenreid, <i>State v.</i> 9 Baxt. 287	580
<i>R. v.</i> 12 Mod. 9	595	Deitsch v. Wiggins, 15 Wall. 540	24
<i>v. Reid</i> , 5 Sim. 443	471	Dejardin, <i>Com. v.</i> 126 Mass. 46	92, 93, 118, 146
<i>v. Roby</i> , 64 Me. 430	488	De la Motte's Case, 21 How. St. Tr.	
<i>State v.</i> 38 Ark. 581	441	810	553
<i>State v.</i> 4 Blackf. 345	595	Delaney, <i>State v.</i> 28 La. An. 434	584
<i>State v.</i> 3 Brev. 3	393	Dell v. Oppenheimer, 9 Neb. 454	380
<i>v. State</i> , 10 Ga. 101	60, 721	Dellane, <i>Com. v.</i> 11 Gray, 47	154
<i>v. State</i> 58 Ga. 173	204, 578	Dellinger's Case, 71 Penn. St. 425	401
<i>v. State</i> , 35 Ind. 496	408, 412, 417, 418	Dellwood v. State, 33 La. An.	
<i>v. State</i> , 34 La. An. 381	658	1229	266, 276, 363, 635
<i>v. State</i> , 38 Md. 15	406, 412, 445, 490, 491, 774	Delozier v. State, 1 Head, 45	445
<i>v. State</i> , 39 Md. 355	144	Delphino v. State, 11 Tex. Ap. 30	90, 99
<i>v. State</i> , 50 Miss. 86	758	Dement, <i>In re</i> , 53 Ala. 389	426
<i>v. State</i> , 14 Nev. 407	764	Demerritt v. Randall, 116 Mass.	
<i>State v.</i> 69 N. C. 313	118, 212, 213, 216	331	556, 557, 559, 562
<i>State v.</i> 77 N. C. 483	225	Dempsey, <i>v. State</i> , 3 Tex. Ap. 429	538
<i>v. State</i> 87 N. C. 514	484, 698	Den v. Downam, 13 N. J. L. 135	604
<i>v. State</i> , 15 Ohio, 72	733	<i>v. Fulford</i> , 2 Burr. 1179	184
<i>v. State</i> , 25 Oh. St. 369	764	<i>v. Vancleve</i> , 2 South. (N. J.)	
<i>State v.</i> 1 South, 311	571	589	368
<i>v. State</i> , 2 Tex. Ap. 588	633, 647	Denis, <i>State v.</i> 19 La. An. 119	366, 493
<i>v. State</i> , 37 Tex. 277	225	Denison v. Denison, 35 Md. 361	171
<i>v. State</i> , 8 Tex. Ap. 510	678	Dennin, <i>State v.</i> 32 Vt. 158	492
<i>v. State</i> , 17 Vt. 658	227	Dennis v. Barber, 6 S. & R. 420	202
Davison v. People, 90 Ill. 222	252, 262, 263, 764	<i>v. Crittenden</i> , 42 N. Y.	
Dawber, <i>R. v.</i> 3 Stark. 34, n	441	542	390
Dawley v. State, 4 Ind. 128	363	People v. 4 Mich. 609	201
Dawson, <i>R. v.</i> 1 Eng. L. & Eq.		<i>R. v.</i> 3 F. & F. 502	484
589; 3 Stark. 62	135	Dennison v. Page, 29 Penn. St. 420	518
Day v. State, 63 Ga. 667	315, 427, 460, 463, 661	<i>State v.</i> 31 La. An. 847	584
<i>State v.</i> 55 Vt. 510	650, 654	Denny v. Moore, 13 Ind. 418	154
Dean v. Com., 4 Grat. 541	31, 152, 750	Densmore, <i>Com. v.</i> 12 Allen, 535	281, 304
<i>v. Com.</i> , 32 Grat. 912	24, 382	<i>State v.</i> 67 Ind. 306	330
<i>v. Com.</i> , 55 Vt. 510	650, 654	Dent, <i>State v.</i> 6 Rich. (N. S.) 383	108
<i>Com. v.</i> 109 Mass. 349	104	Denton v. Erwin, 5 La. An. 18	638
Dearborn, <i>State v.</i> 54 Me. 442	144, 584	<i>v. Hill</i> , 4 Hayw. 73	200
De Arman v. State, 71 Ala. 351	764	<i>v. State</i> , 1 Swan, 279	296
De Armond v. Neasmith, 32 Mich.		Dephuc v. State, 44 Ala. 32	409
231	528	Derby v. Salem, 30 Vt. 722	532, 533, 534
Deathridge v. State, 1 Sneed, 75	646, 650, 651, 677, 678	Derrington, <i>R. v.</i> 2 C. & P. 418	644, 670
		Desborough v. Rawlins, 3 Myl. & C. 515	502, 503

TABLE OF CASES.

	SECTION		SECTION
Desbrow v. Farrow, 3 Rich. (S. C.) 382	552	Dillon v. Anderson, 43 N. Y. 231	429, 431
Deshon v. Ins. Co., 11 Met. 199	492	Com. v. 4 Dall. 116	677
Despard R. v. 28 How. St. R. 346	440	Dillon v. People, 1 Hun, 670; 4 Thomp. & C. 205	758
De Thoren v. Attorney General, L. R. 1 App. Cas. H. L. Div. 686	827	R. v. 14 Cox, 4	153
Detroit R. R. v. Van Steinburg, 17 Mich. 99	70, 460	Dilmore, R. v. 6 Cox, 52	227
Devine, People v. 44 Cal. 452	82, 483, 484	Dinah v. State, 39 Ala. 359	677
People v. 46 Cal. 45	227	Dineen, State v. 10 Minn. 409	1, 135
v. Wilson, 10 Moore P. C. 502	550	Dingler, R. v. 2 Leach, 561	282
Devlin v. People, 104 Ill. 504	807	Dingley, R. v. 1 C. & K. 637	658, 660
R. v. 2 Crawf. & D. C. C. 152	646, 662	Dinkey v. Com., 17 Penn. St. 126	144, 586
State v. 7 Mo. Ap. 32	429, 679	Dist. of Cbl. v. Arms, Sup. Ct. U. S. 1883	370
Devoto v. Com., 3 Meto. (Ky.) 417	44	Divoll v. Leadbetter, 4 Pick. 220	390
Dewett v. Piggott, 9 C. & P. 75	682	Dixon v. Lee, 5 Tyrw. 180	350
Dewey, State v. 55 Vt. 550	138	R. v. 3 M. & S. 11	736
Dewey v. Williams, 43 N. H. 384	482	v. State, 13 Fla. 636	281, 297, 632, 756, 764
Dewhurst R. v. 2 Stark. Ev. 614	758	v. State, 2 Tex. Ap. 530	761
Dewitt v. Barley, 5 Selden, 371	417	v. Vale, 1 C. & P. 278	470
De Witt, State v. 2 Hill (S. C.) 282	154	Dobbin, Com. v. 2 Parsons, 380	588
De Wolf, State v. 8 Conn. 93	366, 369, 375, 492	Dock v. Com., 21 Grat. 909	68
Dexter v. Booth, 2 Allen, 559	398, 401	Dockstader, State v. 42 Iowa, 436	62
v. Hall, 15 Wall. 9	418	Dodd v. Norris, 4 Camp. 519	472, 473
Diaz, People v. 6 Cal. 243	227	Dodge v. State, 4 Zab. 455	387
Dibley, R. v. 2 C. & K. 818	758	Doe v. Andrews, 2 Cowp. 846	346, 503
Dicas v. Lawson, 1 C., M. & R. 934; 7 Dowl. 693	451	v. Barnes, 1 M. & Rob. 386	530, 532, 533
Dick, People v. 32 Cal. 213	20	v. Bray, 8 B. & C. 813	533
v. State, 30 Miss. 593	441	v. Brown, 5 B. & A. 243	164
Dickenson, U. S. v. 2 McLean, 325	363, 472, 484	v. Cole, 6 C. & P. 360	168
Dickerman v. Graves, 6 Cush. 308	396	v. Foster, 1 A. & E. 791	229
Dickerson v. Brown, 49 Miss. 357	170	v. Fowler, 19 L. J. Q. B. 151	533
v. State, 48 Wisc. 288	664, 668, 748	v. Frankis, 11 A. & E. 795	682
Dickinson v. Breeden, 25 Ill. 186	200	v. Gore, 2 M. & W. 321	603
v. Dustin, 21 Mich. 561	363, 489	v. Harris, 5 C. & P. 594	504
v. Fitchburg, 13 Gray, 546	429	v. Harris, 7 C. & P. 330	491
v. Hayes, 31 Conn. 417	598	v. Mostyn, 12 C. B. 268	603
State v. 41 Wis. 299	262, 277	v. Nepean, 5 B. & Ad. 86; 2 N. & M. 219	811
Dickson v. Wilton, 1 F. & F. 425	513	v. Newton, 5 Ad. & L. 514	551
Diddy, State v. 72 N. C. 325	661	v. Reagan, 5 Blackf. 217	417
Dill v. State, 6 Tex. Ap. 113	456, 459	v. Sisson, 12 East, 62	24
Dillane, Com. v. 1 Gray, 483	103	v. Suokermore, 5 A. & E. 703	551, 552, 555, 559
Com. v. 11 Gray, 67	593	v. Thomson, 9 Dowl. 948	346
Dillard v. State, 58 Miss. 368	405, 460, 778	v. Wilson, 10 Moore P. C. 502, 530	550
Dilleher v. Ins. Co., 69 N. Y. 256	516	Doebler, U. S. v. 1 Bald. 519	39, 118, 207

TABLE OF CASES.

	SECTION		SECTION
Donaghoe v. People, 6 Parker C. R.		Dowlen v. State, 14 Tex. Ap.	61 271
120	62, 551, 552	Dowling, People v. 84 N. Y.	478 225,
Donahue v. People, 56 N. Y.	208 363,		263, 691, 761
	489	v. State, 5 Sm. & M.	664 65
Donaldson, <i>Ex parte</i> , 44 Mo.	149 573	Downer v. Dana, 19 Vt.	338 483
v. R. R., 18 Iowa,	280 539	R. v. 14 Cox C. C.	486; 43
v. State, 10 Tex. Ap.		L. T. (N. S.)	445 486,
307	473		503, 504, 695
Donavan, State v. 16 N. W. Rep.		Downham, R. v. 1 F. & F.	386 216
206	734	Downing, Com. v. 4 Gray,	29 440, 468
Doncaster v. Day, 3 Taunt.	262 227,	v. State, 66 Ga.	110, 160 413
	231	Downs v. R. R., 47 N. Y.	83 690
Donellan v. Donellan, 2 Hagg. Eco.		Doyell, People v. 48 Cal.	85 492
R. 144	389	Doyles, People v. 21 Mich.	221 50
Donelly v. Com., 6 Weekly Notes,		Drake, Com. v. 15 Mass.	161 508, 646,
104	334, 441, 691		660
People v. 2 Parker C. R.		Com. v. 124 Mass.	21 442
182	445	R. v. Salk.	666 114
Donkle v. Kohn, 44 Ga.	266 362	v. State, 51 Ala.	30 60
Donnel v. U. S., 1 Morris,	141 96	State v. 64 N. C.	589 106
Donnell v. Jones, 13 Ala.	490 457	State v. 82 N. C.	592 677
Donnellan's Case	787	Draper v. Draper, 68 Ill.	17 366
Donnelly v. State, 2 Dutch. (N. J.)		People v. 1 N. Y. Cr. Rep.	
26 N. J. L.	463 1, 276, 278, 279,	139	538
293, 296, 297, 302, 303, 361,	362,	v. Saxton, 118 Mass.	431 418
464, 493, 679, 680		State v. 1 Houst. C. C.	291 339
Donohue v. People, 56 N. Y.	208 429,	State v. 65 Mo.	335 278
	434	v. State, 22 Tex.	400 703
Donovan, Com. v. 13 Allen,	571 96	Draycott v. Talbot, 3 Bro. P. C.	
State v. 1 Houst. C. C.	43 124	564	530
Dooris, State v. 40 Conn.	145 173 a,	Dredge, R. v. 1 Cox,	235 760
	530, 535, 536	Drennen v. Lindsey, 15 Ark.	359 483
Doran's Case, 2 Parsons,	467 468	Dresser, State v. 54 Me.	569 639
Doran, R. v. 1 Esp.	127 150, 152, 176	Drew, Com. v. 3 Cush.	279 573
Dorsey, Com. v. 103 Mass.	412 460	Com. v. 4 Mass.	391 736, 764
v. Kendall, 8 Bush,	294 594	R. v. 8 C. & P.	140 651, 673
v. State, 34 Tex.	651 69	v. Tarbell, 117 Mass.	90 398,
Dossett v. Miller, 3 Sneed,	72 492		400, 401
R. v. 2 Cox, 243; 2 C. &		Dreyer v. State, 11 Tex. Ap.	503 758
K. 306	29, 46, 50	Driscoll, People v. 47 Mich.	413 262,
Doty v. State, 7 Blackf.	427 344		263, 489
Doughty v. Doughty, 32 N. J. Eq.		Drum, Com. v. 58 Penn. St.	9 1, 20,
32	391		334, 721
Douglas, R. v. 1 Mood. C. C.	462 326	Com. v. 19 Pick.	479 137
State v. 20 W. Va.	770 496	Drummond's Case, 1 Leach,	337; 292
U. S. v. 2 Blatch.	207 703	1 Russ. C. & M.	763
v. Wood, 1 Swan.	393 471	Drumright v. State, 29 Ga.	430 679
Douglass, <i>In re</i> , 3 Q. B.	837 356	Drury v. Hervey, 126 Mass.	519 680
v. Mitchell, 35 Penn. St.		R. v. 3 C. & K.	190 439
440	707	R. v. 3 Cox,	544 579
Dove v. State, 3 Heisk.	348 171, 390,	Druse v. Wheeler, 22 Mich.	439 833
	417, 418, 494, 721	Du Barree v. Livette, Peake's Cas.	
State v. 10 Ired.	469 492	77	508
Dover v. Maestaer, 5 Esp.	92, 94 365	Dubois v. Baker, 30 N. Y.	355; S. 459, 559
Dovey, R. v. 2 Den. C. C.	92; 2 136	C., 40 Barb.	556 753
Eng. L. & Eq.	532 797	State v. 49 Mo.	573 24,
Dowd v. Guthrie, 13 Bradw.	659 383	Dubose v. State, 10 Tex. Ap.	230 330
Dowdell v. Neal, 10 Ga.	148 24,	v. State, 13 Tex. Ap.	418 46,
Dowdican, Com. v. 114 Mass.	257 460		602 a, 643

TABLE OF CASES.

	SECTION		SECTION
Du Bost v. Beresford, 2 Camp.	511 255	Durkee v. R. R., 29 Vt.	127 162, 645
Dudley, State v. 7 Wis.	664 396, 399, 402	Duttenhofer v. State, 34 Oh. St.	91 499
Due, State v. 7 Foster,	256 678	Dutton v. Woodman, 9 Cush.	262 682
Duffy v. Com., 6 W. N.	371 32, 369, 384a, 698	Duvall v. Darby, 38 Penn. St.	56 462
v. People, 26 N. Y.	588 678	v. State, 63 Ala.	12 97, 126
People v. 1 Wheel. C. C.	123 446	v. State, 8 Tex. Ap.	370 124
R. v. 4 Cox,	190 639	Dwyers, R. v. cited 2 Russ. C. &	M. 887, n. p. 666
Dufour, State v. 31 La. An.	804 24, 690, 750	Dyer, Com. v. 128 Mass.	70 138
Dukes v. State, 11 Ind.	557 76, 264	v. Morris, 4 Mo.	214 446
Dulaney v. Dunlap, 3 Cold.	307 525	R. v. 1 Cox,	113 427
Dumas v. State, 62 Ga.	58 108, 282, 297, 784	v. Smith, 12 Conn.	384 200
v. State, 63 Ga.	600 430, 439, 659, 664	v. State 85 Ind.	525 114
v. State, 65 Ga.	471 296	Dyke, R. v. 8 C. & P.	261 441
v. State, 14 Tex. Ap.	464 234, 397		
Dumphey, State v. 4 Minn.	438 69, 78, 445, 757	E.	
Dunan, Com. v. 128 Mass.	422 23, 282, 297, 403	Eagan, Com. v. 103 Mass.	71 733
Dunbar v. Parks, 2 Tyler,	217 511	Eagle v. Emmet, 4 Bradf. N. Y.	117 811
Duncan v. Bancroft, 110 Mass.	267 591	Eagleton v. Kingston, 8 Ves.	476 553
v. Beard, 2 N. & McC.	401 556	Earhart's Case, 9 Leigh,	671 691
v. Com., 6 Dana,	295 154, 585, 593	Earl v. People, 73 Ill.	329 1, 441
v. Com., 128 Mass.	422 24	Earp v. State, 55 Ga.	136 632, 646, 653
State v. 6 Ired.	236 225, 602	Earl's Trusts, L. R. 8 Eq.	98 197
State v. 64 Mo.	262 699	Early v. State, 9 Tex. Ap.	476 521, 758
Dunlap v. Cody, 31 Iowa,	260 595	Easland, Com. v. 1 Mass.	15 392
v. Hearn, 37 Miss.	471 400	Eason, State v. 86 N. C.	674 148
v. State, 9 Tex. Ap.	179 227	East v. Chapman, 1 M. & M.	46; 2 C. & P. 573 470
Dunn v. Dunn, 11 Mich.	284 482	Eastman v. Amoskeag Co., 44 N.	H. 143 460
v. People, 29 N. Y.	523 440, 483	Com. v. 1 Cush.	189 32, 445, 557, 558, 682, 688
v. Pipes, 20 La. An.	276 494	Com. v. 2 Gray,	76; 4 Gray, 416 116a, 132, 147, 588
R. v. 4 C. & P.	543 651	Eastwood, People v. 14 N. Y.	462 417, 459, 460
R. v. 1 Mood. C. C.	146 44	v. People, 3 Parker C.	R. 25 312, 797
v. Snowden, 32 L. J. Ch.	104; 2 Drew. & Sm. 201, S. C. 811	Eaton v. Woolly, 28 Wis.	628 460
v. State, 2 Ark.	229 30, 276, 281, 282, 571	Eborn v. Zimpelman, 47 Tex.	503 544
Dunning v. Roberts, 35 Barb.	463 162	Ebos v. State, 34 Ark.	520 412
Dunnovant, State v. 3 Brev.	9 124	Eddings, State v. 71 Mo.	545 430, 664
Dupree v. State, 33 Ala.	380 69, 75, 229, 757	Eddy, Com. v. 7 Gray,	583 336, 338, 729
Durett v. State, 62 Ala.	434 761	Edgerly, Com. v. 10 Allen,	184 33, 39, 48, 682
Durgin v. Danville, 47 Vt.	95 749	Edington v. Ins. Co., 5 Hun	1; 67 N. Y. 185 271, 516
Durham v. Holeman, 30 Ga.	619 373, 377	Edmonds, R. v. 6 C. & P.	164 227
v. People, 4 Scam.	172 578, 580	v. Rowe, Ry. & M.	77 354
v. State, 45 Ga.	516 490	v. State, 34 Ark.	720 93, 262, 271
State v. 72 N. C.	447 148	Edmonson v. State, 41 Tex.	496 281
Durham's Case, 1 Leach,	478 441		
	774		

TABLE OF CASES.

	SECTION		SECTION
Edmonson v. State, 7 Tex. Ap.	116	494	Elrington, R. v. 9 Cox, 86; 1 B. &
Edmund's Case, 1 Wh. & St. Med.			S. 689; 10 W. R. 13
Jur. § 167	742,	748	Elton v. Larkins, 5 C. & P. 385
Edmundson v. State, 17 Ala.	179	96	Elwell, Com. v. 1 Gray, 463
Edson v. Freret, 11 La. An.	710	638	Elworthy, R. v. L. R. 1 C. C. 103;
Edwards, People v. 41 Cal.	640	69, 81	37 L. J. M. C. 3
R. v. 3 Cox, 82		448	Embden, R. v. 9 East, 437
R. v. 12 Cox, 230	225,	296,	Embury v. Conner, 3 Comst. 322
		757 a	Emerson v. Bleakley, 2 Abb. (N.
R. v. R. & R. 497	120,	124	Y.) App. 22
v. State, 27 Ark.	493	703	v. Lowell, 6 Allen, 146
v. State, 34 La. An.	1012		
		756, 784	v. Stevens, 6 Allen, 112
v. State, 47 Miss.	581	757 a	State v. 48 Iowa, 72
State v. 19 Mo.	674	153, 445	Emery, Com. v. 107 Mass. 172
State v. 60 Mo.	490	342	v. Fowler, 39 Me. 326
State v. 79 N. C.	648	366,	State v. 76 Mo. 348
		368	
State v. 2 N. & McC. 13	463,	469	Emmons, Com. v. 98 Mass. 6
State v. 13 S. C.	30	680	Emporia v. Volmar, 12 Kans. 622
v. Sullivan, 8 Ired. Law,		302	En, State v. 10 Nev. 277
		483	England, State v. 78 N. C. 552
Effer, State v. 85 N. C.	585	429, 432	Engleman v. State, 2 Carter, 91
Egan v. Cowan, 30 Law Times,		223	English, People v. 52 Cal. 212
		555	State v. 67 Mo. 137
State v. 59 Iowa,	636	38, 58	Enoch, R. v. 5 C. & P. 539
Egerton, R. v. R. & R.	375	24	Entrehman, R. v. 1 C. & M. 248
Eggler v. People, 3 N. Y. Supr. Ct.		796; 56 N. Y. 642	Epperson v. State, 5 Lea, 291
		68, 71, 774	Epps v. State, 19 Ga. 192
Egglesht, State v. 41 Iowa,	574	580, 588	66, 67, 452
Eighmy v. People, 79 N. Y.	546	24	Erb, State v. 74 Mo. 199
Eliland v. State, 52 Ala.	322	69, 75,	Erickson v. Smith, 2 Abb. (N. Y.)
		627, 688, 764	App. 64
Eisenhart v. Slaymaker, 14 S. &			State v. 45 Wis. 86
R. 153		217	Eriswell, R. v. 3 T. R. 721
Elam v. State, 25 Ala.	53	487	Erissman v. Erissman, 25 Ill.
Elden, State v. 41 Me.	165	574	136
Eldershaw, R. v. 3 C. & P.	396	801	Erskine v. Davis, 25 Ill. 251
Eldridge's Case, R. & R.	440	632	Esbridge v. State, 25 Ala. 30
Elizabeth v. State, 27 Tex.	329	678	State v. 1 Swan, 413
Elkins, State v. 63 Mo.	159	69, 380,	Esop, R. v. 7 C. & P. 456
		757	Estes, State v. 4 Me. 150
Ellicombe, R. v. 1 M. & Rob.	280;		Estrado, People v. 49 Cal. 171
5 C. & P. 522		176, 214, 216	679, 698
Elliot, Com. v. 110 Mass.	104	440-1-2	Ettinger, Com. v. 98 Penn. St. 338
Elliot, State v. 68 N. C.	124	484	32, 441, 442, 626, 679
State v. 45 Iowa,	486	291, 297,	Evans, Com. v. 101 Mass. 25
		757 a	166, 570,
State v. 14 Tex.	423	138	585, 602 a
v. Van Buren, 33 Mich.	49	460	v. Evans, 41 Cal. 103
Ellis v. Dempsey, 4 W. Va.	126	698	625
v. Kelly, 8 Bush,	621	595	v. Evans, 1 Hagg. C. R.
v. People, 21 How. Pr.	356	556	105, 324
R. v. 6 B. & C. 145		24	v. Getting, 6 C. & P. 586
R. v. R. & M. 432		662, 664	v. Iglehart, 6 Gill & J. 171
State v. 3 Conn.	185	111	602
Ellison, State v. 58 N. H.	325	94	v. Lipscomb, 31 Ga. 71
Elmendorff v. Carmichael, 3 Litt.			373,
(Ky.) 472		523	380
			v. Morgan, 2 C. & J. 453
			People v. 40 N. Y. 1
			People v. 90 Ill. 384
			32, 698
			R. v. 2 Cox, 270
			758
			R. v. 3 Stark. 35
			129, 135
			v. Reed, 2 Mich. N. P. 212
			608
			v. Rees, 12 Ad. & El. 55
			352
			v. State, 62 Ala. 6
			98, 756, 784

TABLE OF CASES.

	SECTION		SECTION
Evans v. State, 7 Baxt. 112	365	Farris v. Com., 14 Bush, 362	329, 736, 764
State v. 5 Jones (N. C.), 250	342	Farrish v. State, 63 Ala. 164	1
v. State, 44 Miss. 762	757	Fash v. Blake, 38 Ill. 363	553
State v. 65 Mo. 574	263, 721, 722, 764	Fasset, State v. 16 Conn. 457	510
v. Taylor, 7 A. & E. 617; 3 N. & P. 174	606	Faucett v. Nichols, 64 N. Y. 377; S. C., 4 N. Y. Supt. Ct. 597	37
Evelyn v. Haynes, Tay. on Ev. § 1509	591	Faulk v. State, 52 Ala. 415	756
Everett v. Lowdham, 4 C. & P. 91	446	Fauntleroy, R. v. 1 Mood. C. C. 52; 1 C. & P. 421	116a
v. State, 62 Ga. 65	412, 460, 756, 784	Fay v. Richmond, 43 Vt. 25	833
Evers v. Ins. Co., 59 Mo. 429	401	State v. 43 Iowa, 651	430, 432
Everson v. Carpenter, 17 Wend. 419	483	Fayetteville, State v. 2 Murph. 371	580
Ewing v. Osbaldistone, 6 Sim. 808	470	Fearing v. Kimball, 4 Allen, 125	682
Exall, R. v. 4 F. & F. 922	763	Fearshire, R. v. 1 Leach, 240	667
Eyerman v. Sheehan, 52 Mo. 221	459	Featherman v. Miller, 45 Penn. St. 96	360
F.		Felgel v. State, 85 Ind. 580	138, 718
Fagent, R. v. 7 C. & P. 238	281, 300	Fellen, People v. 58 Cal. 218	171, 810
Fagnan v. Knox, 40 N. Y. Sup. Ct. 41	417	Felch, Com. v. 132 Mass. 22	286
Fahnestock v. State, 23 Ind. 231	69	Feldman, Com. v. 131 Mass. 588	602a
Fair, People v. 43 Cal. 137; 1 Green C. R. 217	60, 65	Felix v. State, 18 Ala. 720	66
Fairbanks v. Kerr, 70 Penn. St. 86	826	Fells, Com. v. 9 Leigh, 613	574
Fairchild v. Bascomb, 35 Vt. 398	371, 378, 417, 418, 455	Felt v. Amidon, 43 Wis. 467	266
Faire v. State, 58 Ala. 74	281, 297	Felter, State v. 32 Iowa, 49	334, 338
Fairie, R. v. 8 E. & B. 486; 8 Cox, 66	591	Feltes, State v. 51 Iowa, 495	635, 677
Fairlie v. Denton, 3 C. & P. 103	682	Fennell v. R., 7 Q. B. D. 147; 14 Cox C. C. 607	651, 654
Falkner & Bond's Case, R. & R. 481	632	v. Tait, 1 C., M. & R. 584	351, 370
Faneuil Hall Bk. v. Bk. of Brighton, 16 Gray, 534	833	Fenno, Com. v. 125 Mass. 387	91
Fanning v. State, 14 Mo. 386	64, 750	Ferguson v. People, 90 Ill. 510	144
Farler, R. v. 8 C. & P. 106	441, 442	R. v. 2 Stark. (N. P.) 489	111
Farley, R. v. 2 C. & K. 313; S. C., 1 Den. C. C. 197	502, 504	v. State, 32 Ga. 658	698
v. State, 57 Ind. 331	153, 432	State v. 2 Hill (S. C.), 619	295
Farmers' Bk. v. Young, 36 Iowa, 45	413, 419	State v. 9 Nev. 106	757a
Farr, R. v. 4 F. & F. 336	213	Fernandez, <i>Ex parte</i> , 10 C. B. (N. S.) 3, 39, 40; 30 L. T. (C. P.) 321	469, 471
State v. 12 Rich. 24	96	v. Henderson, 1 Carolina L. J. 213	508
Farrall v. State, 32 Ala. 557	331	v. State, 4 Tex. Ap. 419	31
Farrand, State v. 3 Halst. 336	114	Ferrigan, Com. v. 44 Penn. St. 386	68, 73
Farrar, Com. v. 10 Gray, 6	484	Ferrill v. Com. 1 Duv. 153	111
Farrell v. Brennan, 32 Mo. 328	417	Ferris v. People, 56 Cal. 442	99
Com. v. 105 Mass. 189	639	v. People, 35 N. Y. 125	338
v. People, 21 Hun, 485	698	Fiddler v. State, 7 Humph. 508	580
People v. 30 Cal. 316	33, 43, 440	Fidment, State v. 35 Iowa, 541	689
People v. 31 Cal. 576	431	Fiedler v. Darrin, 50 N. Y. 437	431
Farren, Com. v. 9 Allen, 489	725	Field, State v. 14 Mo. 244	68, 82
Farrer v. State, 2 Oh. St. 54	29, 30, 50	State v. 57 Miss. 474	263, 271, 296
Farrier, State v. 1 Hawks, 487	113	Fields v. State, 47 Ala. 603	66, 75
		v. State, 52 Ala. 348	584

TABLE OF CASES.

	SECTION		SECTION
Fife v. Com., 29 Penn. St.	429 333,	Flagg v. People, 40 Mich.	706 646
	655, 658, 689	Flaherty, R. v. 2 C. & K.	782 172, 686
State v. 1 Bailey, 1	580, 587	Flanagan v. People, 52 N. Y.	467 338
Fild, R. v. Berks. Spr. Assizes,		Flanagin v. State, 25 Ark. 92	366, 390
1828	441	Flanders v. Maynard, 58 Ga. 56	691
Filkins v. People, 69 N. Y. 101	91,	State v. 38 N. H.	324 462
	734, 736	Flannigan, State v. 6 Md. 167	144
Filliter v. Phippard, 11 Q. B.		State v. 64 Ga. 52	263
347	824	Flattery v. Flattery, 88 Penn. St.	
Finch v. Gridley, 25 Wend. 469	560	27	389
People v. 5 Johns. 236	116a	Flavel's Case, 8 W. & S. 197	365
Fincher v. State, 58 Ala. 215	477	Fleming v. Fleming, 4 Bing. 266	828
Findon, R. v. 6 C. & P. 132	333	R. v. 1 Arm., M. & O. 330	651
Finley v. Hunt, 56 Miss. 521	380	v. State, 5 Humph. 564	369,
People v. 38 Mich. 482	1,		378
	338, 339	State v. 7 Humph. 152	573
Finn v. Com., 5 Rand. (Va.)		v. State, 11 Ind. 234	312, 797
701	34, 227, 229	State v. 2 Strobh. 464	144
Finnegan, People v. 1 Parker C. R.		U. S. v. 18 Fed. Rep. 90	749
147	492	Fletcher v. Braddyl, 3 Stark. R.	
Finnerty v. Tipper, 2 Camp. 72	52	64	839
Finney v. State, 3 Head, 544	390, 397	v. Conley, 2 Greene,	
First Nat. Bank v. Robert, 41 Mich.		Iowa, 88	96
700	550	R. v. 4 C. & P. 250	699, 700
v. McManigle, 69		v. R. R., 1 Allen, 9	482
Penn. St. 156	887	v. State, 49 Ind. 124	433
Firth, R. v. L. R. 1 C. C. 172; 11		Fley, State v. Rice's S. C. Dig.	
Cox, 234	589	100; 2 Brev. 338	102, 147, 572
Fisher v. Clement, 10 B. & C. 475	739	Flint, State v. 33 La. An. 1288	148
v. Kyle, 27 Mich. 454	231	Flitters v. Allfrey, L. R. 10 C. P.	
v. Longnecker, 8 Barr, 410	594	29	570
v. People, 23 Ill. 283	339	Flores v. State, 13 Tex. Ap. 665	758,
v. People, 77 Ind. 42	24		761
R. v. 8 C. & P. 182	70	Floyd, State v. 3 Heisk. 342	764
R. v. 1 Leach C. C. 310,		State v. 15 Mo. 349	758
311	667	v. State, 7 Tex. 215	469, 471
v. Ronalds, 12 C. B. 762;		Flye, State v. 26 Me. 312	329, 344
74 E. C. L. R. 465, 468, 469		Flynn v. Ins. Co., 17 La. An. 135	153
State v. 6 Jones (N. C.),		v. State, 34 Ark. 441	92, 116a
478	677	Fogg v. Dennis, 3 Humph. 47	551
State v. 33 La. An. 1344	757	Fogleman v. State, 32 Ind. 145	484
State v. 65 Mo. 437	34	Foley v. State, 9 Ind. 363	144
v. Willar, 13 Mass. 379	447	v. State, 15 Nev. 64	364
Fitch v. Hill, 11 Mass. 286	402	State v. 45 N. H. 466	255, 261
v. Smallbrook, Ld. Raym. 32	363	Folkes v. Chadd, 3 Doug. 157	415
Fitchburg R. R. Com. v. 126 Mass.		Follansbee v. Walker, 72 Penn. St.	
472	24	228	385
Fitzgerald v. State, 11 Neb. 577	281	v. Walker, 74 Penn. St.	
Fitzhugh v. McPherson, 9 Gill & J.		306	510
51	594	Follett v. Jefferyes, 1 Sim. N. S. 1	504
State v. 2 Oregon, 227	280,	Folwell, State v. 14 Kans. 105	31,
	288		458, 460
Fitz James v. Moys, 1 Sid. 133	511	Fontaine Moreau, R. v. 11 Q. B.	
Fitzpatrick v. Fitzpatrick, 6 R. I.		1033	570, 615, 638
64	604	Forbes, R. v. 7 C. & P. 224	42
People v. 5 Parker C.		Ford v. Com., 16 Grat. 547	482
R. 26	393, 394	Com. v. 111 Mass. 394	203, 440
Fitzsimmons, State v. 30 Mo. 236	446	Com. v. 130 Mass. 64	261a
Fitzwalter Peerage Case, 10 Cl. &		Com. v. State, 34 Ark.	
Fin. 193	548, 560	649	32, 679

TABLE OF CASES.

	SECTION		SECTION
Ford, R. v. 2 Salk. 689; Bull. N. P. 292	363, 365, 445	Frank v. State, 39 Miss. 705	646, 763
v. Simmons, 13 La. An. 397	341	Franklin, People v. 3 Johns. Cas. 299	114
v. State, 71 Ala. 385	329, 330, 338, 384, 417, 730, 752	R. v. 17 How. St. Tr. 638	525
State v. 3 Strobbh. 517	66	v. State, 29 Ala. 14	69, 75
U. S. v. 99 U. S. 594	443	v. State, 5 Baxt. 613	107
Forester, R. v. 4 F. & F. 857; S. C., 10 Cox, 368	281	Franklin Bank v. Navigation Co. 11	483
Forney v. Ferrell, 4 W. Va. 729	472	Gill & J. 28	483
Forster, R. v. 29 Eng. L. & Eq. 548; Dears. C. C. 456; 6 Cox, 521; 24 L. J. M. C. 134	33, 34, 39, 40, 45	Fraser v. State, 55 Ga. 325	626, 764
Fort v. Brown, 46 Barb. 366	412	v. Jennings, 42 Mich. 206	516
Fortner, State v. 43 Iowa, 494	670	Fraunburg, State v. 40 Iowa, 555	295
Fosgate v. Herkimer Man. Co. 9 Barb. 287	542	Frazer v. State, 58 Ind. 8	471
Foss v. Hildreth, 10 Allen, 76	661	Frazer v. People, 54 Barb. 306	491
Foster v. Hall, 12 Pick. 89	497	Frazier v. R. R., 38 Penn. St. 104	60
In re, 44 Vt. 570	433	v. State, 1 Houst. C. C. 176	263, 295, 296, 297
v. Leeper, 29 Ga. 294	837	v. State, 5 Mo. 536	106
v. People, 18 Mich. 266	476	Frederick, State v. 69 Me. 400	231, 750
v. Pierce, 11 Cush. 437	465	v. State, 3 W. Va. 695	678
R. v. 6 C. & P. 325	263, 492	Freeland v. People, 16 Ill. 380	585
R. v. 1 Lew. C. C. 46	666, 667	Freeman v. Baker, 5 C. & P. 482	526
R. v. R. & R. 412	96	v. Morey, 45 Me. 50	837
v. State, 39 Ala. 229	580, 592	State v. 4 Jones (N. C.), 5	46, 49
v. State, 52 Miss. 595	758	State v. 12 Ind. 100	658
State v. 23 N. H. 348	465, 470	State v. 1 Speers, 57	284, 661
v. State, 1 Tex. Ap. 531	762	State v. 11 Tex. Ap. 92	440, 441
v. State, 8 Tex. Ap. 248	263	Freestone v. Butcher, 9 C. & P. 647	733
v. Trull, 12 Johns. 456	153	Freleigh v. State, 8 Mo. 606	494
Foster's Will Case, 34 Mich. 21	544, 557	French v. Merrill, 6 N. H. 465	492
Foulk v. State, 8 Oh. St. 98	648, 654, 658	v. State, 12 Ind. 670	1
Foulke, U. S. v. 6 McLean, 349	1	v. Venneman, 14 Ind. 282	432
Fountain v. Boodle, 3 Q. B. 3	61	Freshour, People v. 55 Cal. 375	465
Fowle v. R. R., 107 Mass. 352	591	Friend's Case, 4 St. Tr. 225	472
Fowler v. Com., 4 Call (Va.), 35	365	Friend, R. v. 13 How. St. Tr. 1146	463
Com. v. 10 Mass. 290	833	Fries' Case, Wh. St. Tr. 480	386
v. Lewis, 25 Tex. 380	407	Fries v. Brugler, 12 N. J. L. 79	482
State v. 52 Iowa, 103	329, 751	Frink v. Potter, 17 Ill. 406	826
v. State, 3 Heisk. 154	590	Fritz v. State, 40 Ind. 18	578, 579
Fox v. People, 95 Ill. 71	34, 39, 750, 752	State v. 23 La. An. 55	555, 557
Foxworthy, R. v. 7 Mod. 153	365	Frost v. Brown, 2 Bay (S. C.), 133	707
Foye, U. S. v. 1 Curtis, C. C. 364	146	v. Holloway, 1 Stark. Ev. 197	474
Frady v. People, 8 Baxt. 349	69	State v. 1 Brev. 385	575
Frain v. State, 40 Ga. 529	363	Fry v. Wood, 1 Atk. 445	229
Fralich v. People, 65 Barb. 48	430, 432, 433, 470	Frye v. Stade, 7 Tex. Ap. 94	1
France, State v. 1 Tenn. 434	95	Fryer v. Gathercole, 13 Jur. 542	459
Frances, R. v. 4 Cox, 57	418	Fugate v. Pierce, 49 Mo. 446	389
Francis, People v. 38 Cal. 183	730	Fuller v. Fuller, 17 Cal. 605	354, 361
R. v. 12 Cox, 612; L. R. 2 C. C. 128	33, 53	People v. 2 Parker C. R. 16	826
v. State, 7 Tex. Ap. 501	34	v. Princeton, 2 Dane Ab. Ch. 48, 49	537
Francisco v. State, 4 Zab. 30	144, 584	R. v. R. & R. 408	33, 43
Frank v. State, 27 Ala. 38	688, 698	State v. 1 McCord, 178	365
	778	State v. 39 Vt. 74	699
		Fulmer v. Com., 97 Penn. St. 503	24, 735

TABLE OF CASES.

	SECTION		SECTION
Fulsome v. Concord, 46 Vt. 135	460	Gannon, Com. v. 97 Mass. 547	733
Fulton v. Hood, 34 Penn. St. 365	559, 560	People v. 61 Cal. 476	306
v. Macracken, 18 Md. 538	379	Garbett, R. v. 2 C. & K. 474; S. C.,	
v. State, 58 Ga. 224	756	1 Den. C. C. 235; 2 Cox 448, 465, 468	
Funk v. Dillon, 21 Mo. 294	400	470, 496, 664, 665	
Furber v. Hilliard, 2 N. H. 480	560	Garbutt, People v. 17 Mich. 9	58, 60,
Furneaux's Case, R. & R. 335	132, 588	66, 339	
Furneaux v. Hutchins, 2 Cowp. 80	742	Garcia v. State, 26 Tex. 209	758
Furnish v. Com., 14 Bush. 180	487	v. State, 12 Tex. Ap. 335	324
Furrow v. Chapin, 13 Kans. 107	401	Garden v. Creswell, 2 M. & W. 319	346
Furser, R. v. Say. 90	595	v. Garden, 2 Houst. 574	811
Fursey, R. v. 6 C. & P. 81	24, 47, 168, 545	Gardiner v. People, 6 Parker, C. R.	
Fury v. State, 8 Tex. Ap. 475	330	155 312, 412, 573, 742,	
Fussell, R. v. 3 Cox, 291	120 a	752, 769	
		v. People, 3 Scam. 83	264,
			691, 698
		R. v. 2 Burr. 1117	364
		R. v. 8 C. & P. 737	387
		State v. Wright (Ohio),	
		392	95, 98
		State v. 11 Tex. Ap. 165	785
		Gardner v. Bartholomew, 40 Barb.	
		325	489, 491
		People v. 2 Johns. 477	111
		R. v. 2 Camp. 513	540
		State v. 84 N. C. 732	445
		State v. 1 Root, 485	363, 390,
			402
		Garfield v. State, 74 Ind. 60	1, 116 a
		Garham v. People, 58 Ill. 160	96
		Garland, Ex parte, 4 Wall. 333	365
		v. Lane, 46 N. H. 245	342
		Garner, R. v. 2 C. & K. 920; S. C.,	
		1 Den. C. C. 329	651, 652,
			689
		R. v. 4 F. & F. 346	50
		Garnett, People v. 29 Cal. 622	446
		Garrand, State v. 5 Oreg. 216	281, 691
		Garrard v. State, 50 Miss. 147	646,
			688, 698
		Garrels v. Alexander, 4 Esp. 37	553,
			555
		Garrett, R. v. 6 Cox, 260, Dears.	
		232	112
		State v. 1 Busbee, 357	472, 474
		v. State, 6 Mo. 1	445, 482
		State v. 71 N. C. 85	312
		Garrett's Case, 71 N. C. 85	315
		Garrison v. State, 87 Ill. 96	30
		Garry v. Post, 13 How. Pr. 118	812
		Garside, R. v. 2 Lew. C. C. 38	443
		Gartside v. Outram, 26 L. J. Ch.	
		113, 114	504
		Garvey, State v. 25 La. An. 191	668
		State v. 28 La. An. 925	678,
			689
		State v. 11 Minn. 154	456
		v. Wayson, 42 Md. 187	527
		Garvin v. State, 52 Miss. 209	556
		Gaskill v. Skene, 14 Q. B. 664	679

TABLE OF CASES.

	SECTION		SECTION
Gass v. Stinson, 2 Sumner, 610	487	Gibson v. McCarthy, Cas. Temp.	
Gassenheimer v. State, 52 Ala. 314		Hardw. 311	596 a
	31, 32, 457	People v. 53 Cal. 601	439
Gassert, State v. 65 Mo. 352	721, 722	R. v. 8 East, 107	689
Gateley, Com. v. 126 Mass. 52	117	Giddings, R. v. C. & M. 634	590
Gates, People v. 46 Cal. 52	261	Gifford v. People, 87 Ill. 210	432
People v. 13 Wend. 311; 2		Gigher, State v. 23 Iowa, 318	438, 445
Rogers's Rec. 79	508	Gilbert, People v. 60 Cal. 108	829
State v. 20 Mo. 400	382	v. Simpson, 6 Daly, 30	550
Gauldin v. Sheehe, 20 Ga. 531	734	Gilbraith v. State, 41 Tex. 567	32
Gavignan v. State, 55 Miss. 533	545	Gildersleeve v. Caraway, 10 Ala.	
Gavin, Com. v. 121 Mass. 54	121	260	231
Gavisk v. R. R., 49 Mo. 274	460	Giles, R. v. L. & C. 502	223
Gay v. Ins. Co., 2 Big. Ins. Cas. 14	420	R. v. 1 Mood. C. C. 166	801
v. Lloyd, 1 Greene (Iowa) 78	182	Giles v. State, 6 Ga. 276	1
People v. 7 N. Y. 378	432, 491	Gilham, R. v. 1 Mood. C. C. 186	508,
R. v. 7 C. & P. 230	295		660, 664
Gayle v. Bishop, 14 Ala. 552	494	R. v. 6 T. R. 265	126
Gazard, R. v. 8 C. & P. 595	509	v. State, 1 Head, 38	486
Gazzolo, Com. v. 123 Mass. 220	254	Gilkey v. Peeler, 22 Tex. 663	390
Geary v. People, 22 Mich. 220	485	Gillard v. Bates, 6 M. & W. 547	503
Gebhart v. Shindle, 15 S. & R. 2	384 a	Gillespie, Com. v. 7 S. & R. 469	94,
Gedieke v. State, 43 N. J. L. 86	271, 493		96, 102, 112
Geering, R. v. 18 L. J. M. C. 215		v. State, 9 Ind. 380	144
	50, 787	Gillick, State v. 10 Iowa, 98	538
Gehrke v. State, 13 Tex. 568	417, 538	Gillis, R. v. 17 Ir. L. R. (N. S.)	
Geiger, People v. 49 Cal. 643	698	512; 11 Cox, 69	443, 656, 664
Geisenberger, Com. v. Philadel-		Gillon, Com. v. 2 Allen, 502	109
phia, Dec. Term, 1858	774	R. v. 1 Mood. C. C. 85	740
Gening v. State, 1 McCord, 573	331	Gillooley v. State, 58 Ind. 182	508
Genung, People v. 11 Wend. 18	432	Gilman v. Riopelle, 18 Mich. 145	456
George, R. v. C. & M. 14	445	State v. 51 Me. 206	664
State v. 8 Ired. 324	491, 492,	State v. 69 Me. 163	734, 738,
	698		764
v. State, 39 Miss. 570	441	Gilmore, People v. 4 Cal. 376	584
Gerard v. People, 3 Scam. 263	580	Gilpatrick v. Foster, 12 Ill. 355	521
Gerber, R. v. Temp. & M. 647	439	Gilpin v. Fowler, 9 Ex. R. 615	739
Gerhauser v. Ins. Co., 7 Nev. 174	229	Girdwood, R. v. 1 Leach, 142	113
German, State v. 54 Mo. 526	632	Girons v. State, 29 Ind. 93	96
German Bank v. Kerlin, 53 Mo.		Givens v. Com., 29 Grat. 830	366
382	494	State v. 5 Ala. 747	555
Getty, People v. 49 Cal. 581	760	Glass, State v. 5 Oregon, 73	1, 271
Gholstan v. State, 33 Tex. 342	124	State v. 50 Wis. 218	664
Gibbes v. Vincent, 11 Rich. (S. C.)		Gleason, People v. 1 Nev. 173	60
323	811	State v. 56 Iowa, 203	580
Gibbons, People v. 49 Cal. 557	668	Glenn v. Bank, 70 N. C. 191	383
R. v. 1 C. & P. 97	651	v. Clore, 42 Ind. 62	363, 489
R. v. 12 Cox, 237	725	v. Garrison, 17 N. J. L. 1	608
Gibbs v. Linabury, 22 Mich. 479	483	v. Glenn, 47 Ala. 204	169, 530
People v. 93 N. Y. 471; 1		People v. 10 Cal. 32	297
N. Y. Cr. Rep. 473	30, 32	Gliddon v. Goos, 21 La. An. 682	153
Resp. v. 3 Yeates, 429	472	Glory v. State, 13 Ark. 236	698
Gibert, U. S. v. 2 Sumner, 19	10, 159,	Glover, Com. v. 111 Mass. 395	440
	445, 449	Glynn v. Houston, 1 Keen, 329	566
Gibney, R. v. Jebb C. C. 15	646, 662,	State v. 51 Vt. 577	477
	663	Goddard, Com. v. 13 Mass. 455	571, 594
Gibson v. Com., 87 Penn. St. 253		v. Gardner, 28 Conn. 172	502
	396, 401	R. v. 15 Cox C. C. 7	281
v. Hatchett, 24 Ala. 201	457	Godfrey v. Macaulay, Pea. R. 155, n.	543
v. Holland, L. R. 1 C. P. 1	644		

TABLE OF CASES.

	SECTION		SECTION
Godfrey R. v. D. & B. 426	116 a	Gordon's Case, 2 M. & S. 582	351
v. State, 31 Ala. 323	801	Gordon v. Bucknell, 38 Iowa, 438	525
Godofrey v. Jay, 3 C. & P. 192	603	v. Clapp, 38 Ala. 357	690
Goerson v. Com., 99 Penn. St. 388		Com. v. 2 Brewst. 569	390, 392
32, 37, 46, 47		v. Com., 92 Penn. St. 216	510
Goessler v. Eagle Co., 103 Mass.		People v. 40 Mich. 716	448, 763
331	406	v. People, 33 N. Y. 501	341, 716
Goin, State v. 9 Humph. 175	801	R. v. 2 Dowl. 417; S. C.,	
Goldberg, U. S. v. 7 Bias. 175	441	12 Law J. M. C. 84	448
Golden v. Knowles, 120 Mass. 336	615	R. v. 21 How. St. Tr. 535	262,
v. State, 19 Ark. 590	690		263
v. State, 25 Ga. 527	752	R. v. 2 Leach, 581	164, 833
State v. 49 Iowa, 48	758	v. Shurtleff, 8 N. H. 260	266
Goldsborough's Case, Warren's		v. State, 68 Ga. 814	315
Miscellanies, 93	804	Gore v. Bowser, 5 De G. & Sm. 30	504
Goldshede, R. v. 1 C. & K. 657	664	v. Gibson, 13 M. & W. 625	676
Goldsmith v. Bane, 3 Halst. 87	552	v. State, 58 Ala. 391	329, 699
Goldstein v. Black, 50 Cal. 462	562	Gorham, Com. v. 99 Mass. 420	363, 489
Com. v. 114 Mass. 272	213	Gorman, State v. 54 Mo. 516	632
People v. 32 Cal. 432	574	State v. 58 N. H. 77	32
R. v. R. & R. 473	114	v. State, 23 Tex. 646	171
People v. 82 N. Y. 231	733,	Gormley, Com. v. 133 Mass. 580	
	758		733, 734
Gomez Serra v. Munoz, Stra. 821	354	v. State, 37 Ohio St. 120	591
Gonzales, People v. 35 N. Y. 49	312,	Gose v. State, 6 Tex. Ap. 121	750, 758
413, 777		Gosset v. Howard, 10 Q. B. 411	835
v. State, 2 Tex. Ap. 520	96	Gossett, State v. 9 Rich. 428	672
v. State, 9 Tex. Ap. 374	44	Gould, Com. v. 12 Gray, 171	573, 579
v. State, 12 Tex. Ap. 657	641	v. Jones, 1 W. Bl. 384	552
v. State, 13 Tex. Ap. 758	758	v. Norfolk Co., 9 Cush. 338	483
Good, R. v. 1 C. & K. 185	723	v. R. v. 9 C. & P. 364	586, 678,
Goodall v. Little, 20 L. J. Ch. 132;			689
1 Sim. N. S. 135	503	Gove, State v. 34 N. H. 510	147
v. State, 22 Oh. St. 203	146	Governor v. Roberts, 2 Hawks, 26	360
v. State, 1 Oreg. 333	291	Grace, State v. 18 Minn. 398	352
Goode v. State, 2 Tex. Ap. 520	96	Grady, State v. 34 Conn. 119	112, 698
Goodenow, State v. 65 Me. 30	734	Graff, State v. 47 Iowa, 384	442
Goodhue v. Bartlett, 5 McLean, 186	553	U. S. v. 14 Blatch. 381	167,
Com. v. 2 Met. 193	137		658, 698
Gooding, U. S. v. 12 Wheat. 460	698	Graham v. Glover, 5 K. & B. 591	351
Goodman v. Holroyd, 15 C. B. N.		v. Hollinger, 46 Penn. St.	
S. 839	504	55	690
Goodrich v. City, 5 Wall. 566	593	v. People, 63 Barb. 468	488,
v. People, 3 Park, C. R.			496, 504
622	418	State v. 46 Mo. 490	263
State v. 46 N. H. 186	127	State v. 74 N. C. 646	312, 315,
State v. 19 Vt. 116	757		661, 796
State v. 14 W. Va. 851	173	State v. 41 N. J. L. 15	443
v. Weston, 102 Mass. 362		State v. 15 Rich. 310	98
	160, 177	Grand Trunk R. R. v. Richardson,	
v. Wilson, 119 Mass. 429	29	91 U. S. 454	54
Goodright v. Moss, 2 Cowp. 594	518	Granger v. Bassett, 98 Me. 462	429
Goodrum v. State, 60 Ga. 509	398	v. Warrington, 3 Gilman,	
Goodwin, Com. v. 14 Gray, 55	1, 751	299	510
R. v. 1 Lew. C. C. 100	833	Granger's Ins. Co. v. Brown, 57	
v. Smith, 72 Ind. 113	321,	Miss. 308	314
	342	Grannis v. Branden, 5 Day, 260	469
Goodwyn v. Goodwyn, 20 Ga. 600	378	Grant, Com. v. Thach. C. C. 438	441
Goodyear v. Vosburgh, 63 Barb. 154		R. v. 4 F. & F. 322	24
	556, 559	R. v. 1 Ry. & M. 270	363

TABLE OF CASES.

	SECTION		SECTION
Grant, State v. 22 Me. 171	100, 646, 658	Greene v. Mandell (Pamph. Boston, 1868). See Robinson v. Mandell.	
State v. 74 Mo. 33	199, 741	R. v. 6 A. & E. 548	522
State v. 76 Mo. 237	486	Greenfield v. People, 85 N. Y. 75	
v. Thompson, 4 Conn. 203	417	225, 263, 264, 460, 466,	
Grate, State v. 68 Mo. 22	487	751, 785	
Grattan v. Ins. Co., 80 N. Y. 281	516	v. R. R., 29 Iowa, 47	826
Gratz v. Beates, 45 Penn. St. 495	520	Greenfield Bank v. Crafts, 4 Allen, 447	837
Graves, State v. 72 N. C. 482	758	Greenley v. State, 60 Ind. 641	339
State v. 16 Vroom, 203	337	Greenough v. Gaskell, 1 M. & K. 98	496
State v. 12 Wis. 591	757	Greenwade v. State, 72 Mo. 298	32,
Gray v. Cole, 5 Harr. (Del.) 418	399	698	
Com. v. 129 Mass. 474	57	Greenwood v. Lowe, 7 La. An. 197	726
v. Com., 101 Penn. St. 380	633,	v. State, 54 Ind. 250	106
	804	Greepe, R. v. 2 Salk. 513; Bull. N. P. 292	365
v. Haig, 20 Beav. 219	748	Greer v. State 53 Ind. 420	430, 431
v. Kernahan, 2 Mill (S. C.), 65	216	v. State, 31 Tex. 129	646
v. McNeal, 12 Ga. 424	594	Gregg v. State, 3 W. Va. 705	446
v. Nations, 1 Ark. 557	698	Gregor, State v. 21 La. An. 473	757
People v. 61 Cal. 164	282, 285	Gregory v. Richards, 8 Jones (N. C.), 410	758
v. Pentland, 2 S. & B. 23	513	State v. 5 Jones (N. C.), 315	677
R. v. 4 F. & F. 1102	37	State v. 33 La. An. 737	484
v. State, 63 Ala. 66	32, 756, 784	Greville v. Chapman, 5 Q. B. 731	404,
State v. 37 Mo. 463	758	457	
State v. 11 Tex. Ap. 411	146	Gridley v. Conner, 4 La. An. 416	630
v. St. John, 35 Ill. 222	487	Griffin, Com. v. 110 Mass. 181	398
U. S. v. 2 Cranch C. C. 675	261	Com. v. 21 Pick. 523 132, 145,	584
Grear, State v. 28 Minn. 426	336, 338,	v. Marquand, 21 N. Y. 121	431
	676	People v. 2 Barb. 427	113
State v. 29 Minn. 24	632	People v. 38 How. (N. Y.) Pr. 475	126
Great West. R. R. v. Bacon, 30 Ill. 347	341	R. v. 6 Cox, 219	508, 660
Grebe, State v. 17 Kans. 458	435, 762	R. v. R. & R. C. C. 151	678
Green's Case, 3 Wh. & St. Med. Jur. § 597	369	R. v. 14 Cox, C. C. 368	172
Green v. Bedell, 48 N. H. 546	570, 615,	v. Smith, 45 Ind. 366	399
	691	v. State, 14 Oh. St. 55	63, 64,
v. Cawthorn, 4 Dev. L. 409	360	114, 487	
Com. v. 17 Mass. 515	359, 363,	Griffith v. State, 37 Ark. 324	482
	489	Griffiths, Com. v. 126 Mass. 252	116 a
v. Com., 83 Penn. St. 75	1	v. Payne, 11 A. & E. 131	29
Com. v. 2 Pick. 380	801	Griffitts v. Ivory, 11 A. & E. 322; 3 P. & D. 179	554
v. Gould, 3 Allen, 466	454	Griggs's Case, T. Ray. 1; 1 Hale, 693; 1 Russ. C. & M. 218	394, 397
v. Harris, 3 Ired. L. 210	679	Griggs v. State, 59 Ga. 738	418, 456
People v. 1 Denio, 614; 1 Park. C. R. 11	276, 289, 393, 446, 682	Grigsby v. Water Co., 40 Cal. 396	420
R. v. D. & B. 113	578	Grimes, Com. v. 10 Gray, 470	116 a
R. v. 6 C. & P. 655	651	v. Kimball, 3 Allen, 518	748
v. Rennett, 1 T. R. 656	103 a	v. Martin, 10 Iowa, 347	446
v. State, 59 Ala. 68	172	v. State, 63 Ala. 166	384
v. State, 69 Ala. 7	277, 757	v. State, 68 Ind. 193	761
v. State, 38 Ark. 304	69	Grimm v. Hamel, 2 Hilt. 434	231
State v. 35 Conn. 203	785, 786	Grimme v. Com., 5 B. Monr. 263	109
State v. 1 Houst. C. 12	217, 756	Grimmell v. Warner, 21 Iowa, 11	323
State v. 16 Iowa, 239	595		
v. State, 28 Miss. 687	764		
v. State, 55 Miss. 454	441		
v. State, 13 Mo. 382	688		

TABLE OF CASES.

	SECTION		SECTION
Grimwood v. Baritt, 6 T. R. 265	126	Haines, R. v. 2 Russ. C. & M. 886	666
Grisham, State v. 2 Yerg. 589	170	Hair v. Melvin, 2 Jones L. 59	605
Grissom v. State, 8 Tex. Ap. 386	69, 80	Haire v. Wilson, 9 B. & C. 643	739
Griswold v. Newcomb, 24 N. Y. 298	474	Haiston v. Hixon, 3 Need. 691	688
v. State, 24 Wis. 144	688	Hale v. Taylor, 45 N. H. 405	269
Grogan v. State, 44 Ala. 9	573	Haley v. State, 63 Ala. 83, 89	52, 56, 57, 58, 91, 96, 98
Groombridge, R. v. 7 C. & P. 582	801	State v. 52 Vt. 476	57, 261
Grosse v. State, 11 Tex. Ap. 364	483	Hall, Com. v. 4 Allen, 305	33, 39, 489
Grosvenor v. Tarbox, 39 Me. 129	604	v. Emily Banning, The, 33	
Grounsell, R. v. 7 C. & P. 788	91	Cal. 522	429
Grouse, State v. 86 N. C. 617	484	v. Huse, 10 Mass. 39	625
Grundon, R. v. 1 Cowp. 315	600	v. Kellogg, 16 Mich. 135	830
Grunzig, People v. 1 Parker C. R.		v. Naylor, 18 N. Y. 588	53
299, 2 Edm. Sel. Ca. 236	276, 282	v. People, 57 Cal. 569	24
Guardian Co. v. Hogan, 80 Ill. 135	727	v. People, 39 Mich. 717	750
Guardians of the Poor v. Nathans,		v. People, 47 Mich. 636	24
2 Brewst. 149	170, 395	v. People, 6 Parker C. R. 671	47
Guedel v. People, 43 Ill. 226	580	R. v. 12 Cox, 159	651
Guetig v. State, 66 Ind. 95	339, 417,	R. v. 1 Lew. C. C. 110	699, 700
	418, 756	v. Stanton, Sup. Ct. Penn. 2	
Guild, State v. 5 Halst. 163	632, 677	Weekly Notes, 578	53
Guille v. Swan, 19 Johns. 381	826	v. State, 40 Ala. 698	20, 264, 690
Guiteau, U. S. v. 10 Fed. Rep. 161;		v. State, 51 Ala. 9	29, 225
1 Mack. 498	312, 338	v. State, 6 Baxt. 522	229, 414
Gumble, R. v. 27 L. T. N. S. 692;		v. State, 48 Ga. 607	264, 269,
12 Cox C. C. 248; Law Rep. 2 C.			690
C. 1	123	v. State, 8 Ind. 439	758
Gumpert, Com. v. 5 Luz. Reg. 187	288	State v. 9 Nev. 58	757, 757 a
Gurney v. Langlands, 5 B. & A.		v. Warren, 9 Ves. 605	730
330	563	Hallet v. Eslava, 3 St. & P. 105	803
State v. 37 Me. 149	128	Halley v. Webster, 21 Me. 461	486
Gustavson, State v. 50 Iowa, 194	66	Halliday, R. v. 8 Cox, 298	396, 402
Gut v. State, 13 Minn. 543	338	Halloran v. State, 80 Ind. 586	595
Gutch, R. v. M. & M. 433	102, 696	Halloway, Com. v. 44 Penn. 210	489
Guttridge, R. v. 9 C. & P. 471	229, 271	Halsted v. Price, 13 Mo. 171	608
Guy, State v. 69 Mo. 430	662, 756	v. State, 39 N. J. L. 402;	
		S. C., 41 N. J. L. 552	725
H.		Ham v. State, 7 Tex. Ap. 383	199, 562
		Ham's Case, 2 Fairf. 391	172
Haak v. Breidenbach, 3 S. & R. 204	510	Hamblett v. State, 18 N. H. 384	127
Hackett, Com. v. 2 Allen, 136	202, 296	Hamby v. State, 26 Tex. 523	721, 764,
v. Com., 15 Penn. St. 95	734		784, 804
v. People, 54 Barb. 370	280,	Hamilton v. Com., 16 Penn. St. 129	605
	288	v. Nott, L. R. 16 Eq. 112	505
v. R. R., 35 N. H. 390	460	v. People, 57 Barb. 625	728
Hackley, In re, 24 N. Y. 83	471	v. People, 29 Mich. 173	444,
Haddock, State v. 2 Hayw. 162	97	486, 487, 500, 698, 707, 714	
Hadley v. Carter, 8 N. H. 40	757 b	R. v. 9 Q. B. 270	626
v. State, 55 Ala. 31	764	v. State, 36 Ind. 280	263, 266
Hagan, R. v. 12 Cox, 357	756	v. State, 57 Iowa, 596	331
State v. 54 Mo. 192	654	State v. 27 La. An. 400	278
Hagenbaugh v. Crabtree, 33 Ill. 225	679	State v. 13 Nev. 386	1
Haggerty, Com. v. 4 Brewst. 326	365	v. State, 11 Ohio, 435	111
Hahn v. Kelly, 34 Cal. 391; 35		Hammond, State v. 77 Mo. 157	227
Cal. 533	594	v. Varian, 54 N. Y. 400	549
Haight v. Haight, 19 N. Y. 464	263	Hammond's Case, 2 Greenl. 33	549,
Haines, Com. v. 6 Penn. L. J. 239	91		550, 552, 557, 560
		Hamp, R. v. 6 Cox, 167	214
		Hampton v. State, 45 Ala. 82	393

TABLE OF CASES.

	SECTION		SECTION
Hampton v. State, 5 Tex. Ap. 463	691	Hargraves v. Miller, 16 Ohio, 338	380
Hancock v. Ins. Co., 62 Mo. 121	811	Harker v. Dement, 9 Gill, 7	153
v. State, 14 Tex. Ap. 392,		v. State, 8 Blackf. 540	573
440, 446		Harkins, Com. v. 128 Mass. 79	570 a
v. Wilson, 39 Iowa, 47	24	Harley, Com. v. 7 Met. 462	698
Hand v. Brookline, 126 Mass. 324		Harman, Com. v. 4 Barr, 269	1, 10,
413, 418		12, 327, 662, 664, 677, 689	
Handley v. Russel, Hard. (Ky.)		Harper, People v. 1 Edm. (N. Y.)	
145	605	Sel. Cas. 180	362
Handline v. State, 6 Tex. Ap. 347	751	v. R. R. 47 Mo. 567	472
Handly v. Call, 30 Me. 9	690	State v. 35 Ohio St. 78	288
Handy, State v. 20 Me. 81	114	v. West, 1 Cranch C. C.	
Haney, Com. v. 127 Mass. 455	284,	192	521
286, 295, 300		Harrel v. State, 1 Head, 125	362
State v, 2 Dev. & Bat. 381		Harrington v. Lincoln, 4 Gray, 563	491
441, 698, 699		R. v. Taylor's Med. Jur.	
Hankins, R. v. 2 C. & K. 823	214	386	779
Hanley v. Gandy, 28 Tex. 211	555, 560	State v. 12 Nev. 125	430,
Hanlon, Com. v. 3 Brewst. 461	363,	433, 458	
365, 632, 670		v. State, 19 Ohio St. 264	
v. Ingram, 3 Iowa, 81	824		66, 67
Hanna, State v. 84 Ind. 183	829	Harriot v. Sherwood, Ct. Ap. Va.	
State v. 10 La. An. 131	276	1884	555
Hannahan, People v. 91 Ill. 142	688	Harris's Case, 1 Mood. C. C. 338	
v. State, 7 Tex. Ap. 664	442	667, 678	
Hannett, State v. 54 Vt. 83	24, 784	Harris v. Hardeman, 14 How. U.	
Hanoff v. State, 37 Ohio St. 178	465	S. 334	594
Hanrahan v. People, 91 Ill. 142	688	R. v. 8 Cox, 333	758
Hanse, State v. 71 N. C. 518	725	R. v. 7 C. & P. 429	33, 39
Hanson v. Eustace, 2 How. 653	749	R. v. 4 F. & F. 342	48
R. v. C. & M. 334	135	v. State, 34 Ark. 469	757
State v. 39 Me. 337	103	State v. 3 Harring. 559	120
Hanvey v. State, 68 Ga. 612	764	v. State, 30 Ind. 131	491, 492
Hanway, U. S. v. 2 Wall. Jr. 139	386,	State v. 5 Ired. 287	560
391, 446		State v. 7 Lea, 124	440
Happy v. Morton, 33 Ill. 398	457	v. State, 47 Miss. 318	757
Harborne, R. v. 2 A. & E. 540	810, 812	State v. 59 Mo. 550	69, 757,
Hardenburg v. Cockroft, 5 Daly, 79	459	757 a	
Hardenburgh v. Lakin, 47 N. Y.		State v. 76 Mo. 361	756
225	111	State v. 63 N. C. 1	412
Hardiman, Com. v. 9 Gray, 136	334	State v. 64 N. C. 127	120, 126
State v. 9 Allen, 487	581	v. State, 1 Tex. Ap. 74	225
Hardin, State v. 46 Iowa, 623	333	v. Thompson, 13 C. B. 333	739
v. State, 26 Tex. 113	95, 99	v. Tippet, 2 Camp. 637	485
State v. 12 Tex. Ap. 186	143	v. Willis, 15 C. B. 709	594
Harding, R. v. 1 Arm., M. & O. 340	671	Harrison, Com. v. 11 Gray, 308	106
v. State, 54 Ind. 359	34, 647	v. Gordon, 2 Lew. C. C.	
U. S. v. 1 Wall. Jr. 127	584	150	485
Hardisson v. People, 61 Cal. 358	1	v. Kirke, 38 N. Y. Sup.	
Hardwick, R. v. 1 C. & P. 98, in		Ct. (6 Jones & S. 396)	431
note	651	v. Rowan, 3 Wash. C. C.	
R. v. 6 Petersd. Ab. 84	651	580	417
Hardy, Com. v. 2 Mass. 303	60, 64, 66	v. Southampton, 22 L. J.	
R. v. 24 How. St. Tr. 451,		Ch. 722	827
1079	58, 513, 515, 698	v. Southcoote, 1 Ath. 518	466
State v. 47 N. H. 538	144, 584	v. State, 36 Ala. 248	580
Hare, R. v. 3 Cox, 247	682	v. Wisdom, 7 Heisk. 99	698
State v. 70 N. C. 658	204	Harrison's Case, 12 St. Tr. 850	803
State v. 71 N. C. 591	61, 64, 446	Harrod v. Harrod, 1 K. & J. 4	369,
Hargrave, R. v. 5 C. & P. 170	440	375, 826, 827	

TABLE OF CASES.

	SECTION		SECTION
Hart v. Alexander, 2 M. & W. 484	543	Hawkins, Com. v. 11 Bush, 603	580;
Com. v. 10 Gray, 468	141		584
v. Roper, 6 Ired. (Eq.) 349	734	Com. v. 3 Gray, 463	334;
State v. 6 Jones (N. C.), 389	723		483, 738
Hartfel, State v. 24 Wis. 60	725	v. Grimes, 13 B. Mon.	
Hartford v. Palmer, 16 Johns. 143		258	559
	369, 371, 384 a	v. Grimes, 1 Duvall, 335	555
Hartie, R. v. 6 C. & P. 105	564	v. Rice, 40 Iowa, 435	199
Hartington, R. v. 4 E. & B. 780	570	v. State, 25 Ga. 207	456, 457
Hartley v. Cook, 5 C. & P. 441	526	v. State, 7 Mo. 190	648,
Hartman v. Ogborn, 54 Penn. St.			651, 654
120.	594	v. Fall River, 119 Mass.	
Hartnett, State v. 75 Mo. 251	107	94	419
Hartnaff's App., 85 Penn. St.		Hawks v. Charlemont, 110 Mass.	
433	513	110	313, 412, 822, 825
Hartshorn v. Williams, 31 Ala.		v. Truesdell, 99 Mass. 557	603
149	225	Hawley v. Com., 75 Va. 847	142
Hartung v. People, 4 Parker C. R.		Haworth, R. v. 4 C. & P. 254	118, 199,
319	413, 551, 661		208, 212, 214, 216, 664
Hartwell, U. S. v. 3 Cliff. 221	602,	Hawthorne v. State, 58 Miss. 778	
	698, 702		1, 738, 764
Harvey, Com. v. Gray, 487	680	U. S. v. 1 Dill. 422	436
R. v. 3 D. & R. 464	736	Hawver v. Hawver, 78 Ill. 412	402
v. Smith, 17 Ind. 272	3	Hay, R. v. 2 F. & F. 4	508
v. State, 40 Ind. 516	407, 538	v. State, 40 Md. 633	281
State v. 3 N. H. 65	733	Haycock v. Greup, 57 Penn. St.	
Harwood v. People, 26 N. Y. 190	261	438	557
Hasbrouck v. Vandervoort, 9 N.		Hayden, State v. 9 Rep. 237	264
Y. 153	390	State v. 51 Vt. 296	418
Hascall, State v. 6 N. H. 352	131	v. Stone, 112 Mass. 346	482
Hash, State v. 12 La. An. 896	677	Hayes v. State, 58 Ga. 35	734
Haskins, Com. v. 128 Mass. 60	129	Haynes v. Com., 28 Grat. 942	263
State v. 2 Hill (S. C.),		v. Cowen, 15 Kans. 637	603
95	573	People v. 38 How. Pr. 369;	
Haslam v. Cron, 19 W. R. 969	168	55 Barb. 450	441
Haslingfield, R. v. 2 M. & S. 558	603	People v. 11 Wend. 557	131
Haslip v. State, 10 Neb. 590	114	R. v. 4 M. & S. 214	103
Hastings v. Livermore, 15 Gray,		v. State, 17 Ga. 483	68
10	484	State v. 71 N. C. 79	225, 494
R. v. 7 C. & P. 152	441	Haynie v. Baylor, 18 Tex. 498	457
v. Rider, 99 Mass. 622	412	v. State, 2 Tex. Ap. 168	551,
State v. 53 N. H. 452	102,		628
	557	Hays v. Hays, 19 Wis. 182	389
Hatch v. State, 6 Tex. Ap. 384	312,	State v. 22 La. An. 39	272, 421
	555, 588	v. State, 40 Md. 633	264
Hatchett v. Com., 75 Va. 925	602	v. State, 13 Mo. 246	97
v. Com., 76 Va. 102	788	State v. 23 Mo. 287	752, 787
Hathaway v. Addison, 48 Me. 440	154	Hayslep v. Gymer, 1 Ad. & E.	
Hatton, Com. v. 3 Grat. 623	579	162	679
Hatts, R. v. 49 L. T. (N. S.) 780		Hayward, R. v. 6 C. & P. 157	281
	651, 654	People v. 96 Ill. 492	432, 472
Hatwood v. State, 18 Ind. 492	105	State v. 1 N. & Mo. 546	387
Haun v. State, 7 Tex. Ap. 383	199, 562	U. S. v. 2 Gall. 485	331, 342
Havely v. State, 21 Mo. 498	96	Haywood v. Reed, 4 Gray, 574	254
Havey, State v. 58 N. H. 377	103	State v. Phill. (N. C.)	
Hawes v. Dralger, 48 L. T. (N. S.)		376	334
518; 23 Ch. D. 173	828	Hazelton, State v. 15 La. An. 72	496
R. v. 1 Den. C. C. 270	532	Hazen, State v. 39 Iowa, 649	401
Hawkesworth v. Showler, 12 M. &		Hazleton v. Bank. 32 Wis. 47	557
W. 49	392	Hazy, R. v. 2 C. & P. 458	160, 274, 550

TABLE OF CASES.

	SECTION		SECTION
Heacock v. State, 13 Tex. Ap. 97		Hendrick v. Com., 5 Leigh, 707	33, 39
405, 408, 488, 555, 557, 562		Hendricks v. State, 26 Ind. 493	387
Head v. Head, 1 Sim. & S. 150	828	Hendrickson v. People, 1 Parker C.	
v. State, 44 Miss. 731	263, 691	R. 409; 6 Selden, 13	664
Heald v. Thing, 45 Mo. 392	225, 417, 418, 421	Hendrie, Com. v. 2 Gray, 503	97
Healey, <i>In re</i> , 58 Vt. 694	356	Henisler v. Freedman, 2 Parsons	
Heard v. McKee, 26 Ga. 332	690	Sel. Cas. 274	506
v. State, 59 Miss. 645	632, 651	Henke, State v. 58 Iowa, 457	811
v. State, 9 Tex. Ap. 1	39, 557, 701	Henkel v. Pape, L. R. 6 Exch. 7	645
Hearn, R. v. C. & M. 109	652, 666, 673, 678	Henman v. Dickinson, 5 Bing. 183	396
Hearne, R. v. 4 C. & P. 215	699, 700	Hennessey, People v. 15 Wend.	
Heath, Com. v. 11 Gray, 303	334, 338	147	631
v. Com. 1 Rob. (Va.) 735	31, 756	Hennessy, State v. 55 Iowa, 299	442
v. Greelock, L. R. 15 Eq. 257	503	State v. 23 Oh. St. 339	588
v. Page, 63 Penn. St. 108	53	Henry v. Bank, 3 Denio, 593	464
R. v. 18 How. St. Tr. 123	511	v. Leigh, 3 Camp. 499	526
v. State, 7 Tex. App. 464	442, 761	State v. 48 Iowa, 403	333
v. West, 26 N. H. 191	825	State v. 5 Jones (N. C.), 65	66
Heaton v. Findlay, 12 Penn. St. 304	502, 503	v. State, 7 Tex. Ap. 388	96
Heck, State v. 23 Minn. 549	141	U. S. v. 4 Wash. C. C., 428	439, 440, 445
Hector v. State, 2 Mo. 135	646, 690	Henay, R. v. 2 Ld. Ken. 366; 1 Burr. 642	551
Hedge v. Clapp, 22 Conn. 262	483	Henthorn v. Shepherd, 1 Blackf. 157	522
Hedrick v. Hughes, 15 Wall. 123	199	Hepburn v. Bk., 2 La. An. 1007	382
Heek v. State, 25 Wis. 421	758	Herbert, U. S. v. 5 Cranch C. C. 87	574
Heeman, R. v. 1 Dearsly C. C. 269	673	Herman, State v. 13 Ired. 502	828
Heeson, R. v. 14 Cox, 40	50	Herndon v. Givens, 16 Ala. 261	603
Helkes v. Com. 26 Penn. St. 6	109, 579, 581, 699, 784	Herne v. Rogers, 9 B. & C. 577	625
Heine v. Com., 91 Penn. St. 145	66	Herrick, People v. 13 Johns. R. 82	363, 472
Helm v. Cantrell, 59 Ill. 528	461	v. Swomley, 56 Md. 439	555
Hemenway v. Smith, 28 Vt. 701	499	Herring v. Goodson, 43 Miss. 392	828
Hemmings v. Bentley, 32 Mich. 89	493	Hersey, Com. v. 2 Allen, 173	446, 752
Hemmings v. Gasson, E., B. & E. 346	52	Herty, Com. v. 109 Mass. 348	585
Hemp, R. v. 5 C. & P. 468	60	Heseltine, R. v. 12 Cox, 404	797
Hemstead, R. v. R. & R. 344	136	Hess, State v. 5 Ohio, 5	148, 551, 552
Henderson v. Bank, 11 Ala. 855	553	Hessians, State v. 50 Iowa, 135	758
v. Broomhead, 4 H. & N. 569	453	Hessing, People v. 28 Ill. 410	707
v. Hackney, 16 Ga. 521	166, 556	Hevey, R. v. 1 Leach, 229	682
v. Hayne, 2 Metc. (Ky.) 342	487	Hevice, Resp. v. 2 Yeates, 114	393
v. Jones, 10 S. & R. 410	492	Hewett, R. v. C. & M. 534	652, 677
People v. 28 Cal. 465	757	Hewitt, People v. 2 Park. C. R. 20	555, 559, 560
R. v. C. & M. 328	580, 586	v. Prime, 21 Wend. 79	516
v. State, 70 Ala. 23	441, 445, 641, 761	Hewlett, R. v. 1 F. & F. 91	149
State v. 47 Ind. 127	471	Hewson, U. S. v. 7 Boston Law Reporter, 361	327
State v. 68 N. C. 350	417	Hey v. Com., 32 Grat. 946	446
v. State, 12 Tex. 525	68	Heydon, R. v. 1 W. Bl. 351	566
v. State, 14 Tex. 503	108, 212, 214, 329, 330, 736	Heysham v. Forster, 5 M. & R. 277	603
		Heyward, <i>In re</i> , 1 Sandf. 701	509
		Heywood v. Reed, 4 Gray, 574	491
		Hicklin, R. v. L. R. 3 Q. B. 360	725
		Hickling, R. v. 7 Q. B. 880	600
		Hickman, State v. 75 Mo. 416	699
		Hicks, People v. 53 Cal. 354	380
		State v. 27 Mo. 584	69

TABLE OF CASES.

	SECTION		SECTION
Higgins v. Carlton, 28 Md. 115	417	Hindmarsh, R. v. 2 Leach, 648	326,
v. Dewey, 107 Mass. 494	824		633
v. Heard, 14 Ga. 255	463	Hinds v. State, 55 Ala. 145	784
R. v. 3 C. & P. 603	688	v. State, 11 Tex. Ap. 238	24, 376
R. v. 14 Lond. Med. Gaz.		Hines v. State, 26 Ga. 614	385
896	789	State v. 68 Me. 202	605
State v. 13 R. I. 330	716 a	Hing, State v. 16 Nev. 307	442
Higginson, R. v. 1 C. & K. 129	338, 418	Hinkle, State v. 6 Iowa, 380	408, 413
Highberger v. Stiffer, 21 Md. 338	509	Hinley, R. v. 2 M. & R. 524	758
Highfield, R. v. cited 2 Russ. C. &		Hinman, U. S. v. 1 Bald. 292	43, 102a,
M. 859	664		114, 698
Hightower v. State, 58 Miss. 636	667,	Hirsch, State v. 45 Mo. 429	342
	835	Hirschfield v. State, 11 Tex. Ap.	
v. State, 22 Tex. 605	698	207	580
Hildeburn v. Curran, 65 Penn. St.		Hirschman v. People, 101 Ill. 568	61
63	484	Hirst, R. v. 1 Lew. C. C. 46	666, 667
Hilditch, R. v. 5 C. & P. 299	333	Hite v. State, 9 Yerg. 357	578, 580
Hildreth v. Shepard, 65 Barb. 265	434	Hitner v. State, 19 Ind. 48	750
State v. 9 Ired. 429	721	Hitt v. Rush, 22 Ala. 563	373, 377
Hill, Com. v. 11 Cush. 137	97, 281,	Hix v. Whittemore, 4 Met. 545	730
282, 297, 510, 721, 764		Hoard v. Peck, 56 Barb. 202	418
Com. v. 14 Mass. 207	366, 369,	Hoatson, R. v. 2 C. & K. 777	723
	375	Hobbs, State v. 39 Me. 212	105
v. Ice Co., 120 Mass. 345	401, 406	State v. 2 Tyler, 380	646
v. Eldridge, 126 Mass. 234	236	Hobby v. Wis. Bank, 17 Wis. 167	400
v. Mendenhall, 21 Wall. 453	594	Hobson v. Parker, 2 Blackf. 309	229
v. New River Co., 15 L. T.		Hodgdon, People v. 55 Cal. 72	285
(N. S.) 555	825	Hodges v. Bennett, 5 H. & N. 625	388
R. v. 5 Cox, 259; S. C., 2 Den.		Hodgkins, State v. 42 N. H. 475	571,
C. C. 254; 5 Eng. L. & Eq.			594
547	370, 371	Hodskins, State v. 19 Me. 155	171
R. v. 2 Mood. C. C. 30	740	Hodgson, R. v. 1 Lew. 103	33, 39, 40,
R. v. R. & R. 190	131		100
v. R. R., 55 Me. 438	505	R. v. R. & R. 211	60, 472,
v. Scott, 12 Penn. St. 168	520		486
v. State, 41 Ga. 484	276, 390	Hoffman v. Coster, 2 Whart.	
v. State, 4 Ind. 112	473, 476	453	363, 489
v. State, 5 Lea, 725	366	Hogan v. Cregan, 6 Robt. (N. Y.)	
v. State, 72 Me. 238	24	138	482
State v. 65 Mo. 84	758	v. State, 61 Ga. 43	764
State v. 69 Mo. 451	334, 721	v. State, 46 Miss. 274	273
State v. 13 R. I. 314	109	v. State, 30 Wis. 437	764
State v. 2 Speers, 150	833	Hoge v. Fisher, 1 P. C. C. R. 163	730
State v. 11 Tex. Ap. 132	632	Hogg, R. v. 6 C. & P. 176	230
Hillam, R. v. 12 Cox, 174	664	Hogsett v. Ellis, 17 Mich. 351	690
Hiller v. State, 4 Blackf. 552	1	v. State, 40 Miss. 527	429
Hilliard, Com. v. 2 Gray, 294	68, 83	Hogue, State v. 6 Jones (N. C.),	
Hillis v. Wylie, 26 Oh. St. 574	487	381	74, 82
Hills, Com. v. 10 Cush. 530	44, 167	Hoitt v. Moulton, 21 N. H. 586	486
Hiltabiddle v. State, 35 Ohio St.		Hokes, R. v. 2 Russ. by Greaves,	
52	801	1958 d	656
Hilton, State v. 3 Rich. 434	171, 172	Holbert v. State, 9 Tex. Ap. 219	486,
Hinch v. State, 25 Ga. 699	69		487
Hinckley, R. v. 12 East, 361	835	Holbrook v. Burt, 22 Pick. 546	323
Hincks, R. v. 2 C. & K. 464; 1 Den.		v. Mix, 1 E. D. Smith,	
84	363, 443	154	430
R. v. (Can. Q. B.) 10 Cent.		People v. 13 Johns. 90	116,
L. J. 127	16	116a, 118, 216	
Hind, R. v. Bell C. C. 253; 8 Cox,		Holcomb v. Holcomb, 28 Conn.	
300	278, 288	177	370, 371

TABLE OF CASES.

	SECTION		SECTION
Holden, R. v. 8 C. & P. 609	448, 452, 483	Hopkins v. Olin, 23 Wis. 309	463
Holder, Com. v. 9 Gray, 7	111	R. v. 8 C. & P. 591	326
Holland v. State, 12 Fla. 117	764	State v. 50 Vt. 316	65, 446, 458, 552, 554, 557
v. State, 83 N. C. 624	441	Hopper v. Ashley, 15 Ala. 463	426, 553
Hollenbeck v. Rowley, 8 Allen, 473	544	v. Com., 6 Grat. 684	445
Holler v. Färth, Penning. 531	363	v. Hopper, 19 Ill. 219	570
v. State, 37 Ind. 57	76, 757	v. State, 19 Ark. 143	331
Hollond, R. v. 5 T. R. 607	103	Hoppias, State v. 5 Ired. L. 406	495
Holloway v. Com., 11 Bush, 344	1, 363	Hopps v. People, 31 Ill. 385	60, 339
Com. v. 44 Penn. St. 210	365	Hopson, People v. 1 Denio, 574	46
Holly v. State, 55 Miss. 424	757a	Hopt v. People, Sup. Ct. U. S. 1884	225, 360a, 658, 806
Holman v. Austin, 34 Tex. 668	450	Horan, State v. Phill. (N. C.) 571	121
Holme, State v. 54 Mo. 153	330, 721	Horbach v. State, 43 Tex. 254	69, 80
Holmes v. Baddeley, 1 Phill. 476	499	Horn, State v. 43 Vt. 20	169, 171, 173a, 530
Com. v. 127 Mass. 424	441	Hornbeck v. State, 35 Oh. St. 277	273
v. Holmes, 1 Abb. U. S. 528	169, 170	Horne v. State, 9 Kans. 119	430, 433
R. v. 2 F. & F. 788	366	Horneman, State v. 16 Kans. 452	579, 587
R. v. L. R. 1 C. C. 334	485	Horne Tooke, R. v. 25 How. St. 120	682
State v. 69 Ind. 577	594	Horning, State v. 49 Iowa, 158	67
State v. 88 Ind. 145	366	Horton, Com. v. 2 Gray, 354	35
State v. 11 Tex. Ap. 223	80	Com. v. 9 Pick. 206	577
U. S. v. 1 Cliff. 98	482, 492	v. Green, 64 N. C. 64	412
Holt, Com. v. 121 Mass. 61	169, 170, 171, 172, 647	People v. 4 Mich. 67	402
R. v. Bell C. C. 280 ; 9 W. R. 74	46, 53	v. State, 66 Ga. 690	698
R. v. 7 C. & P. 518	736	Hoskins v. State, 11 Ga. 92	40, 134, 736
R. v. 5 T. R. 443	540	Hotchkiss v. Ins. Co., 5 Hun (N. Y.),	91, 492
v. State, 38 Ga. 187	580	v. Lothrop, 1 Johns. 286	52
Holtham, R. v. 2 Russ. by Greaves, 958	656	Hough v. Cook, 69 Ill. 581	24
Home v. Bentinck, 2 B. & B. 130	513	R. v. R. & R. 120	33, 39
Homer, State v. 40 Me. 438	640, 641	Houghtaling v. Kelderhouse, 1 Parker C. C. 241	365
v. Wallis, 11 Mass. 309	557	Houghton v. Gilbert, 7 C. & P. 701	537
Honeycutt v. State, 8 Baxt. 37	661, 669	v. People, 23 Alb. L. J. 442	401
Honeyman, Penn. v. Addis. 148	764	Houlton, R. v. 1 Jebb C. C. 24	392
People v. 3 Denio, 121	109	House v. Fort, 4 Blackf. 293	408
Honig, State v. 9 Mo. App. 298	144	Houser v. Com., 51 Penn. St. 332	472
Hood, R. v. 1 Mood. C. C. 281	391	State v. Busbee, 410	96
Hook v. Botelar, 4 Har. & McHen. 349	699	v. State, 58 Ga. 78	10
R. v. 8 Cox, 5	387	State v. 26 Mo. 431	227, 229
Hooker v. State, 4 Ohio, 350	124	State v. 28 Mo. 178	229
State v. 17 Vt. 658	227	Houston, R. v. 3 Craw. & Dix, 310	579
Hooper, R. v. 1 F. & F. 85	760	State v. 1 Bail 300	40
R. v. Ros. Cr. Ev. 59	667	Hovey v. Chase, 52 Me. 304	418
State v. 2 Bailey, 37	549	v. Grant, 52 N. H. 569	24, 53
Hoover v. State, 56 Md. 554	105	People v. 92 N. Y. 555, S. C., 1 N. Y. Cr. Rep. 180,	283
Hope v. Com., 9 Met. 134	127	472, 473, 741, 749	
Com. v. 22 Pick. 1	130	How, Com. v. 9 Gray, 110	676
v. People, 83 N. Y. 418	32	People v. 2 Wheel. C. C. 412	27, 798
v. State, 62 Cal. 291	314, 750, 799	Howard v. Ins. Co. 4 Denio, 502	482
Hopes, R. v. 7 C. & P. 136 ; 1 M. & Rob. 396, n., S. C.	666	v. Patrick, 46 Mich. 121	555
Hopkins, Com. v. 2 Dana, 418	32, 64, 260, 261	R. v. 1 M. & R. 187	164, 833
v. Com., 50 Penn. St. 9	756		

TABLE OF CASES.

	SECTION		SECTION
Howard v. Sexton, 4 N. Y.	157 52	Hudson v. State, 9 Yerg.	408 678
v. State, 50 Ind.	190 333	Huet v. Le Mesurier, 1 Cox Ch. R.	275 530
State v. 9 N. H.	485 487, 490	Huff v. Bennett, 6 N. Y.	337 231
State v. 17 N. H.	171 677	State v. 11 Nev.	17 430, 432, 474
State v. 82 N. C.	623 24, 628	Huffman v. Com., 6 Randolph,	685 96, 114
State v. 8 Tex. Ap.	53 753	Penn. v. Addis.	140 574
State v. 32 Vt.	380 441	Huggins v. Ward, 21 W. R.	914 341
U. S. v. 3 Sumner, 12	94, 101, 138, 140, 142, 146	Hughes v. Christy, 26 Tex.	230 153
Howden, State v. 46 Iowa,	629 333	v. Garnons, 6 Beav.	352 500
Howe, Com. v. 2 Allen,	153 657	R. v. 14 Cox C. C.	223 758
Com. v. 13 Gray,	26 470	R. v. 39 L. T. (N. S.)	292 758
Com. v. 132 Mass.	250 121	v. R. R., 36 N. Y. Sup. Ct.	222 833
v. Howe, 99 Mass.	88 272, 757 b	v. Rogers, 8 M. & W.	123 555
Howell v. Com., 5 Grat.	664 463, 472, 494	v. State, 8 Humph.	75 758
v. Ins. Co., 6 Biss.	436 312	v. State, 58 Miss.	355 441
People v. 4 Johns.	296 116 a, 445	v. State, 71 Mo.	633 482
v. Ruggles, 5 N. Y. Y.	444 525	State v. 1 Swan,	261 99
v. State, 5 Ga.	48 757	v. Wilkinson, 35 Ala.	453 483
Howes, R. v. 6 C. & P.	404 677	Hughey v. State, 47 Ala.	97 757
Howland v. Conway, 1 Abb. Adm.	281 483	Huidekoper v. Cotton, 3 Watts,	56 510
Howly v. Whipple, 48 N. H.	487 162, 837, 842	Hulbut, People v. 4 Denio,	133 510
Howser v. Com., 51 Penn. St.	332 154, 359, 365, 447, 474, 489, 511, 762	Hulcott, R. v. 6 T. R.	583 830
Howze v. State, 59 Miss.	230 429	Hull v. State, 7 Tex. Ap.	593 171, 810, 811
Hoxey, Com. v. 16 Mass.	385 147	Hulme, R. v. L. R. 5 Q. B.	377 471
Hoy v. Couch, 6 Miss.	188 617	Hulverson v. Hutchinson, 39 Iowa,	316 595
r. Morris, 13 Gray,	519 502	Humphrey v. People, 18 Hun,	393 643
Hoy Yen, People v. 34 Cal.	176 678	People v. 7 Johns.	314 172
Hoye v. State, 39 Ga.	718 757	Humphreys v. Parker, 52 Me.	502 462
Hoyle v. State, 14 Tex. Ap.	239 440, 442	Humphries, R. v. 2 Russ. on Cr.	745 216
Hoyt v. Adee, 3 Lansing,	173 372	Hundley, State v. 46 Mo.	414 338
State v. 46 Conn.	330 54, 337, 538, 756, 784	Hunscom v. Hunscom, 15 Mass.	184 361
State v. 47 Conn.	518 398, 756	Hunt v. Com., 13 Grat. (Va.)	757 758
State v. 13 Minn.	132 483, 764	Com. v. 4 Pick.	252 101, 129, 138
Hubbard, R. v. 14 Cox C. C.	565 281, 284	Ex parte, 5 Eng. (Ark.)	284 365
Hubby v. State, 8 Tex. Ap.	597 784	v. Lowell, 8 Allen,	169 419
Hube, R. v. Peake,	132 153, 154	v. McCalla, 20 Iowa,	20 473
Huber v. State, 57 Ind.	341 435 a	R. v. 3 B. & Ald.	566 49, 167, 266, 698, 699
Hubley v. Vanhorne, 7 S. & R.	185 559, 560	R. v. 2 Camp.	583 129, 134
Huchberger v. Ins. Co., 5 Bissell,	106 323	v. State, 10 Ind.	69 445
Hucks, R. v. 1 Stark.	522 297	v. State, 7 Tex. Ap.	212 9
Huddleston, 11 Tex. Ap.	22 114	v. State, 9 Tex. Ap.	166 405, 411, 418, 774
Hudgins v. State, 2 Ga.	173 456	Hunter v. Capron, 5 Beav.	93 500
Hudson v. Com., 2 Duv.	531 699	v. Com., 7 Grat.	641 699
v. Poindexter, 42 Miss.	304 812	v. Com., 79 Penn. St.	503 148, 428
v. Rae, 4 B. & S.	585 725	R. v. 4 C. & P.	128 118, 212, 214, 216
v. State, 3 Cold.	355 280, 288	v. R., 10 Cox,	642 223
State v. 50 Iowa,	157 439, 458, 702, 750	v. State, 40 N. J. L.	495 262, 263, 784
v. State, 6 Tex. Ap.	565 69, 80	v. State, 8 Tex. App.	75 98
		v. State, 13 Tex. App.	16 225

TABLE OF CASES.

	SECTION		SECTION
Huntington v. Charlotte, 15 Vt. 46	594	Ingram v. Plasket, 3 Blackf. 450	311,
Huntley v. Donovan, 15 Q. B. 96	526		312
Huntly v. Comstock, 2 Root, 99	534	v. State, 67 Ala. 67	61, 300
State v. 3 Ired. 418	263	State v. 16 Kans. 14	649
Huntsman v. Nichols, 116 Mass. 521	24	Inman v. Jenkins, 3 Ohio, 271	154
Hurd v. Moring, 1 C. & P. 372	503	Innes, State v. 53 Me. 536	581
v. People, 25 Mich. 405	77, 276,	Innis v. Campbell, 1 Rawle, 373	809
298, 448, 764		v. Senator, The, 4 Cal. 5	460
Hurley, People v. 60 Cal. 74	758, 761	Ins. Co. v. Moseley, 8 Wall. 397	262,
R. v. 2 M. & Rob. 473	160,		264
	205, 550	v. Weide, 9 Wall. 677	203,
State v. 1 Houst. C. C. 28	337		206
Hurt v. State, 25 Miss. 378	584	Intoxicating Liquors, State v. 73	
Hussey, State v. 1 Busbee, 123	393	Me. 278	308
Huston, R. v. 1 Leach, 408	375	Iron Mountain Bank v. Murdock,	
v. Schindler, 46 Ind. 38	557,	62 Mo. 70	29
	560	Irvin v. State, 1 Tex. Ap. 301	441
Hutchins v. Densiloe, 1 Const. R.		Irwin, State v. 1 Hay. 113	667, 764
181	389	Isaacs v. State, 25 Tex. 174	764
v. Kimmell, 31 Mich. 133	169	Iselin v. Peck, 2 Robt. (N. Y.) 629	460
Hutchinson, Com. v. 10 Mass. 225		Isham, State v. 6 How. (Miss.) 35	517
	366, 367, 368	Isler v. Dewey, 71 N. C. 14	491
R. v. 2 B. & C. 608, n.	288	v. Dewey, 75 N. C. 466	378
Hutchison v. Com., 82 Penn. St.		Ives v. Hamlin, 5 Cush. 534	462
472	144	Ivey v. State, 12 Ala. 276	113
Hutson, State v. 15 Mo. 512	96	v. State, 23 Ga. 576	380
Hutto v. State, 7 Tex. Ap. 44	1		
Hyam v. Edwards, 1 Dall. 2.	535	J.	
Hyatt v. Adams, 1½ Mich. 180	271	Jack v. Kiernan, 2 Jebb & Sy. 231	184
Hyde v. Palmer, 3 B. & S. 657	264	v. Martin, 12 Wend. 316	640
Hyde Park v. Canton, 130 Mass.		Jackalow, U. S. v. 1 Black U. S.	
505	171, 510	484	537
Hyer, State v. 39 N. J. L. 598	440, 441	Jackson v. Brooks, 8 Wend. 426	548
Hymer, State v. 15 Nev. 49	756	Com. v. 11 Bush, 679	169,
Hynes v. McDermott, 82 N. Y. 41		171, 172, 686, 810	
550, 556, 557, 559		v. Com., 19 Grat. 656	285
		v. Com., 132 Mass. 16	34
I.		Com. v. 2 Va. Cas. 501	595,
I. F., Com. v. 12 Weekly Notes,			638
108	390	v. Etz, 5 Cow. 314	492
Ihinger v. State, 53 Ind. 251	312	v. French, 3 Wend. 337	497
Iles, R. v. B. N. P. 243	570	v. Gridley, 18 Johns. 98	362,
Ill. Cent. R. R. v. Sutton, 42 Ill.			366
438	272	v. Humphrey, 1 Johns.	
Ill. Land Co. v. Bonner, 75 Ill. 315	170	498	469, 509
Imlay v. Rogers, 2 Halst. 347	510	v. Jackson, 40 Ga. 157	401
Ince's Case, 24 L. T. (N. S.) 421	506	v. Lewis, 13 Johns. 504	486
Inder, R. v. 2 C. & K. 635	114	v. McVey, 18 Johns. 330	380
Indianapolis v. Huffer, 30 Ind. 235	460	v. Murray, Anthon, 105	560
R. R. v. Anthony, 43		People v. 8 Barb. 637	116 a,
Ind. 183	486		121
Ingalls v. State, 48 Wis. 647	432,	People v. 3 Denio, 101	141
441, 757, 758, 759		v. People, 2 Seam. 231	169,
Ingle v. State, 1 Tex. Ap. 301	679		171, 630
Ingledew v. R. R., 7 Gray, 86	419	v. Phillips, 9 Cow. 94	555
Inglis v. R. R., 1 Macqueen, S. C.		v. Rose, 2 Va. Cas. 34	363
112	163	v. State, 52 Ala. 305	296
Ingraham, Com. v. 7 Gray, 46	491,	v. State, 69 Ala. 251	661
698, 699, 700			

TABLE OF CASES.

	SECTION		SECTION
Jackson v. State, 6 Bax. 452	756	Jeffs, Com. v. 132 Mass. 5	261 a
v. State, 56 Ga. 235	297	Jellyman, R. v. 8 C. & P. 604	439, 441
v. State, 14 Ind. 327	588	Jenkins v. Blizard, 1 Stark. R.	
State v. 12 La. An. 679	68	419	543
State v. 29 La. An. 354	698	Com. v. 10 Gray, 485	492
State v. 33 La. An. 1087		R. v. 11 Cox, 250	285
	63, 81	R. v. L. R., 1 C. C. 187	278,
v. State, 56 Miss. 311	656, 664		288, 297
State v. 17 Mo. 544	65, 68,	R. v. R. & R. 492	673, 678
	690, 757	v. State, 41 Miss. 582	632
State v. 9 Oregon, 457	366	State v. 14 Rich. 215	102
v. State, 9 Tex. Ap. 114	1	State v. 2 Tyler, 379	646
v. Van Deusen, 5 Johns.		Jenkinson v. State, 5 Blackf. 465	496
144	551	Jenks, Com. v. 1 Gray, 490	573
v. Wood, 3 Wend. 27	593	Jenne v. Joslyn, 41 Vt. 178	698
Jacksonville R. R. v. Caldwell, 21		Jennes, People v. 5 Mich. 305	35, 51,
Ill. 75	373, 377		103, 361, 441
Jacob v. U. S., 1 Brook. 520	164	Jennett, State v. 88 N. C. 665	758,
Jacobs v. Com., 5 S. & R. 315	103		759
v. Davis, 34 Md. 204	313	Jennings, Com. v. 121 Mass. 47	96
v. Heeler, 113 Mass. 160	398	R. v. D. & B. 447	138
v. Layburn, 11 M. & W. 685	447	R. v. R. & R. 388	587
R. v. 1 Leach C. C. 310	667	Jernigan v. State, 10 Tex. Ap.	
v. Shorey, 48 N. H. 100	698	546	442
v. State, 61 Ala. 448	114	Jerome, State v. 33 Conn. 265	61, 797
v. State, 5 Jones, 259	315, 414	Jerry v. Townshend, 9 Md. 145	418
v. Whitcomb, 10 Cush. 255	690	Jesse, State v. 3 Dev. & Bat. 98	586
Jagger, R. v. 1 East P. C. 455	393	v. State, 20 Ga. 156	494
Jailer, Com. v. 1 Grant, 218	393	Jewett v. Banning, 23 Barb. 13	679
James, Com. v. 99 Mass. 438	225, 264	v. Banning, 21 N. Y. 27	683
Com. v. 1 Pick. 375	121, 152	v. Draper, 6 Allen, 434	559
People v. 2 Caines, 57	365	Jillard v. Com., 26 Penn. St. 169	138
R. v. 1 T. & M. 300; 2 Den.		Jim v. State, 5 Humph. 145	756
C. C. 1	836	Jim Ti, People v. 32 Cal. 60	677
v. Smith, 2 S. C. 183	594	Joannes v. Bennett, 5 Allen, 169	748
State v. 45 Iowa, 412	750	Joe v. State, 38 Ala. 422	646
v. State, 45 Miss. 572	1	John's Case, 1 East P. C. 357; 1	
v. State, 58 N. H. 67	258	Phil. Evid. 75 n.	393
v. Wade, 21 La. An. 548	837	Johns, Com. v. 6 Gray, 274	131
Jane v. Com., 2 Metc. (Ky.) 30	678	Johnson v. Ballew, 2 Porter, 29	457
Janes v. Buzzard, 1 Hempst. 240	601	Com. v. 10 Allen, 196	171
Jarrell v. State, 58 Ind. 293	1	Com. v. 2 Grat. 581	363
Jarrott, State v. 1 Ired. 76	736	Com. v. 21 Grat. 811	633
Jarvis, R. v. 33 Eng. Law & Eq.		Com. v. 29 Grat. 796	325, 329
567; Dears. C. C. 551;		Com. v. 2 Wheel. C. C. 361	
7 Cox, 53	33, 748, 749		647
R. v. L. R., 1 C. C. 96	652, 658	v. Daverne, 19 Johns. 134	
Jay v. Livermore, 56 Me. 107	603, 605		503, 552
Jaynes, State v. 78 N. C. 504	334	v. Filkington, 39 Wis. 62	24
Jeff v. State, 39 Miss. 593	764	v. Johnson, 14 Wend. 637	516
Jefferts v. People, 5 Parker C. R.		v. Kershaw, 1 De G. & Sm.	
522	676	264	166
Jefferson R. R. v. Riley, 39 Ind. 368	489	v. People, 3 Hill (N. Y.),	
State v. 77 Mo. 136	227,	178	486
	278, 368, 664	R. v. 2 C. & K. 354	271, 272,
Jeffries, Com. v. 7 Allen, 548	53, 162,		296, 757 b
177, 506, 558, 645, 837		R. v. 6 East, 583	639
v. State, 40 Ala. 381	579	R. v. 7 East, 65	112, 199, 839
v. State, 9 Tex. Ap. 598	263,	R. v. (Gloucester Spr. Ass.	
	679	1829)	667

TABLE OF CASES.

	SECTION		SECTION
Johnson v. State, 17 Ala. 618	31, 51,	Jones, People v. 5 Lansing, 340	116, 146
	271, 278, 294, 460	People v. 24 Mich. 216	426, 436
v. State, 35 Ala. 363	457,	v. People, 6 Parker C. R. 126	
	552, 560		763
v. State, 37 Ala. 457	460	R. v. 2 Camp. 133	441
v. State, 47 Ala. 9	297, 391	R. v. 3 Camp. 230	441, 825
v. State, 50 Ala. 456	288	R. v. Carrington Suppl. 13	667
v. State, 59 Ala. 37	632	R. v. 1 Cox, 105	122, 123
v. State, 29 Ark. 31	584	R. v. 4 Cox, 198; 1 Den. C.	
v. State, 40 Conn. 139	339	C. 551; 1 Eng. L. & Eq.	
v. State, 14 Ga. 55	144, 382	R. 533; 19 L. J. (M. C.),	
v. State, 44 Ga. 253	586	162	113, 682
v. State, 48 Ga. 116	163, 474,		
	489	R. v. 11 Cox, 358	810
v. State, 61 Ga. 35	61, 338,	R. v. 12 Cox, 241	651, 658
	366, 397, 473, 650	R. v. C. & M. 611	390, 397
v. State, 63 Ga. 395	796	R. v. 2 C. & P. 629	688, 694
v. State, 65 Ga. 94	262, 263,	R. v. 4 C. & P. 217	589
	296, 441	R. v. 1 Den. C. C. 166	502, 504
v. State, 2 Ind. 652	446	R. v. Dougl. 300; 1 Leach,	
v. State, 21 Ind. 329	491	79	116 a
v. State, 65 Ind. 269	164, 441	R. v. 11 Q. B. D. 118; 48 L.	
State v. 19 Iowa, 230	20	T. (N. S.) 768	172
State v. 3 Jones (N. C.),		v. Randall, 1 Cowp. 17	524
266	764	v. R. R., 107 Mass. 261	825
State v. 30 La. An. 921	24, 225	v. R. R., 67 N. C. 125	824
State v. 12 Minn. 476	390, 397	R. v. R. & R. 152	650, 651, 655,
State v. 59 Miss. 543	571		673, 678
State v. 76 Mo. 121	297, 749	v. Ricketts, 7 Md. 108	734
State v. 12 Nev. 121	227, 429	v. Simpson, 59 Me. 180	401
State v. 16 Nev. 36	429	State v. 3 Dev. & Bat. 122	691
State v. 67 N. C. 55	95, 96, 315	State v. 18 Fla. 889	830
v. State, 17 Ohio, 593	273	State v. 7 Ga. 422	595
State v. 3 Rh. I. 94	581	v. State, 48 Ga. 163	383
v. State, 1 Tex. Ap. 333	227	v. State, 55 Ga. 625	573
State v. 1 Vroom, 185	144,	v. State, 63 Ga. 395	796
	148, 584	v. State, 65 Ga. 506	92, 95, 538
State v. Winston (N. C.),		State v. 4 Halst. 357	107
152	63	v. State, 60 Ind. 241	555, 557,
v. Trinity Church, 11			565
Allen, 123	680	v. State, 64 Ind. 473	698, 748,
v. U. S. 3 McLean, 89	103		756
v. U. S. 12 Rep. 135	161	v. State, 71 Ind. 66	276, 279,
Johnston, R. v. 15 Irish C. L. R.		286, 296, 297, 300, 405	
60	662	v. State, 48 Md. 391	172
State v. 6 Jones (N. C.),		State v. 51 Me. 126	445
485	146	v. State, 26 Miss. 247	758
Joliffe, R. v. 4 T. R. 290	227	v. State, 30 Miss. 653	758
Jolley v. Taylor, 1 Camp. 143	163	v. State, 58 Miss. 349	662, 667
Jolly, State v. 3 Dev. & B. 110	399	State v. 1 M'Mul. 236	95, 108
Jones v. Brown, 1 Bing. N. C. 484	640	State v. 54 Mo. 478	677
v. Com., 2 Duv. 554	698, 699	State v. 61 Mo. 232	273
v. Finch, 37 Miss. 461	559, 560	State v. 64 Mo. 391	441, 494
v. Goodrich, 5 Moo. P. C. 16	503	State v. 50 N. H. 370	339
v. Harris, 1 Strobn. 160	361, 365	State v. 13 Tex. Ap. 1	331, 338,
v. Jones, 45 Md. 159; 48 Md.			341, 345
391	171, 827	State v. 20 W. Va. 764	334
People v. 31 Cal. 565	65, 632	v. Tarleton, 9 M. & W. 675	168,
People v. 53 Cal. 58	144		545
v. People, 12 Ill. 259	758	U. S. v. 2 Wheel. C. C. 451	365,
			489

TABLE OF CASES.

	SECTION		SECTION
Jones, U. S. v. 13 Fed. Rep. 165	556	Kehoe v. Com., 85 Penn. St. 127	276,
v. Ward, 3 Jones (N. C.), 24			281, 445, 698
	227, 231	Keith, Com. v. 8 Met. 531	363, 578, 579
Jones's Succession, 12 La. An. 397	534	v. Lothrop, 10 Cush. 453	419,
Jorasoo v. State, 6 Tex. Ap. 283	97		551, 557
v. State, 8 Tex. Ap. 540	758	People v. 50 Cal. 137	493
Jordan v. Elliott, 12 W. N. 56	73	v. State, 27 Ga. 483	679
v. Pollock, 14 Ga. 145	521	v. Wilson, 6 Mo. 434	446
R. v. 9 C. & P. 118	801	Keithler v. State, 10 Sm. & M. 192	441,
v. State, 22 Ga. 545	584		602, 632
v. State, 32 Miss. 382	678	Keller v. R. R., 2 Abb. (N. Y.) App.	
Josephine v. State, 39 Miss. 613	664		480
Josephs, People v. 7 Cal. 129	60		405
Josey, State v. 64 N. C. 56	341	v. Stuck, 4 Redf. (N. Y.),	
Josslyn v. Com., 6 Met. 236	585		294
People v. 39 Cal. 393	440	Kellerman, State v. 14 Kans. 135	441
Joy v. Hopkins, 5 Denio, 84	460	Kelley, Com. v. 10 Cush. 69	103, 716 a
v. State, 14 Ind. 139	483	v. People, 55 N. Y. 565	679
Joyce v. Ins. Co., 45 Me. 168	455	People v. 24 N. Y. 74	450, 466,
R. v. L. & C. 576; 10 Cox,			471
100	116 a	v. Proctor, 41 N. H. 139	390
J. P., State v. 1 Tyler, 283	105	State v. 9 Mo. Ap. 512	758
Judd v. Brentwood, 46 N. H. 430	690	State v. 73 Mo. 608	758
v. Fargo, 107 Mass. 266	825	State v. 57 N. H. 549	370
Judge v. Cox, 1 Stark. R. 285	825	Kellogg, Com. v. 7 Cush. 473	91
Julke v. Adam, 1 Redf. (N. Y.) 454	373	v. French, 15 Gray, 354	543
Jumpertz v. People, 21 Ill. 375	314,	Kelly v. Cunningham, 1 Allen, 473	429
	555	v. Drew, 12 Allen, 107	400, 810
Jupitz v. People, 34 Ill. 516	66	v. Jackson, 6 Peters, 622	344
Justice v. Lang, 52 N. Y. 323	707	v. Killion, 9 Iowa, 329	605
		People v. 28 Cal. 423	758
		People v. 47 Cal. 125	664, 669
		v. State, 52 Ala. 361	295
		Kelsey v. Ins. Co., 35 Conn. 225	476
		R. v. 2 Lew. 45	442
		Kelsoe, State v. 76 Mo. 505	429, 802
		Kemp, State v. 87 N. C. 538	35, 54
		Kempsey v. McGinniss, 21 Mich.	
		123	418
		Kendall v. Field, 14 Mo. 30	519
		v. Grey, 2 Hilt. (N. Y.) 300	516
		v. May, 10 Allen, 59	370, 372
		v. State, 65 Ala. 492	688, 689
		Kendrick v. Kendrick, 4 J. J.	
		Marsh. 241	608
		v. Com., 8 Va. Law. J.	
		299	471, 473
		v. State, 10 Humph. 479	227,
			228
		Kendricks v. State, 55 Miss. 436	757
		Kennard v. Burton, 25 Me. 39	270
		Kennedy v. Com., 14 Bush, 341	482,
			752
		Com. v. 97 Mass. 224	581
		Com. v. 108 Mass. 292	342
		v. Doyle, 10 Allen, 165	531
		v. Gifford, 19 Wend. 296	52
		r. Hilliard, 10 Ir. L. R.	
		(N. S.) 195	453
		v. Lyell, 48 L. T. (N. S.)	
		455	505

K.

K., State v. 4 N. H. 562	463, 470
Kabrich, State v. 39 Iowa, 277	62
Kahlmeyer, Com. v. 124 Mass. 322	799
Kain, State v. 20 W. Va. 679	698, 699
Kane v. Johnston, 9 Bosw. 154	342
Kauffman v. People, 11 Hun, 82	60
Kay v. Fredrigal, 3 Barr, 221	483
R. v. L. R. 1 C. C. 257	621
Kean v. McLaughlin, 28 S. & R. 469	52
State v. 10 N. H. 347	173
Kearney v. Farrell, 28 Conn. 317	459,
	460
Kearns, Com. v. 1 Va. Cas. 109	96, 114
Keaton v. McGwier, 24 Ga. 217	402
Keator v. Dimmick, 46 Barb. 158	398
v. People, 32 Mich. 481	487
Kee v. State, 28 Ark. 155	60
Keefe v. People, 49 N. Y. 348	144
Keeler, State v. 28 Iowa, 553	137, 324
Keen, U. S. v. 1 McLean, 429	94, 114,
	116, 552, 560, 574
Keenan v. Hayden, 39 Wis. 558	54
Keene, State v. 26 Me. 33	354
State v. 50 Mo. 357	69, 80, 757
Keener, State v. 18 Ga. 194	757
Keggon, State v. 55 N. H. 19	341, 342

TABLE OF CASES.

	SECTION		SECTION
Kennedy, People v. 32 N. Y.	141	King v. State, 40 Ala.	314
	324, 329	v. State, 17 Fla.	183
v. People, 39 N. Y.	245	State v. 31 La. An.	179
	405, 412, 779	State v. 64 Mo.	591
State v. 7 Blackf.	233	v. State, 86 N. C.	603
	144, 148		225, 229, 725, 740
v. State, 62 Ind.	136	v. State, 9 Tex. Ap.	515
State v. 20 Iowa,	569	v. State, 13 Tex. Ap.	277
U. S. v. 3 McLean,	175	Kingen v. State, 45 Ind.	518
Kenney, Com. v. 120 Mass.	387		20, 330, 736, 764
Com. v. 12 Met.	235	Kinglake, R. v. 11 Cox,	499
	679, 680, 681	Kingsbury, Com. v. 5 Mass.	106
v. State, 5 Rh. I.	385	State v. 58 Me.	239
Kennon, Com. v. 130 Mass.	39		27, 484, 492, 776
v. State, 11 Tex. Ap.	356	Kingsley, People v. 2 Cow.	522
Kensington v. Rowe,	16		118, 199, 216
Me. 38	312	Kingston, Duchess of, R. v. 2 How.	
Kent, Com. v. 6 Met.	221	St. Tr. 544	516, 570, 595
Keough, State v. 13 La. An.	243	v. Lesley, 10 S. & R.	383
	580, 586	R. v. 4 C. & P.	387
Kepper, Com. v. 114 Mass.	278	v. Tappan, 1 Johns. Ch.	
Kern, People v. 61 Cal.	244		368
Kernin v. Hill, 37 Ill.	209	Kinley, State v. 43 Iowa,	294
Kerns v. Swope, 2 Watts,	75		60, 483
Kerr, R. v. 8 C. & P.	176	Kinloch, R. v. 18 How. St. Tr.	402
v. Shedden, 4 C. & P.	531, n. a.		374
	526	Kinne v. Kinne, 9 Conn.	102
Kerrains v. People, 60 N. Y.	221	Kinner v. State, 45 Ind.	175
People v. 1 Thomp. & C.		Kinney, Com. v. 2 Va. Cas.	139
	332, 333	Kinsman v. State, 77 Ind.	132
Kerrigan, R. v. 9 Cox,	441		116 a
Ketchey, R. v. 70 N. C.	621	Kirby, Com. v. 2 Cush.	577
Keyes, State v. 8 Vt.	57	People v. 2 Parker C. R.	28
Kidwell v. State, 63 Ind.	384		764
Kilbourne v. Jennings,	38	State v. 1 Strobh.	155
Iowa, 533	414	v. State, 7 Yerger,	259
Kilburn v. Mullen, 22 Iowa,	498		698, 699
Kilgore, State v. 70 Mo.	548	Kirk v. State, 65 Ga.	159
State v. 75 Mo.	587		172
Kilpatrick v. Com., 31 Penn. St.		Kirkwood, R. v. Lew. C. C.	103
	198		40
Kilrow v. Com., 89 Penn. St.	299	Kirschner v. State, 9 Wis.	140
	31, 44		363, 469
Kimball, Com. v. 7 Gray,	328	Kiser v. State, 13 Tex. Ap.	201
Com. v. 24 Pick.	366		748
	329, 330, 463	Kistler v. State, 54 Ind.	400
Kimbrough, State v. 2 Dev.	431		60, 66
Kimmel v. Kimmel, 3 S. & R.	336	Kitson, R. v. P. & D.	187; 6 Cox,
Kincaid v. State, 8 Tex. Ap.	465		159
Kinchelow v. State, 5 Humph.	9	R. v. 1 Dears. C. C.	187;
	30, 442	S. C., 22 L. J. M. C.	118
King v. Castlemain, 7 How. St. Tr.			150, 152
	1109, 1110	Kittle, State v. 2 Tyler,	471
Com. v. 9 Cush.	284		579
Com. v. 8 Gray,	501	Kittredge v. Elliott, 16 N. H.	77
v. Donahue, 110 Mass.	155		54, 825
	558, 803	Kline, State v. 54 Iowa,	183
v. Fitch, 2 Abb. (N. Y.) App.			24, 46
	508	Klinger, State v. 46 Mo.	224
v. King, 2 Roberts,	153		405, 417, 418, 455
v. Rookwood, 13 How. St. Tr.		Klingler, State v. 43 Mo.	127
185; 1 Stark. Ev. 99	489		338
	794	Knapp v. Abell, 10 Allen,	485
			603
		Com. v. 9 Pick.	496
			489, 644, 646, 659, 670, 678
		Com. v. 10 Pick.	477
			330, 443, 470, 602, 656
		People v. 1 Edm. (N. Y.)	
		Sel. Cas. 177	298, 302
		People v. 26 Mich.	112
			276, 298, 304, 585
		People v. 42 Mich.	467
			484
		State v. 45 N. H.	148
			49, 273, 312, 460, 748, 797

TABLE OF CASES.

	SECTION		SECTION
Knapp v. White, 23 Conn. 529	734	Lake v. Milliken, 62 Me. 240	825
Kneeland, Com. v. 20 Pick. 206	131	People v. 12 N. Y. 358	418
Knickerbocker v. People, 57 Barb. 365	763	v. People, 1 Parker C. R. 495	731
v. People, 43 N. Y. 177	758	Laliyer, State v. 4 Minn. 368	637, 721
People v. 1 Parker C. R. 302	282	Lamb, People v. 2 Keyes, 360	71
Knight, Com. v. 12 Mass. 274	354	State v. 28 Mo. 218	326
v. House, 29 Md. 194	679	Lambe's Case, 2 Leach, 625	631
R. v. L. & C. 378	588, 758	Lambe v. Orton, 29 L. J. Ch. 286	811
v. State, 70 Ind. 375	62	R. v. 2 Leach, 552	666
State v. 43 Me. 11	334, 412, 413, 423, 545, 777	Lambert, Com. v. 12 Allen, 177	261
Knison, Com. v. 9 Mass. 312	152	v. People, 6 Abb. New Cas. 181; 76 N. Y. 220	695, 697, 833, 835
Knode v. Williamson, 17 Wall. 586	58, 487	Lambeth v. State, 23 Miss. 322	297
Knoll v. State, 55 Wis. 249	457, 538, 777 a, 779	La Merchant, Atty-Gen. v. 2 T. R. 201	212
Knott v. Sargent, 125 Mass. 95	154, 612	Lanahan v. Com., 84 Penn. St. 80	764
Knowles, State v. 48 Iowa, 598	632	Lancaster v. Ins. Co., 62 Mo. 121	809
Koons v. State, 36 Ohio St. 195	408, 556, 560, 563	v. State, 9 Tex. Ap. 393	116 a
Kopke v. People, 43 Mich. 41	533, 827	Lancaster Bk. v. Moore, 78 Penn. St. 407	225, 731
Kowing v. Manly, 49 N. Y. 193,	203; S. C., 57 Barb. 479	Landell v. Hotchkiss, 1 Thomp. & C. 80	33
Kram, People v. 56 Cal. 405	1	Lander v. People, 104 Ill. 248	225, 262, 263, 264
Kramer v. Com., 87 Penn. St. 299	36, 38	Lane v. Ironmonger, 13 M. & W. 368	733
Krebs v. State, 8 Tex. Ap. 1	294, 295	People v. 49 Mich. 340	632
Kreiter v. Bomberger, 2 Weekly Notes, 685	433	Lanergan v. People, 39 N. Y. 39	676, 680
Kreps, State v. 8 Ala. 951	573	Lang, State v. 63 Me. 220	570, 577
Krewson, State v. 57 Iowa, 588	333	Langdale, People v. 100 Ill. 263	114
Krieger, State v. 68 Mo. 98	126	Lange, State v. 59 Mo. 418	758
Kriel v. Com., 5 Bush, 362	339, 764	Langford, State v. Busbee, 436	51, 459, 785
Kring, State v. 74 Mo. 612	227, 230, 631, 632	Langhorne v. Com., 76 Va. 1012	477, 484, 487, 489
Krise v. Neason, 66 Penn. St. 258	215	Langley, State v. 34 N. H. 529	146
Krum, People v. 56 Cal. 405	1	Langlin v. State, 18 Ohio, 99	446
Kuhlman v. Medlinka, 29 Tex. 385	449	Langmead, R. v. 9 Cox, 467	763
Kuntzman v. Weaver, 20 Penn. St. 422	378	Langtry v. State, 30 Ala. 536	171
Kyle v. Frost, 29 Ind. 382	390	Lanham v. State, 7 Tex. Ap. 126	360, 373, 376
v. State, 10 Ala. 236	570	Lanier v. State, 57 Miss. 102	262
		State v. 79 N. C. 622	491
L.		Lannan, Com. v. 13 Allen, 563	432, 470, 615, 638
La Beau v. People, 34 N. Y. 223	312, 756	Lansing v. Russell, 3 Barb. Ch. 325	559
Labouchere, R. v. 14 Cox C. C. 419	129, 131, 728, 738	Lapage, State v. 57 N. H. 245	29, 30, 46, 59, 61, 64, 65
Labra, People v. 5 Cal. 183	445	Lapsley v. Grierson, 1 H. L. Cas. 498	810, 812
Lacefield v. State, 34 Ark. 275	149, 738	Laramore v. Minish, 43 Ga. 282	433
Lacoste, People v. 37 N. Y. 192	452	Largan v. R. R., 40 Cal. 272	460
Lacy v. State, 45 Ala. 80	273	Larkin v. People, 61 Barb. 226	107
Lafone v. Falkland Islands Co., 4 Kay & J. 34	505	State v. 11 Nev. 314	46, 486
Lahey, Com. v. 14 Gray, 91	35	State v. 49 N. H. 36	580, 698

TABLE OF CASES.

	SECTION		SECTION
Larned v. Com., 12 Met.	240	116 a,	Le Blanche, State v. 2 Vroom, 82
		129, 130	111
People v. 7 N. Y.	445	46, 334,	Ledbetter, R. v. 3 C. & K. 108
		753, 799	227
Laros v. Com., 84 Penn. St.	200	411,	Lee v. Gansell, Cowp. 3; Bull. N.
		678	P. 392
Larrabee, Com. v. 99 Mass.	413	441	363
Larry v. Sherburne, 2 Allen,	35	180	v. Kilburn, 3 Gray, 594
Lash, State v. 1 Harr. (N. J.)	380	171	257
Lashus, State v. 67 Me.	564	146	v. Lamprey, 43 N. H. 13
Latham v. Edgerton, 9 Cow.	227	594	698
Lattin, State v. 29 Conn.	389	357, 368	People v. 17 Cal. 76
Laughlin v. Com., 13 Bush,	261	445	276
v. State, 18 Ohio, 99	273, 446		People v. 2 Utah, 441
Laughran v. Kelly, 8 Cush.	199	387	384, 439
Lautenschlager, State v. 22 Minn.	514	734, 736	R. v. 4 F. & F. 63
		127	227
Lavery, Com. v. 101 Mass.	207	513	R. v. R. & R. 364
Law v. Scott, 5 Har. & J.	438	707	443
Lawhorn v. Carter, 11 Bush,	7	432	State v. 22 Minn. 407
State v. 88 N. C.	634	487	58, 60, 487
Lawler, Com. v. 12 Allen,	585	339	v. State, 45 Miss. 114
Lawless v. State, 4 Lea,	179	442,	632
Lawlor, State v. 28 Minn.	216	482, 490, 496, 545, 784	v. State, 51 Miss. 566
			439
Lawrence v. Clark, 14 M. & W.	251	214	State v. 80 N. C. 483
		825	452
v. Jenkins, L. R. 8 Q.	B. 274	298	v. State, 21 Oh. St. 151
People v. 21 Cal.	368	96	444
v. State, 59 Ala.	61	729	v. State, 2 Tex. Ap. 338
State v. 57 Me.	574	338, 435,	607
		729	v. Stiles, 21 Conn. 500
U. S. v. 4 Cranch C. C.	514	336, 729	U. S. v. 4 McLean, 103
		35, 699,	443, 656
Lawson v. State, 20 Ala.	66	700	Leeds v. Cook, 4 Esp. 256
		431	748
Lawton v. Chase, 108 Mass.		743	v. Simpson, 4 M. & W. 312
v. Sweeny, 8 Jur.	967	61	667
Laxton, State v. 76 N. C.	564	120 a	Lees v. Martin, 1 M. & Rob. 210
Layer, R. v. 8 Mod.	33	336, 338,	264
Layton, R. v. 4 Cox,	149	729, 730	Leeson v. Holt, 1 Stark. R. 186
		445	543
Lazier v. Com., 10 Grat.	708	463, 466	Leetch v. Ins. Co., 2 Daly, 518
Lea v. Henderson, 1 Cold.	146	472	449
Leach v. People, 53 Ill.	311	106	Legg v. Drake, 1 McCook, 286
Leaden, State v. 35 Conn.	515	365	538
Leak, State v. 5 Ind.	359	96	Leggett v. State, 15 Ohio, 283
State v. 80 N. C.	403	603, 607	225,
Leake v. Westmeath, 2 M. & Rob.	394	723	263
		678	Lehre, State v. 2 Brev. 446
Learned, U. S. v. 11 Int. Rev. Rep.	149	725	52
		750, 751	Leiber v. State, 9 Bush, 11
Leatham, R. v. 8 Cox,	498	799	278, 288
Leathers, U. S. v. 6 Sawyer,	17	602,	Leighton v. Leighton, 1 Str. 308
v. Wrecking Co., 2 Wood,	682	702	606
		658	Lemons v. State, 4 W. Va. 755
Leavitt v. Bangor, 41 Me.	458	366	490,
Le Blanc, State v. Mill (S. C.),	354; 3 Brev. 339	366, 368	491
			Lenox, Com. v. 3 Brewst. 249
			68, 298,
			412, 774
			Leo, Com. v. 110 Mass. 414
			342
			Leonard v. Allen, 11 Cush. 241
			459
			v. Leonard, 14 Pick. 280
			372
			v. Leonard, 1 W. & S. 342
			510
			State v. 6 La. An. 420
			757
			v. Whitney, 109 Mass.
			265
			593
			Lessing, State v. 16 Minn. 75
			129,
			144, 584
			Lester v. State, 32 Ark. 727
			676
			Levernion, R. v. 11 Cox, 152
			503
			Levett, R. v. Cro. Car. 538
			725
			Levison, People v. 16 Cal. 98
			757
			v. State, 54 Ala. 520
			677,
			750, 751
			Levy, Com. v. 126 Mass. 240
			799
			v. People, 80 N. Y. 602
			602,
			702
			v. Pope, M. & M. 410
			504
			v. State, 49 Ala. 390
			658
			State v. 23 Minn. 104
			366
			Lewallen v. State, 6 Tex. Ap. 475
			69,
			80
			Lewes's Trusts, L. R. 11 Eq. 236;
			L. R. 6 Ch. Ap. 356; 40 L. J. Ch.
			602
			811
			Lewis v. Baird, 3 McLean, 56
			730

TABLE OF CASES.

	SECTION		SECTION
Lewis v. Brown, 41 Me. 448	462	Little, State v. 1 N. H. 257	595
Com. v. 1 Met. 151	101	Littlefield, People v. 5 Cal. 355	103,
v. Hartley, 7 C. & P. 405	312		124
v. Havens, 40 Conn. 363	162	Littlejohn, Com. v. 15 Mass. 163	171
In re, 39 How. (N. Y.) Pr.		Livermore, Com. v. 4 Gray, 18	146
155	472	v. Com., 14 Grat. 592	41
v. Ins. Co., 10 Gray, 508	378	Livingston v. Cox, 8 W. & S. 61	231,
v. Marshall, 5 Peters, 470	530		457
v. Moore, 20 Conn. 211	447	v. Keech, 34 N. Y. Sup.	
v. People, 80 N. Y. 329	602, 702	Ct. 547	430
R. v. Dears. & B. 182; 7 Cox,		v. Kiersted, 10 Johns.	
277	110	362	370, 371, 378
R. v. 6 C. & P. 161	664, 668	v. R. R., 35 Iowa, 555	644
R. v. 4 Esp. 225	463, 472	v. State, 1 Houst. C. C.	
v. State, 35 Ala. 380	491	71	164
v. State, 49 Ala. 1	458	Livingstone v. Com., 14 Grat. 592	417,
v. State, 51 Ala. 1	584		584
State v. 2 Hawks, 98	580, 586	Llewellyn v. Baddeley, 1 Hare,	
v. State, 1 Head, 329	639	527	505
State v. 45 Iowa, 20	626	Lloyd, Com. v. Whart. on Hom.	
v. State, 4 Kans. 296	482, 758	732	788
State v. 69 Mo. 92	333	v. McClure, 2 Greene (Iowa),	
v. State, 9 S. & M. 115	282	139	521
v. State, 1 Tex. Ap. 323	574	v. Passingham, 16 Ves. 64;	
Libbey, State v. 44 Me. 469	171	Ry. & M. 385	478
Life Ins. Co. v. Ins. Co., 7 Wend. 31	749	R. v. 4 C. & P. 233	288
Lightner v. Wike, 4 S. & R. 203	231	R. v. 6 C. & P. 393	673
Liles v. State, 30 Ala. 24	272	Locke, Com. v. 114 Mass. 288	342
Lilleshall, R. v. 7 Q. B. 158	816	v. W. G. 7 Cranch, 339	344
Lilly, People v. 38 Mich. 270	77, 460	Lockett v. Mims, 27 Ga. 207	461
Lime Bank v. Hewett, 52 Me. 531	231	Lockhart v. Luker, 36 Miss. 68	400
Limerick v. Limerick, 4 Sw. & Tr.		R. v. 1 Leach, 386	678
252	163	Locklear, State v. Busbee, 205	134
Lincoln v. Barre, 5 Cush. 590	414	Lockwing, People v. 61 Cal. 380	261,
v. Claflin, 7 Wall. 132	698		750
Lindsay v. People, 63 N. Y. 143	412,	Lockwood, People v. 6 Cal. 205	99
439, 443, 784, 804		Lodge v. Phipper, 11 S. & R. 333	559,
People v. Pamph. Syra-			560
ouse, 1875	777	Loeffner v. State, 10 Oh. St. 598	336,
v. State, 38 Ohio St. 507	34		338, 729
Line v. State, 51 Ind. 172	1	Logan, Com. v. 3 Brews. 341	126
v. Taylor, 3 F. & F. 731	312	Loggins v. State, 8 Tex. Ap. 434	679,
Lingate, R. v. 6 Petersd. Ab. 84	651		680
Lingo v. State, 29 Ga. 470	399, 757	Logston v. State, 3 Helsk. 414	366
Linnehan v. Sampson, 126 Mass.		Logue, Com. v. 38 Penn. St. 265	725
506	626	Lohman v. People, 1 Comst. 379;	
Linney, State v. 52 Mo. 40	494	S. C., 2 Barb. 216	138, 142, 148,
Linthicum, State v. 68 Mo. 66	620		470, 472, 474, 586
Linton v. Hurley, 14 Gray, 191	412	Lombard, People v. 17 Cal. 316	757
Lipscomb, State v. 52 Mo. 32	331, 342	Long v. Lamkin, 9 Cush. 361	490
Lister v. Boker, 6 Blackf. 439	463	People v. 50 Mich. 249	225
v. State, 1 Tex. Ap. 739	278	State v. 1 Hayw. 455	632, 636
Litchfield v. Merritt, 102 Mass. 524	398	v. State, 56 Ind. 182	435 a
State v. 58 Me. 267	506	v. State, 52 Miss. 23	24, 753
Litman v. State, 9 Tex. Ap. 461	120 a	v. State, 10 Tex. Ap. 186	153, 552
Little v. Com., 25 Grat. 921	510, 691	v. State, 13 Tex. Ap. 215	680
v. Downing, 37 N. H. 355	204	Longbottoms, State v. 11 Humph.	
v. State, 6 Baxt. 491	69, 757	39	127
v. State, cited Hor. & Thomp.		Longfellow v. Williams, Peake's	
Self-Defence, 487	757	Add. Cas. 225	644

TABLE OF CASES.

	SECTION		SECTION
Longineau, State v. 6 La. An. 700	153	Lurton v. Gilliam, 1 Scam. 577	525.
Lonsdale, State v. 48 Wis. 348	469		540
Loom, R. v. 1 Mood. C. C. 160	124	Luscomb, Com. v. 130 Mass. 42	121,
Loop, People v. 3 Parker C. R. 559	586		143
Loper v. State, 4 Miss. 429	603	Lyford v. Farrar, 11 Foster (N. H.)	
Lopez, People v. 59 Cal. 362	46	314	363
People v. 2 Edm. Ca. 262	427	Lyles v. Lyles, 1 Hill Ch. (S. C.)	
Lord v. Bigelow, 8 Vt. 460	523	76	492
Lorton v. State, 7 Mo. 55	125, 132, 588	Lynch v. Com., 77 Penn. St. 205	339,
Loubz v. Hafner, 1 Dev. (N. C.) L.			729
185	825	R. v. 5 C. & P. 324	70
Loud, Com. v. 3 Met. 328	578, 579	v. Smith, 104 Mass. 53	457
Louden v. Blythe, 16 Penn. St.		Lynde v. Judd, 3 Day, 499	200
532	696	Lyne v. Bank, 5 J. J. Marsh. 545	608
Loughridge, People v. 1 Neb. 11	111	Lynes v. State, 36 Miss. 617	698
Louisville R. R. v. Fox, 11 Bush,		Lynn v. Sigabee, 67 Ill. 75	405
495	54	Lyon v. Bolling, 14 Ala. 753	186
Love v. State, 22 Ark. 336	677	v. Guild, 5 Heisk. 175	837
Lovelady v. State, 14 Tex. Ap.		v. Hancock, 35 Cal. 372	757
546	418, 632	v. Lyman, 9 Conn. 55	557, 559,
Lovell v. Arnold, 2 Munf. 167	598		560
v. State, 12 Ind. 18	35	v. Lyon, 62 Barb. 138	625
Low's Case, 4 Me. 440	510	People v. 27 Hun, 180, S. C.,	
Low v. Mitchell, 18 Me. 372	463, 470,	1 N. Y. Rep. 400	46, 66, 716 a
	486	People v. 9 Mich. 178	203, 225
v. People, 2 Parker C. R. 37	127	R. v. R. & R. 255	116 a
Lowe v. State, 57 Ga. 171	588	State v. 81 N. C. 600	443
v. State, 11 Tex. Ap. 253	758	v. State, 22 Ga. 399	703
Lowenburg v. People, 5 Parker		v. Wilkes, 1 Cow. 591	426
C. R. 414	66	Lyons, People v. 49 Mich. 78	203
Lowenstein's Case (Albany, 1874),		Lytile, People v. 47 Ill. 422	96
	804		
Lower v. Winters, 7 Cow. 263	487, 490		
Lowhorne, State v. 66 N. C. 639	650		
Lowry, State v. 1 Swan, 34	595		
Lubbenham, R. v. 5 B. & Ad. 968	532		
Luby v. Com., 12 Bush, 1	278, 299		
v. R. R., 17 N. Y. 131	225		
Lucas v. Brooks, 23 La. An. 117	748		
v. Brooks, 18 Wall. 436	396,		
	400		
v. State, 23 Conn. 18	390		
Luckhurst, R. v. 1 Dears. C. C.			
245; 6 Cox, 243; 22 Eng. L. &			
Eq. Rep. 604	652, 673		
Luco v. U. S., 23 How. 515	544		
Lucre v. State, 7 Baxt. 148	438		
Luffe, R. v. 8 East, 193	518		
Luke v. Calhoun Co., 52 Ala. 115	544		
Lull, State v. 48 Vt. 581	69, 257		
Lum v. State, 11 Tex. Ap. 483	816		
Lumley, R. v. L. R. 1 C. C. 196;			
38 L. J. M. C. 86; 11 Cox, 274	810		
Lumpkin v. State, 68 Ala. 56	441, 829		
Lunay v. Vantyne, 40 Vt. 501	400		
Lund v. Tyngsboro, 9 Cush. 36	266,		
	269, 460		
Luning v. State, 1 Chand. (Wis.)			
264	407, 538		
Lunsford v. State, 9 Tex. Ap. 217	384		

TABLE OF CASES.

	SECTION		SECTION
Maden v. Catanach, 7 H. & N. 360 ;		Manning, State v. 14 Tex. 402	99
31 L. J. Ex. 118	361, 362	Manny v. Harris, 2 Johns. 24	593
Mages v. Scott, 9 Cush. 148	818	Mansfield, R. v. C. & M. 142	758
Magie v. Osborn, 1 Robt. (N. Y.)		R. v. 1 Q. B. 444	518, 810,
689	552		828
Magness v. Walker, 26 Ark. 470	401	R. v. 14 Cox, 637	651
Magoon, State v. 50 Vt. 338	448	Manson, Com. v. 2 Ashm. 31	392, 445
Maguire v. R. R., 115 Mass. 240	54	Manwaring, R. v. D. & B. 132 ; 7	
v. State, 47 Md. 485	605	Cox, 192	163, 173
State v. 69 Mo. 197	429	Manzano, R. v. 2 F. & F. 64	427
Mahaffey, Terr. v. 3 Mont. 112	442	Marble, People v. 38 Mich. 117	2, 262,
Mahalovitch v. State, 54 Ga. 217	261		264, 390
Maher v. People, 10 Mich. 212	325,	Marbury v. Madison, 1 Cranch,	
	334, 720, 764	144	513
People v. 4 Wend. 229	579	March v. Harrell, 1 Jones (N. C.),	
State v. 35 Me. 225	581	329	492
Mahon, People v. 1 Utah, 205	504	v. Ludlam, 3 Sandf. Ch. 35	497
Mahoney v. Ins. Co., L. R. 6 C. P.		People v. 6 Cal. 543	731
252	516	State v. 1 Jones (N. C.)	
Maillet v. Propeller Co., 61 N. Y.		526	474
312	24	Marchant, U. S. v. 12 Wheat, 480	445
Maillet v. People, 42 Mich. 262	273	Marchmont Peer. Min. Ev. 62, 77	537
Main, State v. 31 Conn. 572	573	Marcy v. Barnes, 16 Gray, 161	544,
Maine, People v. 16 N. Y. Sup. Ct.			561, 805
113	281, 294, 298	Mariana Flora, The, 11 Wheat. 1	725
Mairs, State v. Cox, 453	102, 456	Marion, People v. 28 Mich. 255	114
Maitland v. Bank, 40 Md. 540	492	People v. 29 Mich. 31	53, 748
Majone, People v. 1 N. Y. Cr. Rep.		Marler, State v. 2 Ala. 43	339, 482
87, 94	266, 734	v. State, 67 Ala. 55	32, 439,
Malaspina, People v. 57 Cal. 628	742		444, 698, 786
Malings, R. v. 8 C. & P. 242	427	v. State, 68 Ala. 580	439, 441,
Mallett, R. v. 2 Russ. C. & M. 867	666		443, 756, 784
Malley, State v. New Haven, 1882	405	Marlow v. Marlow, 77 Ill, 633	200
Mallon, State v. 75 Mo. 355	750	Marnoch v. State, 7 Tex. Ap. 269	784,
Malone, Com. v. 114 Mass. 295	11, 460		799
v. Dougherty, 79 Penn. St.		Marquette R. R. v. Langton, 32	
46	430	Mich. 77	24
v. State, 8 Ga. 408	698	Marriot v. Marriot, 1 Str. 671	598
v. State, 49 Ga. 210	1	Marsden v. Overbury, 18 C. B. 34	351
Maloney v. Bartley, 3 Camp. 210	463	Marsh, Com. v. 10 Pick. 57	390, 445
R. v. 9 Cox, 26	471	v. Loader, 14 C. B. (N. S.)	
R. v. Matthews' Dig. Cr.		535	801
Law.	667	v. Mitchell, 26 N. J. Eq.	
Maloy, State v. 44 Iowa, 104	757 a	497	638
Manchester v. Manchester, 24 Vt.		v. Potter, 30 Barb. 506	401
649	390	R. v. 6 Ad. & El. 236	510
Mandeville v. Stockett, 28 Miss.		Marshall v. Brown, Sup. Ct. Mich.	
398	604	1883	538
Manier, State v. 6 Baxt. 595	263, 691	v. Oakes, 51 Me. 308	733
Manke, People v. 78 N. Y. 611	405	v. R. R. 11 C. B. 398	346
Manley v. Shaw, C. & M. 361	511	v. State, 8 Ind. 498	445
Manluff, State v. 1 Houst. C. C.		State v. 36 Mo. 400	463
208	764	v. State, 31 Tex. 470	124
Mann, R. v. 4 M. & S. 337	579	Marston v. Downes, 1 A. & E. 34	465
v. State, 44 Tex. 642	390	v. Jenness, 11 N. H. 156	571
Manning v. East. Cos. Ry. Co., 12		Martha v. State, 26 Ala. 72	578
M. & W. 237	603	Martin v. Com., 2 Leigh, 745	34, 39,
v. Ins. Co., 100 U. S. 693	707		42, 698
People v. 48 Cal. 335	474	v. Com., 1 Mass. 348	733
R. v. 2 C. & K. 887	733	v. Maguire, 7 Gray, 177	557

TABLE OF CASES.

	SECTION		SECTION
Martin, People v. 47 Cal. 96	698	May v. Bradlee, 127 Mass. 414	418
R. v. 2 Camp. 100	526	v. Brown, 3 B. & C. 113	52
R. v. 3 C. & P. 211	764	v. May, 2 Stra. 1073	530
R. v. 6 C. & P. 562	485, 486	v. People, 92 Ill. 343	632
R. v. L. R. 1 C. C. 178	312, 797	v. State, 55 Ala. 39	276
v. State, 38 Ga. 293	20	v. State, 14 Oh. 461	520, 552
State v. 10 Mo. 391	99	May Looke, State v. 7 Oregon, 54	172
State v. 74 Mo. 544	30, 445	Maybee v. Avery, 16 Johns. 352	596 a
State v. 82 N. C. 672	121	Mayberry, State v. 48 Me. 218	216
State v. 30 Wis. 216	295, 584, 585	State v. 3 Strobbh. 144	833
Martindale v. Faulkner, 2 C. B. R. 720	723	Mayer, People v. 80 N. Y. 364	46, 476
Martineau v. May, 18 Wis. 54	432	Mayhew, R. v. 6 C. & P. 315	387
Marts v. State, 26 Oh. St. 162	58, 69	Mayhugh v. Rosenthal, 1 Cincin. 492	811
Marvin, State v. 35 N. H. 22	390, 396, 402	Mayo v. Ah Loy, 32 Cal. 477	594
Marwilsky v. State, 9 Tex. Ap. 377	90, 120 a	v. Mayo, 119 Mass. 292	465
Marx v. Bell, 48 Ala. 497	472, 690	v. State, 30 Ala. 32	557
v. People, 63 Barb. 618	430, 433	Mayor, R. v. L. R. 3 Q. B. 629	723
Mash, Com. v. 7 Met. 472	725	Mayson v. Beazley, 27 Miss. 106	203
Mask v. State, 32 Miss. 405	391	Mazagora, R. v. R. & R. 291	736
Mason v. Poulson, 43 Md. 162	685	McAdams v. State, 25 Ark. 405	764
v. State, 42 Ala. 532	32, 33, 39, 698	v. Weaver, 2 Kerr (New Brunswick), 176	354
U. S. v. 12 Blatch. 497	117	McAdory v. State, 59 Ala. 92	457, 460
v. Wolff, 40 Cal. 246	603	State v. 62 Ala. 154	677, 751, 784, 887
Massey, State v. 86 N. C. 658	734	McAfee v. State, 68 Ga. 823	759
v. State, 1 Tex. Ap. 563	688	v. State, 14 Tex. Ap. 668	758
State v. 10 Tex. Ap. 645	678	McAleer v. McMurray, 58 Penn. St. 126	707
v. Westcott, 40 Ill. 160	154	McAllister, State v. 24 Me. 139	33, 34, 39, 62, 334
Masters, U. S. v. 4 Cranch C. C. 479	486	McAlpine v. State, 47 Ala. 78	1
Mather, People v. 4 Wend. 229	463, 466, 469, 471, 476, 487, 494, 585	McAndrew v. Terr., 3 Mont. 158	1
Mathews v. Mathews, 41 Tex. 331	625	McAteer v. McMullen, 2 Barr. 32	483
Matteson v. Noyes, 25 Ill. 591	162, 645	McBride v. McBride, 4 Esp. 242	472
v. R. R., 62 Barb. 364;		v. State, 2 Eng. (Ark.) 374	144
S. C., 35 N. Y. 487	396	McCabe v. Burns, 66 Penn. St. 356	698
v. State, 55 Ala. 224	460	McCafferty, R. v. 1 Ir. R. C. L. 365;	
Matthews v. Poythress, 4 Ga. 287	382	10 Cox, 603	386
R. v. 1 Den. C. C. 596	733	State, v. 64 Me. 223	312
v. State, 55 Ala. 187	632	McCalla v. State, 66 Ga. 346	442
v. State, 9 Lea, 128	654, 660	McCann, Com. v. 97 Mass. 580,	632, 650
State v. 9 Port. 370	154	People v. 16 N. Y. 58	338, 339
v. State, 6 Tex. Ap. 23	440, 698	People v. 3 Parker C. R. 272	405, 418, 785, 786
v. State, 9 Tex. Ap. 138	750	v. State, 13 Sm. & Mar. 471	10, 795
Matthis, State v. 1 Hill (S. C.) 37	102	McCarney v. People, 83 N. Y. 408	139, 179, 440
Mattingley v. State, 8 Tex. Ap. 345	429	McCartee v. Camel, 1 Barb. Ch. 456	811
Mattocks v. Lyman, 16 Vt. 113	682	McCarthy, U. S. v. 16 Fed. Rep. 388	47, 472
Mawson v. Hartsink, 4 Esp. 103	487	U. S. v. 18 Fed. Rep. 871	463, 472
Maxham v. Place, 46 Vt. 434	496, 504	McCartney v. State, 3 Ind. 353	39
Maxwell v. State, 3 Heisk. 420	756		
State v. 42 Iowa, 208	482		
v. State, 51 Iowa, 314	154, 376, 593		

TABLE OF CASES.

	SECTION		SECTION
McCarty, Com. v. 119 Mass.	354 36,	McDermott, Com. v. 123 Mass.	440 680
v. People, 51 Ill.	231 753	v. Hoffman, 70 Penn.	St. 52 681
Res. v. 2 Dallas,	86 688	State v. 89 Ind.	187 764
McCaskill v. Elliott, 5 Strobb.	196 54,	McDonald v. People, 47 Ill.	533 96
	825	State v. 67 Mo.	13 134
McCaskle v. Amarine, 12 Ala.	17 160,	McDonel v. State, 90 Ind.	327 380, 761
	550, 552	McDougall v. State, 88 Ind.	24 339
McCauley, Com. v. 105 Mass.	69 581	McDowell v. Preston, 26 Ga.	528 378,
v. Fulton, 44 Cal.	355 594		384 a
McClain, v. Com., 99 Penn. St.	86 227,	McEntyre, State v. 3 Ired.	171 836
230, 386, 423, 740, 764, 777,	778	McFadden v. State, 23 Penn. St.	12 573
McClare, U. S. v. 17 Bost. Law	Rep. 439 764	McFarlin v. State, 41 Tex.	23 476
McClenkan v. McMillan, 6 Penn.	St. 366 679	McGahey v. Alston, 2 M. & W.	188 164, 833
McClin, Territory v. 1 Mont.	394 632,	McGarren, People v. 17 Wend.	460 361
	646	McGarry v. People, 2 Lansing,	227 432,
McClintock, State v. 8 Iowa,	203 590		470
McCluer, State v. 5 Nev.	132 329, 330	McGee v. People, 1 Denio, 19	273, 366,
McClung v. McClung, 40 Mich.	493 35		375
McCombie v. Anton, 6 M. & Gr.	27 227	v. State, 4 Tex. Ap.	625 121
McCombs v. R. R., 67 N. C.	193 166	McGill, U. S. v. 4 Dall.	427; 1
v. State, 66 Ga.	581 107	Wash. C. C.	463 110
v. State, 8 Oh. St.	643 273	McGinnis v. Grant, 42 Conn.	77 488
McConkey v. Com., 101 Penn. St.	416 784	v. State, 24 Ind.	500 212,
McConnell v. State, 67 Ga.	633 382		216
McCord, State v. 8 Kans.	232 401	v. State, 74 Mo.	245 107
McCorkle v. Binns, 5 Binney,	340 557	v. State, 76 Mo.	326 107, 429
McCormack, People v. 4 Parker C.	R. 17 171	McGinniss v. Sawyer, 63 Penn. St.	267 178, 202
McCormick v. Sullivant, 10 Wheat.	192 594	McGloin, People v. 91 N. Y.	241;
U. S. v. 4 Cranch C. C.	104 103	S. C., 1 N. Y. Cr. Rep.	105, 154 363,
McCoy, People v. 45 How. Pr.	216 315		364, 658, 664
State v. 29 La. An.	593 757	McGlothlin v. State, 2 Cold.	223 646
State v. 34 Mo.	531 338	v. State, 56 Iowa,	544 388
v. State, 44 Tex.	616 762	McGlue, U. S. v. 1 Curtis C. C.	1 324,
McCracken v. McCrary, 5 Jones	(N. C.) L. 399 215	329, 336, 418, 729,	764
McCraney, People v. 6 Parker C.	R. 49 390	McGlynn, State v. 34 N. H.	422 128,
McCrea, People v. 32 Cal.	98 679		341, 342
McCreary v. Com., 29 Penn. St.	323 574	McGorty, Com. v. 114 Mass.	299 734
McCrum v. Corby, 15 Kans.	112 383	McGowan v. Com., 2 Meto. (Ky.)	3 106
McCue, Com. v. 16 Gray,	226 833	People v. 17 Wend.	386 586,
v. Com., 78 Penn. St.	185 784		593
McCulley v. State, 62 Ind.	428 142	McGrath v. R. R., 63 N. Y.	522 683
McCulloch v. State, 48 Ind.	109 13,	v. Seagrave, 2 Allen,	444 166
	325, 633, 688	State v. 19 Mo.	678 105
McCully's Case, 2 Lew. C. C.	272 124	McGraw, State v. 1 Walker,	208 578,
McCutochen v. McCutochen,	9 Port. 650 487		579
McCutocheon v. Pigue, 4 Heisk.	563 370	McGregor v. Montgomery, 4 Penn.	St. 237 200
McDaniel v. State, 8 Sm. & M.	401 286,	State v. 41 N. H.	407 261
	297	McGrew, State v. 13 Rich.	316 391
		McGuire v. People, 44 Mich.	286 367
		v. State, 50 Iowa,	153 699, 701
		v. State, 7 Humph.	54 723
		McGungill, People v. 41 Cal.	429 432
		McHugh v. State, 31 Ala.	317 293
		McIlvain v. State, 80 Ind.	69 24

TABLE OF CASES.

	SECTION		SECTION
McIntire, State v. 59 Iowa, 264	96	McMahon, People v. 15 N. Y. 384	66,
State v. 1 Jones (N. C.)			668
1	365	People v. 2 Parker C. R.	
McIntosh v. State, 52 Ala. 355	657	663	664
McIntyre, People v. 9 N. Y. 38; 1		McManus v. Com., 91 Penn. St. 57	24
Parker C. R. 372	445	McMath v. State, 55 Ga. 303	750
McKain v. Love, 2 Hill (S. C.) 506	511	McMillan v. Davis, 66 N. C. 539	313
McKay v. State, 8 Tex. 376	100	McMillen v. Andrews, 10 Oh. St.	
McKean, State v. 36 Iowa, 343	440	112	509
McKee v. Bidwell, 74 Penn. St. 218	683	McMurphey, State v. 52 Mo. 251	66
v. Nelson, 4 Cow. 355	460	McNaghton's Case, 10 Cl. & F. 200;	
People v. 36 N. Y. 113	266,	1 C. & K. 135	337, 418, 538
	683, 751	McNair v. Zeigler, 68 Ill. 224	401
State v. 1 Bailey, 651	573	McNair v. Com., 26 Penn. St. 388	
U. S. v. 3 Dill. 546	438, 698	551, 557	
McKeen v. Frost, 46 Me. 239	400, 401	People v. 21 Wend. 608	366
McKenna v. People, 18 Hun, 580	69, 71	State v. 14 Tex. Ap. 79	760
McKenney, Com. v. 9 Gray, 114	126	McNally v. Meyer, 5 Ben. 239	373
v. Neil, 1 McLean, 540	483	State v. 34 Me. 210	164
McKenzie v. State, 24 Ark. 636	445	McNamara, State v. 3 Nev. 70	703
v. State, 26 Ark. 334	338,	McNeal, U. S. v. 1 Gall. 387	103 a, 115
	435	McNeil, State v. 3 Hawks, 183	573
v. Wardwell, 61 Me. 136	822	State v. 33 La. An. 1332	227
McKeone v. Barnes, 108 Mass. 344		McNeill v. Arnold, 22 Ark. 477	482
	552, 557, 559	McNinch, State v. 12 S. C. 89	384 a
McKern v. Calvert, 59 Mo. 244	482	McO'Brien, State v. 24 Mo. 402	227
McKie, Com. v. 1 Gray, 61	329, 330,	McPhail v. State, 9 Tex. Ap. 164	263,
	344		761
McKinney v. People, 7 Ill. 540	354	McPherson v. State, 22 Ga. 478	294
McKinnon v. Bliss, 21 N. Y. 206	537	v. State, 9 Yerger, 279	298
McKnight v. State, 6 Tex. Ap. 158		McPike, Com. v. 3 Cush. 181	135, 152,
	457, 458, 462	262, 263, 271, 296, 570, 683, 740, 751	
McKonkey v. Gaylord, 1 Jones L.		McQueen v. State, 82 Ind. 72	60, 121
(N. C.) 94	552	McRae v. Morrison, 13 Ired. L. 46	462
McLain v. Com., 99 Penn. St. 86	86,	U. S. v. L. R. 3 Ch. App. 79	466
227, 230, 386, 423, 740, 704,	777, 778	McReynolds v. State, 5 Cold. 18	172
v. Smith, 17 Mo. 49	733	Mead v. Boston, 3 Cush. 404	570, 596 a
State v. 2 Brev. 443	124	Com. v. 10 Allen, 396	801
McLane, People v. 60 Cal. 412	489	Com. v. 12 Gray, 167	68, 83, 510
State v. 15 Nev. 345	751	v. Parker, 115 Mass. 413	707
McLaughlin, Com. v. 12 Cush. 615	590	People v. 50 Mich. 228	66, 225,
State v. 44 Cal. 435	281,		273, 315, 492
	304	R. v. 2 B. & C. 605; 4 D. &	
v. State, 52 Ind. 476	96	R. 120; 1 Phil. Ev. 225	278,
State v. 44 Iowa, 82			288
	647, 649	Means v. Means, 7 Rich. (S. C.) 533	
McLean v. Clark, 47 Ga. 24	462		546
v. State, 16 Ala. 672	446, 731	v. State, 10 Tex. Ap. 16	263
McLees v. Felt, 11 Ind. 218	383	Mears v. Graham, 8 Blackf. 144	734
McLellan v. Richardson, 13 Me. 82		Mech. Bk. v. Union Bk. 22 Wall.	
	510, 512	276	833
McLeod, People v. 1 Hill (N. Y.),		Medlicott, State v. 9 Kans. 257	284,
377	764		418
v. State, 35 Ala. 395	35	Medlook v. Brown, 4 Mo. 379	342
State v. 1 Hawks, 344,	231,	v. State, 18 Ark. 363	103
	510	Medway v. U. S. 6 Ct. of Cl. 421	556
McMahon v. Burehell, 1 Coop. Ca.		Mee v. Reid, Peake (N. P.), 23; 1	
209	615	Leach, 498	354
v. Harrison, 2 Seld. 443	816	Meek v. Perry, 36 Miss. 190	263
		R. v. 9 C. & P. 513	609

TABLE OF CASES.

	SECTION		SECTION
Megson, R. v. 9 C. & P. 420	273, 284, 286	Metzger v. State, 18 Fla. 481	689
Mehan v. State, 7 Wis. 670	331, 342	Mewherter, State v. 46 Iowa, 88	503, 504
Meinaka v. State, 55 Ala. 47	661, 689	Mexican & S. Amer. Co., <i>Ex parte</i> , 4 De Gex & J. 220; 27 Beav. 474	469
Melen v. Andrews, M. & M. 336	681, 699	Meyer v. Barker, 6 Binn. 228	748
Mellor, R. v. (Staff. Sum. Ass. 1833)	439	v. People, 86 N. Y. 375	46
State v. 13 R. I. 667	715 a	v. Sefton, 2 Stark. 278	166
Melville's Case, 29 How. St. Tr. 764	696	Meyers v. Com., 83 Penn. St. 131	1, 339, 736
Melvin v. Kasley, 1 Jones (N. C.) L. 386	407	v. State, 6 Tex. Ap. 1	698
v. Melvin, 58 N. H. 569	518	v. State, 14 Tex. Ap. 35	408, 795
Mendum v. Com., 6 Rand. 704	406	Meynecke v. State, 66 Ind. 401	61
Menk v. Steinfott, 39 Wis. 370	401	Meynell's Case, 2 Lew. C. C. 122	677
Mercein, People v. 8 Paige, 47	393, 394	Michenor v. Lloyd, 16 N. J. Eq. 58	153
Merceir v. Chace, 9 Allen, 242	594	Mick, R. v. 3 F. & F. 822	662
Mercoer v. Cheese, 4 M. & Gr. 804	816	Mickle v. State, 27 Ala. 20	10
v. Patterson, 41 Ind. 440	398	Middleham, State v. Sup. Ct. Iowa, 1883	679
Merceron, R. v. 2 Stark. 366	664	Middlehurst, R. v. 1 Burr. 399	134
Merchants' Bank v. State Bank, 10 Wall. 604	833	Middleton v. Bamed, 4 Exch. R. 243	452
Merchant's Will, 1 Tucker (N. Y.), 151	559	v. Croft, Str. 1056	723
Merkle v. State, 37 Ala. 139	407, 538	v. State, 52 Ga. 527	442
Merle v. More, Ry. & M. 390	498	Mikle, State v. 81 N. C. 552	24
Merriam v. R. R., 20 Conn. 354	401, 491	Milan v. Pemberton, 12 Mo. 598	153
Merrick, State v. 19 Mo. 398	758	Milbank v. Dennistown, 10 Bosw. 382	225
v. Wakley, 8 A. & E. 170	526	Milbourne, State v. 87 N. C. 529	341
Merrill, Com. v. 8 Allen, 545	592	Mildrone, R. v. Leach, 412	354
Com. v. 8 Cush. 571	126	Miles v. Bough, 3 Q. B. 848	163
v. Foster, 33 N. H. 379	603	v. Loomis, 75 N. Y. 288	556-60
State v. 2 Dev. 269	30, 764	v. O'Hara, 4 Binn. 108	231
v. State, 45 Miss. 651	116	v. U. S., 103 U. S. 304	24, 95, 98, 172, 397
q. State, 58 Miss. 65	278, 295	v. Wingate, 6 Ind. 458	603
State v. 44 N. H. 624	588	Milgate, People v. 5 Cal. 127	721
Merrimac, The, 1 Benedict, 490	354	Millard, Com. v. 1 Mass. 6	691, 758
Merriman v. State, 68 Ind. 401	61	R. v. R. & R. 245	42, 46
v. State, 3 Lea, 393	472	Miller, Com. v. 2 Ashm. 61	570, 572
Merritt v. Campbell, 79 N. Y. 625	556	v. Com. 13 Bush, 731	32
v. State, 59 Ala. 47	658	Com. v. 3 Cush. 243	29, 30
v. State, 52 Ga. 582	10	Com. v. 5 Dana, 320	584
v. State, 2 Tex. Ap. 177	633	v. Com., 78 Ky. 15	29, 699
v. State, 10 Tex. Ap. 402	389	v. Deaver, 30 Ind. 371	603
v. Thompson, 1 Hilt. (N. Y.) 550	811	v. Jones, 32 Ark. 338	555
v. Wright, 19 La. An. 91	202	v. People, 39 Ill. 457	99, 673
Mershorn v. State, 54 Ind. 14	225	People v. 2 Parker C. R. 197	509
Messenger, Com. v. 1 Binn. 274	118, 216	v. Smith, 112 Mass. 475	418
Messner v. People, 45 N. Y. 1	271, 294, 457, 459, 460	State v. 24 Conn. 522	128
Messersmith, People v. 61 Cal. 246	336, 338, 714, 781	v. State, 15 Fla. 577	436
Metallic Comp. Co. v. R. R., 109 Mass. 277	824	v. State, 58 Ga. 200	584
Methard v. State, 19 Oh. St. 363	578, 763	v. State, 37 Ind. 432	764
		v. State, 69 Ind. 284	99
		v. State, 53 Iowa, 209	384, 458, 690
		v. State, 3 Oh. St. 475	581
		v. State, 25 Wis. 384	277, 733

TABLE OF CASES.

	SECTION		SECTION
Miller v. State, 37 Wis.	520	29, 30,	103 a,
	32, 555-6,	567	115
v. Sweitzer, 22 Mich.	391	698	
v. Williamson, 5 Md.	219	390	Monroe v. Lattin, 25 Kan. 351
Millett v. Marston, 62 Me.	477	520	v. State, 5 Ga. 85
Mills v. Catlin, 22 Vt.	108	539	v. Twistleton, Peake's Ev.
v. Colchester, 31 L. J. C. P.			Ap. 39
214	523		399
R. v. 6 C. & P. 146	673		Montague v. Dudman, 2 Ves. Sen.
State v. 17 Me. 211	131		397
v. State, 13 Tex. Ap. 487	32		566
Milne v. Leisler, 7 H. & N. 786	691		Montgomery, Com. v. 11 Met. 534
Milnor v. Tillotson, 7 Peters, 100	164		758,
Miltimore v. Miltimore, 40 Penn.			762
St. 161	570		
Milton v. Rowland, 11 Ala. 732	460		People v. 13 Abb. (N.
v. State, 6 Neb. 136	721		Y.) Pr. N. S. 207
Mims, State v. 26 Minn. 123	833		426
Mimms v. State, 16 Oh. St. 221			v. People, 53 Cal. 576
	49, 756,		752
Minet v. Morgan, L. R. 8 Ch. 361	497		
Mingo, U. S. v. 2 Curtis C. C. 1	764		v. Pickering, 116
Minor v. State, 63 Ga. 318	384		Mass. 227
v. State, 58 Ill. 59	170		496, 500
Minshower v. State, 53 Md. 11	539		v. Scott, 34 Wis. 338
Minton, R. v. 1 McNally, 386	282		412, 458
Mitchell v. Com., 33 Grat. 845	440		v. State, 40 Ala. 684
v. Com. 78 Ky. 219	487, 490		446
Com v. 117 Mass. 431	648		v. State, 63 Ala. 1
v. Mitchell, 40 Ga. 11	603		678
v. Napier, 22 Tex. 120	679		v. State, 80 Ind. 338
R. v. 6 Cox C. C. 82	545		288, 294
R. v. 12 Eng. L. & Eq. 588	144		v. State, 11 Ohio, 424
v. State, 58 Ala. 417	412, 829		281, 301
State v. 5 Ired. 350	736		Moody, R. v. 2 Cr. & Dix C. C. 347
State v. Phil. (N. C.) L.			673
447	659		v. Rowell, 17 Pick. 490
v. State, 5 Yerger, 340	721,		553,
	764		557, 559, 560
Mitchinson v. Cross, 58 Ill. 366	400,		v. State, 7 Blackf. 424
	401		108
Mitchum v. State, 11 Ga. 615	10, 12,		State v. 2 Haywood, 31
	263, 324		285
Mix, State v. 15 Mo. 153	34, 380, 736		Moon v. State, 68 Ga. 687
v. Woodward, 12 Conn. 262	52		314, 458, 545
Mixon v. State, 55 Miss. 525	803		State v. 41 Wis. 684
Mize v. State, 49 Ga. 375	571		749
Mobbs, R. v. 6 Cox, 223	29, 30		Mooney, Com. v. 110 Mass. 99
Mobile R. R. v. Ashcroft, 48 Ala. 15	54		482
Mockabee, Com. v. 78 Ky. 380	287, 293		State v. 64 N. C. 54
Moock v. People, 100 Ill. 242	294, 304		392
Moelchen, State v. 53 Iowa, 310	458,		State v. 1 Yerg. 431
	757, 796		445
Moett v. People, 55 N. Y. 373	380		Moore v. Com., 2 Leigh, 701
Moffit v. Moffit, 69 Ill. 641	594		646, 677
v. State, 2 Humph. 99	445		Com. v. 130 Mass. 45
Mollier, State v. 1 Dev. 263	387		95
Moloney v. Dows, 2 Hilt. (N. Y.)			People v. 45 Cal. 19
247	471		699
Molyneaux v. Collier, 30 Ga. 731	483		People v. 65 How. (N. Y.)
			390
			177
			R. v. 12 Eng. L. & Eq. 583 ;
			5 Cox C. C. 554
			652
			R. v. 2 Lew. C. C. 37
			443, 656
			R. v. Matthew's Dig. Cr.
			Law, 157
			667
			v. State, 12 Ala. 764
			281, 289,
			303, 304, 393
			v. State, 68 Ala. 360
			486
			v. State, 68 Ga. 687
			314, 458,
			545
			v. State, 65 Ind. 218, 232,
			460
			97, 125
			v. State, 59 Miss. 25
			586
			v. State, 65 Ind. 213
			97
			State v. 25 Iowa, 128
			490
			State v. 11 Ired. (N. C.) 70
			811
			State v. 12 N. H. 42
			135, 740
			v. State, 2 Oh. St. 500
			10
			v. State, 12 Oh. St. 387
			109
			v. State, 2 Tex. Ap. 351
			108
			v. U. S., 91 U. S. 270
			556

TABLE OF CASES.

	SECTION		SECTION		
Moore v. Wingate, 53 Mo.	398	401	Morris v. State, 38 Tex.	603	261
Moores, R. v. 7 C. & P.	270	441	v. Stokes, 21 Ga.	552	461
Moors, R. v. cited 6 East,	421	216	U. S. v. 1 Curtis C. C.	23	573
Mopsey, R. v. 11 Cox,	143	116 a	Morrison v. Lennard, 3 C. & P.	127	369,
Moran, State v. 34 Iowa,	453	441			375
Mordecai v. Beal, 8 Porter,	529	749	v. Myers, 11 Iowa,	538	156
State v. 68 N. C.	207	312	v. State, 76 Ind.	335	1
Morea, State v. 2 Ala.	275	366, 369	Morrissey v. Ferry Co., 47 Mo.	521	532
Moreland v. Mitchell County,	40		v. Ingham, 111 Mass.		
Iowa, 394		825	63		271
Morey, Com. v. 5 Cush.	461	658	v. People, 11 Mich.	327	408
Com v. 1 Gray, 461	652, 658,	670	v. R. R., 63 N. Y.	643	726
		149	State v. 3 Dev.	299	331, 342
Morgan, Com. v. 11 Bush,	601	149	State v. 2 Ired.	9	142
v. Com., 14 Bush,	106	757	v. State, 5 Oh.	438	699
Com. v. 107 Mass.	199	134,	Morrow, People v. 60 Cal.	142	20, 429
	432, 470		v. State, 48 Ind.	432	429, 430
v. Evans, 3 Cl. & F.	205	679	v. State, 57 Miss.	836	446
v. Jones, 24 Ga.	155	216	U. S. v. 4 Wash. C. C.	733	695
v. People, 59 Ill.	58	162	Morse v. Presby, 25 N. H.	299	594
R. v. 1 Leach, 54		354	R. v. 8 C. & P.	605	667
R. v. 14 Cox C. C.	337	284	Morss v. Morss, 11 Barb.	510	509
R. v. Law Times, March 5,			v. Palmer, 15 Penn. St.	51	491
1881		293	Mortimer v. McCallen, 6 M. & W.		
State v. 40 Conn.	44	261	67		168
v. State, 31 Ind.	193	282	State v. 20 Kans.	93	678
v. State, 61 Ind.	447	92, 146	Mortlock, R. v. 7 Q. B.	459	216
State v. 33 Md.	44	573	Morton v. Copeland, 16 C. B.	517	342
v. State, 13 Sm. & M.	242	149	R. v. 12 Cox, 456; L. R. 2		
Moriarty v. R. R., L. R. 5 Q. B.	314	748	C. C. 22		116 a
Morine, People v. 61 Cal.	307	482	State v. 1 Williams (Vt.),		
Morley's Case, 6 How. St. Tr.	421,		310		32
770		229	State v. 8 Wis.	352	46
Morley v. Gaz. Co., 2 F. & F.	373	312	Mose v. State, 35 Ala.	421	278
Morman v. State, 24 Miss.	54	581	v. State, 36 Ala.	211	20
Mornington v. Mornington, 2 John.			Mosely v. Eakin, 15 Rich. (S. C.)		
& H. 697		504	324		518
Morphin, State v. 37 Mo.	373	588	v. State, 9 Tex. Ap.	137	143
Morphy, State v. 33 Iowa,	270	334,	Moses v. State, 58 Ala.	117, 429	632
	412, 771, 774		U. S. v. 1 Cranch C. C.	170	463
Morrell, Com. v. 99 Mass.	542	163, 689	U. S. v. 4 Wash. C. C.	726	513,
Morrill v. State, 5 Tex. Ap.	447	391			515
Morrigan, People v. 29 Mich.	9,		Mosey, R. v. 1 Leach, 265, n.		678
420		476	Mosler, Com. v. 4 Barr,	264	661
Morris v. Davies, 5 Cl. & Fin.	163	827,	Mosley, R. v. 1 Mood. C. C.	97; 2	
		828	Russ. on Crimes, 757	281, 283, 286	
v. East Haven, 41 Conn.	252		Moss v. State, 17 Ark.	327	445
		460	Mossam v. Ivy, 10 How. St. Tr.	562	
v. Edwards, 1 Oh.	524	537		312, 850	
v. Harmer, 7 Pet.	554	537	Moughon v. State, 57 Ga.	102	1
v. Miller, 4 Burr.	2057	163	Moulton, Com. v. 4 Gray,	39	494
v. People, 3 Denio,	381	725	v. Mason, 21 Mich.	364	215
R. v. 7 C. & P.	270	441	State v. 48 N. H.	485	401
R. v. 1 Leach C. C.	109	138	U. S. v. 5 Mason,	537	116 a
R. v. L. R. 1 C. C.	90	585	Mount v. Com., 2 Duv.	93	579
v. State, 47 Conn.	179	329, 539,	Mountain v. Fisher, 22 Wis.	93	390
		753	v. State, 40 Ala.	344	592,
State v. 84 N. C.	756	24, 784,			678
		796	Mounts v. State, 14 Oh.	295	573, 574
v. State, 13 Sm. & M.	242	149	Moy Looko, State v. 7 Or.	54	172

TABLE OF CASES.

	SECTION		SECTION
Moye v. Herndon, 30 Miss. 110	560	Muscot, R. v. 10 Mod. 192	387
v. State, 66 Ga. 740	680	Mutche v. Pierce, 49 Wis. 231	264
Moynahan v. People, 3 Col. 367	96	Mutual Ins. Co. v. Wager, 27 Barb.	354
Mudd v. Snuckermore, 5 A. & El.	551	Myers, Com. v. 1 Va. Cas. 188	571, 594
703	418	People v. 20 Cal. 518	336, 729
Muldowney v. R. R., 39 Iowa, 615	312	v. People, 26 Ill. 173	111
Mulhade v. R. R., 30 N. Y. 370	432, 470	v. State, 62 Ala. 599	756, 784
Mullen, Com. v. 97 Mass. 545	435 a, 470	v. State, 33 Tex. 525	757
State v. 14 La. An. 570	757	v. Toscan, 3 N. H. 47	556, 557
v. State, 33 La. An. 159	363		
Muller's Case, Pamph. N. Orleans,	1846	N.	
1846	807	Napier, State v. 65 Mo. 462	688
Mullet v. Hunt, 1 Cr. & M. 752	350	Nash v. Hunt, 116 Mass. 237	418
Mullins, Com. v. 2 Allen, 295	368	State v. 7 Iowa, 347	276, 277, 698
R. v. 3 Cox C. C. 526	440	State v. 10 Iowa, 81	263, 401
Mulkey v. State, 43 Ala. 316	733	Nat. Bk. v. Nat. Bk., 7 W. Va. 544	506
Munford v. State, 39 Miss. 558	579	Nat. Ins. Co. v. Gleason, 77 N. Y.	400
Munger, State v. 15 Vt. 291	103		363
Munroe v. State, 5 Ga. 95	69, 75	Nat. Un. Bk. v. Marsh. 46 Vt. 443	552
Munshower v. State, 55 Md. 19	225, 482	Neagle, State v. 65 Me. 468	32, 46, 602, 605
Munson, State v. 40 Conn. 475	103	Neal's Case, cited 1 Redfield on	
State v. 79 Ind. 541	199	Wills, ch. iii. § 13	420
Murdock R. v. 2 Den. C. C. 298	53	Neal, Com. v. 10 Mass. 152	733
v. State, 68 Ala. 567	655, 750, 820	v. Cunningham, 1 Cranch C.	C. 76
Murphy v. Com., 4 Allen, 491	393, 394	R. v. 7 C. & P. 168	463
v. Com., 23 Grat. 960	398, 484, 739	State v. 7 Foster, 131	440
Com. v. 14 Mass. 387	486	Neeley, State v. 20 Iowa, 108	69
Com. v. 3 Penn. Law J.	363	State v. 74 N. C. 425	734
290	170	Nefus, Com. v. 135 Mass. 533	847
v. Georgia, 50 Ga. 150	227, 231, 264	Neile v. Jakle, 2 C. & K. 709	679
People v. 45 Cal. 137	282, 764	Neill, State v. 6 Ala. 685	394
v. People, 37 Ill. 447	382	Nelms v. State, 13 Sm. & M. 500	301
v. People, 90 Ill. 59	24, 649, 662, 670, 784, 796, 804	Nelson v. Ins. Co., 71 N. Y. 453	406
v. People, 1 N. Y. Cr. 102	305, 306	v. Iverson, 24 Ala. 9	483
R. v. 8 C. & P. 297	446, 699	v. Johnson, 18 Ind. 329	559
R. v. 19 How. St. Tr. 724	491	v. People, 23 N. Y. 293	833
State v. 6 Ala. 845	127	State v. 58 Iowa, 208	491
v. State, 63 Ala. 1	669	v. State, 7 Humph. 542	278, 281, 282
v. State, 50 Ga. 150	170	State v. 29 Me. 329	588
v. State, 28 Miss. 638	129	v. State, 2 Swan, 237	446
State v. 84 N. C. 742	32	Nepean v. Doe d. Knight, 2 M. & W.	894; 2 Smith L. C. 476, 492
v. State, 6 Tex. Ap. 554	96		811
v. State, 36 Ohio, 628	679	Nesbit v. State, 43 Ga. 238	302, 784
Murray, Com. v. 2 Ashm. 41	276, 297	Nesham v. Selby, L. R. 13 Eq. 191;	
v. Com., 79 Penn. St. 311	736	L. R. 7 Ch. 400	521
v. Cone, 26 Iowa, 276	690	Nett, State v. 50 Wis. 524	69, 81, 757
v. Milner, 12 Ch. D. 845	233	Nettlebush, State v. 20 Iowa, 257	299
People v. 10 Cal. 309	68, 69, 81	Nettles, Ex parte, 58 Ala. 268	231
State v. 15 Me. 100	585	v. Harrison, 2 McCord, 230	225
v. State, 65 Iowa, 530	580	Nettleton v. State, 1 Root, 308	556
v. State, 1 Tex. Asp. 417	736	Neubrandt v. State, 53 Wis. 89	758
Murtagh, Com. v. 1 Ashm. 272	171	Neverson, U. S. v. 1 Mack. U. S.	152
			492, 756

TABLE OF CASES.

	SECTION		SECTION
Neveling v. Com., 98 Penn. St.		Nichols, People v. 62 Cal. 519	429
322	322, 329, 340, 757	v. Dowding, 1 Stark. 81	698
Nevill v. State, 60 Ind. 308	441	State v. 29 Minn. 357	829
Neville, R. v. 6 Cox, 69	492	v. State, 58 N. H. 41	138
v. Robinson, 1 Bailey, 361	602	v. Stewart, 20 Ala. 358	492
New, State v. 22 Minn. 71	758	Nicholson v. State, 38 Md. 140	689
Newberry, People v. 20 Cal. 439	445	Nickerson, Com. v. 5 Allen, 518	495
Newcomb v. Griswold, 24 N. Y. 298		Niles, People v. 44 Mich. 606	330
153, 156, 432, 474, 489		v. Sprague, 13 Iowa, 198	536
v. State, 37 Miss. 383	465,	State v. 47 Vt. 82	273
690, 757		Niller v. Johnson, 27 Md. 6	555, 560
Newell, Com. v. 7 Mass. 245	148	Nims v. Johnson, 7 Cal. 110	204
v. Nicholls, 75 N. Y. 78	809	Nixon v. Palmer, 10 Barb. 175	816
Newhal v. Wadhams, 1 Root, 504	486	v. People, 5 Parker, C. R. 119	439
New Haven Bk. v. Mitchell, 15		Noble, State v. 15 Me. 476	138, 146
Conn. 206	839, 840	Noelke, People v. 94 N. Y. 137; 1	
Newland, R. v. 2 East P. C. 1001-2;		N. Y. Cr. Rep. 252, 495	
1 Leach, 311	549	34, 472, 473, 477	
State v. 27 Kan. 764	225	U. S. v. 17 Blatch. C. C.	
Newlin, State v. 69 Ind. 108	418	554	839
Newman v. Jenkins, 10 Pick. 515	809	Noftsinger v. U. S., 7 Tex. Ap. 301	751
v. Mackin, 21 Miss. 383	486	Nolan, R. v. 1 Crawford & D. 74	673
v. People, 63 Barb. 630	430.	v. State, 14 Tex. Ap. 482	
People v. 5 Hill, N.Y.		678, 683	
295	229	Nonemaker v. State, 34 Ala. 211	592,
R. v. 3 C. & K. 252	446	Noon, R. v. 6 Cox, 137	739, 764
R. v. 1 E. & B. 268; 3 C.		Noonan v. State, 1 Sm. & M. 562	679,
& K. 252	679	680	
R. v. 2 Den. C. C. 390; 21		v. State, 55 Wis. 258	405
L. J. M. C. 75	570, 603, 607	Norcross, Com. v. 9 Mass. 492	163
v. State, 49 Ala. 9	650	Norfolk v. Gaylord, 28 Conn. 309	470
State v. 9 Nev. 48	111	Norkot's Case, 14 How. St. Tr.	
New OrL. Co. v. Allbritton, 38 Miss.		1324	776, 781
242	412	Norris v. Russell, 5 Cal. 249	527
New Portland v. Kingfield, 55 Me.		North v. Moore, 8 Kans. 143	594
172	483	North Am. Ins. Co. v. Throop, 22	
Newson, State v. 2 Jones (N. C.),		Mich. 146	554
173	103	North Bank v. Abbott, 13 Pick.	
Newton v. Belcher, 1 Q. B. 921	625	465	252
v. Jackson, 23 Ala. 335	491	v. Buford, 1 Duv.	
v. Liddiard, 12 Q. B. 927	625	335	556
v. Price, 41 Ga. 186	644	North Berwick Co. v. Ins. Co., 52	
R. v. 1 C. & K. 469	833	Me. 336	644
R. v. 1 F. & F. 641	288	North Brookfield v. Warren, 16	
R. v. 2 M. & R. 503; 1 C. &		Gray, 171	168, 536
K. 164	171, 572, 686	North M. R. R. v. Akers, 4 Kans.	
State v. 42 Vt. 537	588	453	418
v. White, 47 Ga. 400	593	North Petherton, R. v. 5 B. & C.	
New York Ins. Co. v. Graham, 2		508	532
Duv. 506	323	Northrup, State v. 48 Iowa, 583	66
Neyland v. State, 13 Tex. Ap. 336	345,	North Stonington v. Stonington, 31	
691		Conn. 412	225, 690
Nicholas, R. v. 2 C. & K. 246	367, 368	Norton v. Ladd, 4 N. H. 444	361
Nicholls, R. v. F. & F. 51	44	v. Moore, 3 Head, 480	460
Nichols v. Binns, 1 Sw. & Tr. 243	730	R. v. R. & R. 510	94, 95
Com. v. 10 Allen, 199	725	v. State, 74 Ind. 337	95
v. Com., 11 Bush, 575	768	State v. 76 Mo. 180	414
Com. v. 114 Mass. 285	35, 430,	State v. 82 N. C. 628	757
432, 435		v. State, 14 Tex. 387	571
Com. v. 10 Met. 259	102	Norvell, State v. 2 Yerg. 24	579

TABLE OF CASES.

	SECTION		SECTION
Norwich Nav. Co. v. Theobald, M. & M. 153	543	Odell v. Koppees, 5 Heisk. 88	362
Norwood, State v. 74 N. C. 247	10	State v. 4 Blackf. 156	571
Nott, Com. v. 135 Mass. 269	651, 662	v. State, 8 Oregon, 30	442
State v. 50 Mo. 524	757	Offord, R. v. 5 C. & P. 168	417
U. S. v. 1 McLean, 499	646, 658	Offutt, State v. 4 Blackf. 355	510
Nourse v. Nourse, 116 Mass. 101	690	O'Gara v. Eisenlohr, 38 N. Y. 296	707
Nowell v. Wright, 3 Allen, 166	457	Ogden v. Walters, 12 Kans. 282	603
Noyes v. State, 40 N. J. L. 429	438	Ogletree v. State, 28 Ala. 693	30, 339
v. State, 41 N. J. L. 418	438	Ohio and Miss. R. R. v. Porter, 92 Ill. 437	266
Nudd v. Burrows, 91 U. S. 426	698	O'Keefe, Com. v. 121 Mass. 59	91
Nuckolls v. Com., 32 Grat. 884	408, 411	Oleson v. State, 11 Neb. 276	273
Nugent v. State, 18 Ala. 521	273, 486	Olifer, R. v. 10 Cox, 402	725
v. State, 71 Mo. 136	32	Olive v. State, 11 Neb. 1	62, 441
Numbers v. Shelly, 78 Penn. St. 426	603	Oliver v. Pate, 43 Ind. 132	512, 513
Nutt, State v. 28 Vt. 598	581	v. Persons, 30 Ga. 391	603
Nutting v. Page, 4 Gray, 584	263	R. v. 8 Cox, 384; Bell, 287	144, 584
Nuzum v. State, 88 Ind. 599	484	v. State, 17 Ala. 587	83
Nye v. Macdonald, L. R. 3 P. C. 331	197	State v. 2 Houst. 585	276, 286
v. Merriam, 35 Vt. 438	482	State v. 70 N. C. 60	393
O.		Olmstead, People v. 30 Mich. 431	294
Oakes v. Weston, 45 Vt. 430	457	O'Mara v. Com., 75 Penn. St. 424	263, 334, 412, 721, 764, 778
Oakly v. Schoonmaker, 15 Wend. 228	648	Omeara, U. S. v. 1 Cranch C. C. 165	263
Oaks v. Harrison, 24 Iowa, 179	323	Omichund v. Barker, Willes, 538;	
Ober, State v. 52 N. H. 459	432, 435 a, 470	1 Sm. L. C. 194	354, 361
O'Brian v. Com., 6 Bush, 563	227	Ommaney v. Stilwell, 23 Beav. 328	512
v. State, 12 Ind. 369	571	O'Neal, State v. 7 Ired. 251	62, 64
O'Brien, Com. v. 12 Allen, 183	441	Oneale v. Com., 17 Grat. 582	171
Com. v. 8 Gray, 487	261	Oneil v. State, 48 Ga. 66	96, 117
Com. v. 107 Mass. 208	590	v. State (Tex. 1884) 17 Rep. 285	699
Com. v. 119 Mass. 342	61, 764	O'Neill, State v. 4 Ired. 88	486
Com. v. 134 Mass. 198	460	O'Neill v. Lowell, 6 Allen, 110	460, 482
v. People, 48 Barb. 274	658	Orchard, R. v. 3 Cox, 248; 20 Eng. L. & Eq. 598	448
v. People, 28 Mich. 213	261	Ordway v. Haynes, 50 N. H. 159	476
State v. 10 La. An. 453	68		538, 544
State v. 7 R. I. 336	407, 538	Ormsby v. Ihmsen, 34 Penn. St. 462	414
v. State, 10 Tex. App. 544	109	v. People, 53 N. Y. 472	435 a, 698, 699
Ocean Nat. Bank of N. Y. v. Carll, 55 N. Y. 441	536	Orr v. State, 34 Ga. 342	20
O'Connell, Com. v. 12 Allen, 451	125, 127, 132, 588	Orton v. McCord, 33 Wis. 205	496
v. Com., 7 Met. 460	127	R. v. 39 L. T. (N.S.) 293	812, 818
v. People, 87 N. Y. 377	338	R. v. (Pamph. Trial) (see Tichborne Case),	459, 803
R. v. Arm. & T.; 11 Cl. & Fin. 155	129, 136, 150, 152, 167	Ortwein v. Com., 76 Penn. St. 414	339
O'Connor, Com. v. 11 Gray, 94,	272, 757 b	Osborn v. Black, Speers (S. C.), 431	390
Oddy, R. v. 5 Cox, 210; 2 Den. C. C. 264	39, 44, 65	v. London Dock Co., 10 Exch. 698; 24 L. T. Exch. 140	465, 468, 469
		Osborne v. People, 2 Parker, C. R. 583	31, 32
		R. v. C. & M. 622	273, 492
		O'Shields v. State, 55 Ga. 696	691

TABLE OF CASES.

	SECTION		SECTION
Osman, R. v. 15 Cox C. C. 1	300	Parchman v. State, 2 Tex. Ap. 228	96
Ostrander, State v. 18 Iowa, 434	1	Pargeter, R. v. 3 Cox, 191	824
Otey v. Hoyt, 3 Jones (N. C.) L. 407	556	Parham, State v. 10 Lea, 498	440
Otis v. Thom, 23 Ala. 469	457	Parish v. Parish, 32 Ga. 653	594
Otmer v. People, 76 Ill. 149	10	State v. Busbee, 239	667
Oulaghan, R. v. Jebb, 270	573	State v. 83 N. C. 613	479, 484
Outerbridge, U. S. v. 5 Sawyer, 620	757	Park, Com. v. 1 Gray, 553	102
Outlaw v. Hurdle, 1 Jones (N. C.) L. 150	556	People v. 41 N. Y. 21; 1 Lans. 263	363
Overstreet v. State, 3 How. (Miss.) 328	255, 260	Parker v. Chambers, 24 Ga. 518	379
Overton v. State, 43 Tex. 616	390	v. Enslow, 102 Ill. 272	315
Owen, R. v. 4 C. & P. 236	801	R. v. C. & M. 639	387
R. v. 9 C. & P. 238	664, 668	R. v. 8 Cox, 465; 9 W. R. 699	651
R. v. 1 Mood. C. C. 96	109, 123	R. v. 3 Dougl. 242	492
v. Slack, 2 Sim. & St. 606	748	R. v. L. & C. 42	672
State v. 73 Mo. 440	114, 556, 557, 560	v. State, 39 Ala. 365	124
v. State, 7 Tex. Ap. 329	96, 98	State v. 1 Chipman, 298	118
Owens v. Collins, 3 Gill & J. 25	602	State v. 5 Lea, 568	103
Com. v. 114 Mass. 252	460	v. St. Co., 109 Mass. 506	457
v. State, 52 Ala. 400	1	Parkhurst v. Lowten, 1 Mer. 400; 2 Swanst. 215	432, 464, 466, 471
v. State, 59 Miss. 547	297	Parks, State v. 3 Ired. 296	487
State v. 10 Rich. 169	94	Parlange v. Parlange, 16 La. An. 17	421
Owings v. Terr., 3 Mont. 137	1	Parmenter, Com. v. 101 Mass. 211	100
Oxford, R. v. 9 C. & P. 525	731	Com. v. 5 Pick. 279	114
State v. 30 Tex. 428	510	Parr, Com. v. 5 W. & S. 345	585, 616
		Parratt, R. v. 4 C. & P. 570	651, 652, 673
		Parrish v. State, 14 Neb. 60	735
		v. State, 45 Tex. 51	383
		Parry, R. v. 7 C. & P. 836	593
		Parsons v. Copeland, 33 Me. 370	601
		v. Ins. Co., 16 Gray, 463	458
		v. State, 43 Ga. 197	266
		Partee v. State, 67 Ga. 570	441
		Parton, People v. 49 Cal. 632	678
		Partridge, R. v. 7 C. & P. 551	651, 758
		Paschal v. State, 68 Ga. 818	764
		Pascoe, R. v. Pearce & D. 456	33
		Patch, R. v. Wills Circum. Ev. 230	784
		Patchin v. Ins. Co., 13 N. Y. 268	483
		Pate v. People, 3 Gilm. (8 Ill.) 644	557, 559
		Patmore v. State, 61 Ga. 379	477
		Patrick v. The Adams, 19 Mo. 73	459
		Patten v. People, 18 Mich. 314	482, 484
		Patterson v. Black, 2 Park on Ins. 919	812
		v. Colebrook, 29 N. H. 94	457
		Com. v. 8 Phila. 609	402
		v. Gaines, 6 How. 550	171
		v. People, 46 Barb. 625	69, 169, 334, 757
		v. State, 66 Ind. 185	169, 296
P. 153	401		
Packard v. Reynolds, 100 Mass. 153	401		
Packet Co. v. Clough, 20 Wall. 528	401, 695		
v. Sickles, 5 Wall. 580	593		
Padget, State v. 68 Ind. 46	107		
Page v. Parker, 40 N. H. 47	413		
v. Homans, 14 Me. 487	556		
People v. 1 Idaho, 114	43		
v. State, 61 Ala. 16	96, 418		
v. State, 59 Miss. 474	131, 199		
v. Stephens, 23 Mich. 357	748		
Paine v. Tilden, 20 Vt. 554	491		
Painter, State v. 67 Mo. 84	736		
State v. 50 Iowa, 317	388		
Palmer v. Haight, 2 Barb. 210	483		
R. v. 3 St. Tr. 56	386		
R. v. Taylor's Med. Jur. 101	787		
State v. 35 Me. 9	138		
v. White, 10 Cush. 321	452		
Palmore v. State, 29 Ark. 248	736, 757		
Pancake, State v. 74 Ind. 15	138		
v. State, 81 Ind. 93	103		
Pannell v. Com., 86 Penn. St. 260	339, 417, 420, 476		
Panton v. Norton, 18 Ill. 496	460		

TABLE OF CASES.

	SECTION		SECTION
Patterson, State v. 2 Ired. 346	96, 390,	Pendleton v. Empire Co., 19 N. Y.	483
397, 465, 482, 484, 485		13	
State v. 7 Ired. 70	261	Pendock v. Mackinder, Willes R.	363
v. State, 3 Lea, 575	91	665	
v. State, 73 Mo. 695	326,	Pennington v. Yell, 11 Ark. 212	707
573, 632, 661		Penn. v. Bell, Addison, 171, 173	147
State v. 63 N. C. 520	691	v. Honeyman, Addison, 148	764
State v. 74 N. C. 157	484	v. Lewis, Addison, 282	764
State v. 1 Strobb. 169	733	v. McFall, Addison, 257	764
State v. 45 Vt. 308	295, 299,	v. Stoops, Addison, 381	289, 393
	334	Penn. R. R. v. Henderson, 51 Penn.	
Paul v. State, 65 Ga. 152	633	St. 315	457, 460, 683
Paulette v. Brown, 40 Mo. 52	380	v. Hickman, 28 Penn.	
Pauli v. Com., 89 Penn. St. 432	329	St. 318	555
Paulk, State v. 18 S. C. 514	331	v. Weber, 76 Penn. St.	
Paxton v. Douglass, 19 Ves. 225	463	157	732
Payne v. Com., 31 Grat. 855	644	Pennsylv. Co. v. Conlan, 101 Ill.	
v. Com., 1 Metc. (Ky.) 370		93	380
	69, 75	Pennywit v. Kellogg, 1 Cincin. 17	191
R. v. 12 Cox, 118	390, 391	Penobscot R. R. v. Weeks, 52 Me.	
v. State, 60 Ala. 80	483, 757	456	594
v. State, 57 Miss. 348	691, 761	Penrod v. People, 89 Ill. 150	99
State v. 4 Mo. 376	571, 594	Perkin, R. v. 9 C. & P. 395	282
v. State, 86 N. C. 609	338	Perkins's Case, 2 East P. C. 1120 ;	
Pea v. Pea, 35 Ind. 387	400	2 Lew. 150	113
Peace, State v. 1 Jones (N. C.),		Perkins, Com. v. 7 Grat. 651	114
251	380	Com. v. 1 Pick. 388	99, 100
Peake v. Stout, 8 Ala. 647	456	v. Gay, 55 Miss. 153	502
Pearce, R. v. 3 B. & Ald. 579	100	v. Nugent, 45 Mich. 156	835
R. v. 9 C. & P. 667	393	R. v. 2 Mood. C. C. 135 ;	
v. State, 40 Ala. 720	32	9 C. & P. 395	290, 357,
State v. 2 Blackf. 318	144		366, 368
v. State, 15 Nev. 188	60, 81,	v. R. R., 44 N. H. 223	272,
	757		418
v. Whale, 5 B. & C. 38	833	v. State, 60 Ala. 7, 6, 49, 650	
Pearl v. Wellman, 3 Gilm. 311	640	State v. 3 Hawks, 377	680
Pearson v. People, 50 Mich. 233	333	v. State, 4 Ind. 222	510
Pearson v. Le Maitre, 6 Scott N. R.		State v. 66 N. C. 126	487, 490
607 ; 5 M. & Gr. 700	52	State v. 53 N. H. 435	342
Pease, Com. v. 110 Mass. 412	484	State v. 4 Zab. 409	633
People v. 27 N. Y. 45	342, 431	v. Stevens, 24 Pick. 277	365
v. State, 63 Ga. 631	427	v. Vaughan, 4 M. & Gr.	
v. State, 74 Ind. 263	114	988	52
Peat, R. v. 2 Lew. C. C. 288	390, 395,	v. Walker, 19 Vt. 144	154
	397	Perley v. R. R., 98 Mass. 414	824
Peck, Com. v. 1 Met. 428	552	Perry's Case, 3 Grat. 632	357, 361
In re, 29 L. J. Pr. & Mat. 95	811	Perry v. Breed, 117 Mass. 165	482
v. Yorks, 47 Barb. 131	153	v. May, 1 Hill S. C. 76	185
Peel, R. v. 9 Cox, 220	111	v. Newton, 1 Nev. & P. 1 ;	
R. v. 2 F. & F. 21	283	5 Ad. & E. 514	556
Peeples v. Smith, 8 Rich. 90	160	People v. 8 Abb. N. Y. Fr.	
Peers v. Carter, 4 Litt. (Ky.) 268	608	R. (N. S.) 27	282
Pefferling v. State, 40 Tex. 486	273	v. People, 86 N. Y. 353	363
Pegler, R. v. 5 C. & P. 521	463	R. v. 1 Den. C. C. 69 ; 1 C.	
Peltier, R. v. 4 Low. Can. 3	288	& K. 727	390
Pembleton, R. v. L. R., 2 C. C. 149	150	v. Simpson Co., 40 Conn.	
Pembridge, R. v. C. & M. 157 ; 41		313	638
E. C. L. R.	603	v. State, 41 Tex. 485	758
Pendleton v. Com., 4 Leigh, 694	118,	v. State, 44 Tex. 473	736
	199, 216	Person v. Greer, 66 N. Y. 124	356

TABLE OF CASES.

	SECTION		SECTION
Persons v. State, 3 Tex. Ap. 240	124	Phipps v. State, 3 Cold. 344	20
Perth Peer., 2 H. L. C. 865	530	Phoenix Bank v. Philip, 13 Wend.	560
Peter v. State, 4 Sm. & M. 31	677	81	170
Peters, Com. v. 12 Met. 387	571	Physick's Est., 2 Brewst. 179	833
State v. 2 Rice's Dig. 106	764	Piatt v. McCullough, 1 McLean, 78	384
Peterson v. Morgan, 116 Mass. 350		Pickens v. State, 13 Tex. Ap. 13	284
61, 357, 368, 455		Pickersgill, R. v. (Leeds Summer	
v. State, 50 Ga. 142	757	Assizes, 1869)	138
v. State, 70 Me. 216	95, 96,	Pickett v. U. S., 1 Idaho, N. S.	124
	98, 99	523	143
v. Taylor, 15 Ga. 483	153	Pico, People v. 62 Cal. 50	679
Petrea v. People, 92 N. Y. 129; S.		Pierce, Com. v. 130 Mass. 31	487
C., 1 N. Y. Cr. Rep. 199, 233	830	v. Goldsberry, 35 Ind. 317	555
Petrie v. Howe, 4 N. Y. Sup. Ct.		v. Newton, 13 Gray, 528	417,
85	396, 402	v. Northey, 14 Wis. 9	460
Pettaway, State v. 3 Hawks, 623	398,	v. State, 53 Ga. 365	827
402, 518, 828			407,
Pettit, Com. v. 8 Phila. 608	632	Piers v. Piers, 2 H. L. C. 362	538
Petty, State v. 21 Kan. 54	484	Pierson v. Hoag, 47 Barb. 243.	
Pfomer v. People, 4 Park. C. R. 558	69, 71		
	382	v. People, 79 N. Y. 424;	
Phair, State v. 48 Vt. 366		18 Hun, 239	24, 32, 44,
Pharr v. State, 9 Tex. Ap. 129; 10			271, 412, 516
Tex. Ap. 485	262, 691	v. Steortz, Morris (Iowa),	
Phelin v. Kenderdine, 20 Penn. St.		136	503
354	463	Pigg v. State, 43 Tex. 108	417
Phelps v. People, 72 N. Y. 334	126,	Pike, R. v. 3 C. & P. 598	281, 290, 366
	138	State v. 65 Me. 111	474, 753
State v. 74 Mo. 128	670	State v. 49 N. H. 399	417, 459,
State v. 2 Tyler, 374	399		460
State v. 11 Vt. 117	147, 646	State v. 51 N. H. 105	698
Phene's Trusts, L. R. 5 Ch. 150	811	Pikesley, R. v. 9 C. & P. 124	666, 668
Phettiplace v. Sayles, 4 Mason,		Pilkinton v. State, 19 Tex. 214	1
312	494	Pinckford v. State, 3 Tex. Ap. 468	
Phifer, State v. 65 N. C. 321	626		29, 46
Phil, State v. 1 Stew. 31	579	Piper, Com. v. 120 Mass. 185	24, 264,
Phillips, R. v. 1 Lew. C. C. 105	42	313, 405, 412, 459	
Phillips v. Fadden, 125 Mass. 198		v. Richardson, 9 Met. 155	593
	602 a	Pippin, State v. 88 N. C. 646	32, 35, 37
v. Kingfield, 1 Appleton,		Pirates, U. S. v. 5 Wheat. 184	571
375	487	Pitcher, People v. 15 Mich. 397	698,
People v. (Court of Gen.			749, 750
Sess. N. Y. 1813)	508	v. People, 16 Mich. 142	444
People v. 42 N. Y. 200	658	Pitman v. State, 22 Ark. 354	757
R. v. 8 C. & P. 736	801	Pitsinger, Com. v. 110 Mass. 101	688
R. v. R. & R. 369	105	Pitts, R. v. C. & M. 284	764, 826
R. v. Woodhull's Trials,		v. State, 43 Miss. 472	325, 787
80	773	Plate v. R. R. 37 N. Y. 472	591
v. Routh, L. R. 7 C. P. 289	505	Platner v. Platner, 78 N. Y. 90	688
v. Scott, 43 Mo. 86	837	Platter, State v. 34 La. An. 1061	658,
v. Starr, 26 Iowa, 349	418		674 a, 689
v. State, 68 Ala. 469	91, 734,	Pleasant v. State, 15 Ark. 624	273,
	829	446, 463, 486, 487	
v. State, 36 Ark. 282	135	Plestow, R. v. 1 Camp. 494	143
v. State, 9 Humph. 246	273	Plumer, R. v. R. & R. 264	682
State v. 24 Mo. 476	688, 752	Plummer v. Com., 1 Bush, 76	752
v. State, 6 Tex. App. 364		Plunket, State v. 2 Stew. 11	124
	555, 699	Plunkett v. Cobbett, 5 Esp. 136;	
Philp, R. v. 1 Mood. C. C. 263	625	29 How. St. Tr. 71	514
Philpot v. Taylor, 75 Ill. 309	698		

TABLE OF CASES.

	SECTION		SECTION
Poage v. State, 3 Ohio St. 229	363	Poulton, R. v. 5 C. & P. 329	327
Poindexter v. Com., 33 Grat. 766	786	Pound v. State, 43 Ga. 88	69
v. Davis, 6 Grat. 481	463	Povey, R. v. 6 Cox, 83	173
Point v. State, 37 Ala. 148; 1 Ala.		Powell v. Harper, 5 C. & P. 590	263
Sel. Cas. 54	96	R. v. 1 Leach, 77	366, 369
Polk v. State, 62 Ala. 237	460, 757	v. State, 19 Ala. 577	757
v. State, 36 Ark. 117	412	v. State, 25 Ala. 21	417
v. State, 19 Ind. 170	339	v. State, 52 Ala. 1	757
Poll, State v. 1 Hawks, 442	281, 286,	v. State, 58 Ala. 362	392
	297, 698, 699	State v. 2 Halst. 244	418, 511
Pollard v. State, 53 Miss. 410	333	v. State, 13 Tex. Ap. 244	24,
Pollock v. Pollock, 71 N. Y. 137	35,	46, 412, 446, 769,	784
	440	v. Waters, 17 Johns. 176	229
Pomeroy v. Baddely, R. & M. 430	446	Power v. Frick, 2 Grant (Penn.),	
Com. v. App. to Whart.		306	557, 560
on Hom., 117 Mass. 143		Powers, Com. v. 116 Mass. 337	163
338, 515, 731		v. Leach, 26 Vt. 270	484
v. Golly, Ga. Dec. pt. i. 26	552	v. State, 44 Ga. 209	441
State v. 25 Kan. 349	262, 263	v. State, 87 Ind. 144	280, 641
Pond v. People, 8 Mich. 150	69	Praed, R. v. 4 Burr. 2257	579
Pontifex v. Bignold, 3 M. & Gr. 63		Praslin, Duchess of, Case,	775
	734, 739	Pratt, Com. v. 126 Mass. 402	470, 733
Pontius v. People, 82 N. Y. 339	24,	v. Richards, 69 Penn. St. 53	24
	430, 556, 784	v. State, 1 Houst. C. C. 249	337
Pool v. Devers, 30 Ala. 672	382	v. State, 56 Ind. 179	429
Poole v. Perrit, 1 Speers, 128	469	State v. 20 Iowa, 267	679
v. Richardson, 3 Mass. 330	460	v. State, 88 N. C. 639	688
Pope v. Askew, 1 Ired. 16	555	v. State, 35 Ohio St. 514	126
Com. v. 103 Mass. 440	163, 167,	Prentiss v. Holbrook, 2 Mich. 372	605
459, 767, 778, 796		v. Roberts, 49 Me. 127	491
v. Foster, 4 T. R. 590	103 a,	Prescott, U. S. v. 2 Dillon, 405	664
	115, 126	Pressly, R. v. 6 C. & P. 183	666, 667
Porter v. Cooper, 6 C. & P. 354; 1		Preston v. Carr, 1 Y. & J. 175	505
C., M. & R. 388	603	v. State, 25 Miss. 383	574
v. State, 55 Ala. 95	334, 677	v. State, 8 Tex. Ap. 30	784
v. State, 2 Ind. 435	446	Price, Com. v. 10 Gray, 472	38, 45,
v. State, 17 Ind. 415	154, 593	441, 443, 444, 465, 470	
State v. 34 Iowa, 131	263, 271,	Com. v. 8 Leigh, 757	94
296, 334, 412, 494, 771, 774		v. Littlewood, 3 Camp. 288	526
v. State, 57 Miss. 300	92	v. People, 9 Ill. App. 36	580
v. State, 1 Tex. Ap. 394	223	v. People, 109 Ill.	702
U. S. v. 2 Cranch C. C. 60	363	v. Price, 16 M. & W. 232	816
Post v. Smilie, 48 Vt. 185	593	R. v. 9 C. & P. 729	736
v. State, 10 Tex. Ap. 598	698	R. v. 3 P. & D. 421; 11 Ad.	
Poteete v. State, 9 Baxt. 261	225, 280,	& E. 727	723
	445	v. State, 18 Ohio St. 418	644,
Potter v. Chamberlain, 23 N. Y. 85	396	670	
v. Marsh, 30 Barb. 506; 24		v. State, 19 Ohio, 423	99, 579,
How. Pr. 610	396	v. Thornton, 10 Mo. 135	695
People v. 1 Parker C. R. 47;		Pridgen v. State, 31 Tex. 420	69, 757
1 Edm. N. Y. Sel. Cas. 335	365	Priest v. State, 10 Neb. 393	354, 361,
State v. 13 Kans. 414	68	363, 632	
v. State, 9 Tex. Ap. 55	114	Priestman v. Thomas, Lond. Spect.	
State v. 42 Vt. 495	441, 733	1883	849
State v. 52 Vt. 33	35	Primmer v. Clabaugh, 78 Ill. 94	402
v. Webb, 2 Greenl. 257	598	Prince v. Prince, 25 N. J. Eq. 310	625
Potts v. Everhardt, 26 Penn. St.		R. v. L. R., 2 C. C. 150	725
493	691	v. Samo, 7 A. & E. 627; 3	
State v. 4 Halst. 26	26, 96,	N. & P. 139	493
	216		

TABLE OF CASES.

SECTION		R.		SECTION	
Pringle v. Pringle, 59 Penn. St.	281	390	Radcliff v. Ins. Co., 7 Johns. 38	525	
Prinsop v. Dyce Sombre, 10 Mood.	P. C. 232	730	Radley, R. v. 1 Den. 450; 2 C. & K. 974	138	
Printz v. Cheney, 11 Iowa, 469	463		Rafferty v. People, 72 Ill. 37	429	
v. People, 42 Mich. 144	416		Ragland v. Wickware, 4 J. J. Marsh. 530	473	
Pritchett v. State, 22 Ala. 39	69, 75, 757		Railroad, Com. v. 1 Grant, 330	365	
Proud, R. v. L. & C. 97	32		State v. 52 N. H. 528	54	
Proudfoot v. Montefiore, L. R. 2 Q. B. 511; 8 B. & S. 510	696		Raisler v. Springer, 38 Ala. 703	698	
Prout, U. S. v. 4 Cranch C. C. 301	551		Rajah of Coorg v. East India Co., 29 Beav. 350	514	
Prov. Tool Co. v. Man. Co., 120 Mass. 35	455		Ralph v. R. R., 32 Wis. 177	382	
Prowse v. Shipping Co., 13 Moo. P. C. 484	640		Ramadge v. Ryan, 9 Bing. 333	457	
Pruden v. Alden, 23 Pick. 187	605		Rambler v. Tryon, 7 S. & R. 90	417	
Prudhomme, State v. 25 La. An. 523	315		Ramirez, People v. 56 Cal. 533	676	
Puckering, R. v. 1 Mood. C. C. 242	124		Ramsbotham v. Senior, L. R. 8 Eq. 575	503	
Puckett v. State, 1 Sneed, 355	811		Rand, State v. 29 Me. 84	602	
Puddifoot, R. v. 1 Mood. C. C. 247	124		State v. 33 N. H. 216	702	
Puett v. Beard, 86 Ind. 104	679		State v. 51 N. H. 361	468	
Pugh v. MacCarty, 40 Ga. 444	52		Randall, Com. v. 4 Gray, 36	139, 142	
State v. 7 Jones (N. C.), 61	801		Com. v. 119 Mass. 107	758	
Pullen v. Glidden, 68 Me. 559	254		Randenbush, U. S. v., 8 Pet. 288	40	
v. People, 1 Dougl. 48	392		Rando, People v. 3 Parker C. R. 335	44, 283	
Pully, State v. 63 N. C. 8	484		Randolph v. Bayne, 44 Cal. 366	598	
Purify, State v. 86 N. C. 68	91, 143		v. Loughlin, 48 N. Y. 458	556	
Purkiss v. Benson, 28 Mich. 538	690, 691		People v. 2 Parker, C. R. 213	801	
Purnell, R. v. 1 W. Bl. 37	566		State v. 24 Conn. 363	363, 376, 487	
Puryear v. State, 63 Ga. 692	231		v. Woodstock, 35 Vt. 291	156	
Putnam, Com. v. 1 Pick. 136	173		Ranger v. Goodrich, 17 Wis. 78	266	
Pye's Case, 1 East P. C. 783	140		Rankin, People v. 2 Wheel. C. C. 467	646	
Pym, R. v. 1 Cox, 339	702		v. Rankin, 61 Mo. 295	417	
Pyne, In re, 1 Dow. & L. 703	346		Ransell, State v. 41 Conn. 433	32	
			Ransom v. Mack, 2 Hill, 587	837	
Q.			Rapp v. Com., 14 B. Mon. 614	757	
Quarles, State v. 13 Ark. 307	471		Rash v. State, 61 Ala. 89	405, 412	
Queen's Case, 2 B. & B. 284	156, 362, 483, 485, 492, 493, 688, 696, 698		State v. 12 Ired. 382	31, 46, 51, 756, 785	
Queen, Mima, v. Hepburn, 7 Cranch, 290	225		Rateliffe, Com. v. 130 Mass. 36	698	
Queensbury v. State, 3 St. & Port. 308	69, 75, 83		R. v. 1 Lew. 121	602	
Quilter v. Jones, 14 C. B. (N. S.) 747	535		Rathbun v. Ross, 46 Barb. 127	154	
Quimby v. Morrill, 47 Me. 470	429, 431		Rathburn, People v. 21 Wend. 509	752	
Quin, Com. v. 5 Gray, 478	153, 474		113, 748, 750	574	
Quinebaug Bank v. Brewster, 30 Conn. 559	734		Ratzky v. People, 29 N. Y. 124	560	
Quinlan v. People, 6 Parker C. R. 9	733		Ravelin, State v. 1 Chipm. 295	460	
Quinsigamond Bank v. Hobbs, 11 Gray, 250	559		Rawles v. James, 49 Ala. 183	263, 699	
Qurise, People v. 59 Cal. 343	227		State v. 65 N. C. 334	405	
			Rawls v. Ins. Co., 27 N. Y. 282	264	
			Rawson v. Haigh, 5 Bing. 104; 9 Moore, 217	391	
			Ray v. Com., 12 Bush, 397	114, 621	
			Com. v. 3 Gray, 441		

TABLE OF CASES.

	SECTION		SECTION
Ray v. State, 50 Ala. 104	1, 458, 625, 690	Reed v. R. R., 45 N. Y. 39	270
v. State, 1 Greene (Iowa), 316	439, 443	v. State, 16 Ark. 499	95, 97, 101
v. State v. 1 Rice, 1	579, 580	State v. 12 Md. 263	580, 586
Raymond, Com. v. 97 Mass. 567	725	State v. 60 Me. 550	482, 484
State v. 46 Conn. 345	758	State v. 62 Me. 129	679, 751
State v. 20 Iowa, 582	46, 53, 387	v. State, 15 Ohio, 217	34, 39
v. Wheeler, 9 Cow. 295	640	State v. 40 Vt. 603	584
Rayner v. Ritson, 6 B. & S. 888	505	v. Wilson, 41 N. J. La 29	539
Raynes v. Bennett, 114 Mass. 424	24, 398, 401	Rees, R. v. 6 C. & P. 606	833
Raynham v. Canton, 3 Pick. 293	827	R. v. 7 C. & P. 569	662
Rea v. Missouri, 17 Wall. 532	430, 679	Reese v. Reese, 90 Penn. St. 89	559
Read, R. v. 9 A. & E. 619	388	Reeve, R. v. L. R., 1 C. C. 1, 362;	12 Cox, 179; 1 Green C. R. 398
R. v. M. & M. 403	667	Reeves v. Herr, 59 Ill. 81	401
Reading, R. v. Cas. Temp. Hard.	79; B. N. P. 286	v. Poindexter, 8 Jones (L.)	N. C. 308
R. v. 7 C. & P. 649	666	Regan, R. v. 17 L. T. N. S. 325	662
R. v. 2 Leach, 590; 2	East P. C. 952	v. Regan, 72 N. C. 195	153
Readman v. Conway, 126 Mass. 374	683	Regnier v. Cabot, 2 Gilm. 34	483
Reagle, People v. 60 Barb. 527	400, 401	Regular v. State, 58 Ga. 264	10
Real, In re, 55 Barb. 186	474, 489	Reid, Com. v. 8 Phila. 385	391, 396, 402, 439
v. People, 42 N. Y. 270; 55	Barb. 186-551	v. Reid, 17 N. J. Eq. 101	487
Reany, R. v. 40 Eng. L. & Eq. 552;	Dears. & B. 151; 7 Cox. 209	v. State, 20 Ga. 681	551
Reardon, R. v. 4 F. & F. 76	31, 32, 38	State v. 20 Iowa, 413	763
Reason, R. v. 12 Cox, 228	651, 658	Reidel, State v. 26 Iowa, 430	225
R. v. 1 Str. 500	295	Reidpath's Case, 40 L. J. Ch. 39	837
Reavis, State v. 71 Mo. 419	29	Reilly v. Cavanagh, 29 Ind. 435	153
Rector, Com. v. 80 Ky. 468	646	R. v. Ir. Cir. R. 795	604
People v. 19 Wend. 569	463, 487, 491, 757	Reinhardt, People v. 39 Cal. 449	153, 474
Red, State v. 53 Iowa, 69	429, 762	Reitz, State v. 83 N. C. 634	225, 459, 690, 796
Redd v. State, 68 Ala. 492	661, 688, 756	Rembert v. Brown, 14 Ala. 360	520
v. State, 69 Ala. 257	673, 677	Remnant, R. v. R. & R. 136	452
Reddick, State v. 7 Kans. 143	408, 412, 417, 730	Remsen v. People, 57 Barb. 327	67, 126
Reddin v. Gates, 52 Iowa, 210	312, 544	Rennels, State v. 14 La. An. 278	111
Redemeier v. State, 71 Mo. 173; 8	Mo. Ap. 1	Renton, State v. 15 N. H. 169	65
Redford v. Birley, 3 Stark. 88	256	Revel v. State, 26 Ga. 275	748, 750
v. Peggy, 6 Rand. (Va.) 316	557	Revels, State v. Busbee, 200	580
Redgrave v. Redgrave, 38 Md. 93	172, 395, 827	State v. 34 La. An. 381	658
Redman, R. v. 1 Leach, 477	138	Revis v. Smith, 18 C. B. 126	453
Reed v. Dickey, 1 Watts, 152	748	Reyburn, U. S. v. 6 Pet. 352	164, 199
v. Jackson, 1 East, 855	830	Reyes v. State, 10 Tex. Ap. 1	482
v. Passer, 1 Peake, 233	828	Reynell v. Sprye, 10 Beav. 51	504
People v. 47 Barb. 235	725	Reynolds, Com. v. cited 10 Allen,	64
R. v. C. & M. 306	724, 725	Com. v. 122 Mass. 454	664
R. v. 2 Mood. C. C. 62	116 a	Ex parte, L. R. 20 Ch. D.	294, 46 L. T. (N. S.)
v. R. R., 120 Mass. 43	833	143, 508	469
		v. State, 68 Ala. 502	278, 286
		v. State, 3 Kelly, 53	573
		v. State, 87 N. C. 544	758
		v. State, 11 Tex. 120	144, 584
		U. S. v. 1 Utah T. 319;	98 U. S. 145

TABLE OF CASES.

	SECTION		SECTION
Rhea v. State, 10 Yerger, 258	225	Ricker, State v. 29 Me. 84	602
Rhine v. Robinson, 27 Penn. St. 30	227, 231	Rickerstriker v. State, 31 Ark. 207	390
Rhoades v. Selin, 4 Wash. C. C. 715	164	Rickman R. v. 2 East P. C. 103	447, 758
Rhoads, State v. 29 Oh. St. 171	457	Riddle, State v. 20 Kans. 711	68
Rhodes, R. v. 2 Id. Raym. 886	131	Ridenour v. State, 38 Ohio St. 272	734
R. v. 2 Str. 703	575	Rideout's Trusts, L. R. 10 Eq. 41	396, 518
State v. Phil. (N. C.) 453	393	Rider v. Ins. Co., 20 Pick. 259	457
State v. 11 Tex. Ap. 563	440, 678	Ridgely, State v. 2 Har. & McH. 120	363, 757
Rhodus v. Com., 2 Duv. 159	127	Ridley v. Gyde, 9 Bing. 349	264
Rhone v. Gale, 12 Minn. 54	818	R. v. R. & R. 515	109
Ricardo v. Garcias, 12 Cl. & F. 368	593	Riadale, R. v. (York Spring Ass. 1837); Stark, Ev. 469, n.	492
Rice v. Brown, 77 Ill. 549	594	Riggs v. State, 6 Cold. 517	264, 690
v. Cunningham, 29 Cal. 492	690, 830	State v. 39 Conn. 498	52
v. State, 47 Ala. 38	632, 658	Rights, State v. 82 N. C. 675	758
v. State, 3 Heisk. 215	678	Rigsby, State v. 6 Lea, 554	669
Rich, Com. v. 14 Gray, 335	408, 412	Riley, Com. v. Thach. C. C. 67	96, 114, 560
v. Husson, 4 Sandf. 115	400	v. Packington, L. R. 2 C. P. 53	833
Richard v. Brehm, 73 Penn. St. 140	170	v. State, 9 Humph. 646	110
Richards, Com. v. 1 Mass. 337	116, 116 a	U. S. v. 5 Blatch. 204	103
Com. v. 18 Pick. 434	227, 231	Ring v. Huntingdon, 1 Mill (S. C.), 162	542
v. Kountze, 4 Neb. 200	726	Rink v. State, 19 Ind. 152	312
R. v. 5 C. & P. 318	651	Ripley v. Babcock, 13 Wis. 425	730
R. v. 1 F. & F. 87	418, 455	v. Hebron, 60 Me. 379	817
v. Richards, 37 Penn. St. 225	457	Ripon v. Bittel, 30 Wis. 614	407, 538
Richardson v. Boston, 19 How. 263	591	Rippy v. State, 2 Head, 217	69, 75
Com. v. 126 Mass. 34	91	Rischer, State v. 1 Rich. 217	578, 580
v. Hitchcock, 28 Vt. 149	460	Ritchie v. Holbrook, 7 S. & R. 458	510
v. Hunter, 23 La. An. 255	594	v. Kinney, 46 Mo. 298	166
v. Johnson, 3 Brev. 51	555	Ritter v. Press Co., 68 Mo. 458	363
v. Mellish, 2 Bing. 241	526	Rivarav. Ghio, 3 E. D. Smith, 264	371
v. Newcomb, 21 Pick. 315	557	Rivers, R. v. 7 C. & P. 177	668
v. People, 85 Ill. 495	802	State v. 58 Iowa, 102	24
R. v. 8 Cox, 443; 2 F. & F. 343	32, 46, 53	v. State, 10 Tex. Ap. 177	140
R. v. 3 F. & F. 693	513, 515	Rives v. Thompson, 41 Ga. 68	215
v. Roberts, 23 Ga. 215	380	Roach, People v. 17 Cal. 297	263
v. State, 34 Tex. 142	35	v. State, 77 Ill. 25	429
v. State, 7 Tex. Ap. 487	778	v. State, 41 Tex. 261	402
Richart v. State, 57 Iowa, 245	758	v. State, 8 Tex. Ap. 478	738
Richeson, State v. 45 Mo. 575	342	Roane, State v. 2 Dev. 53	736, 764
Richey v. Ellis, Alc. & Nap. 111	566	Robb v. Hackley, 23 Wend. 50	492
Richie v. Bass, 15 La. An. 668	162	Robbins v. Fletcher, 101 Mass. 115	52
Richman v. State, 2 Greene (Iowa), 532	469	v. People, 95 Ill. 175	161, 799
Richmond v. Aiken, 25 Vt. 324	707	v. State, 8 Oh. St. 131	277, 281
Com. v. 6 Weekly Notes, 431	73	Roberts v. Allott, M. & M. 192	471, 476
Ricker, Com. v. 131 Mass. 581	225, 527	Com. v. 108 Mass. 296	286
		v. Doxen, Peake, 83	166
		v. Gee, 15 Barb. 449	429
		v. Johnson, 58 N. Y. 613	408
		v. People, 99 Ill. 275	120 a
		R. v. 1 Camp. 399	49, 699
		R. v. 2 C. & K. 607	387, 388
		R. v. 38 L. T. (N. S.) 690;	
		14 Cox, 101	164, 786

TABLE OF CASES.

	SECTION		SECTION
Roberts, Resp. v. 2 Dall. 124	144, 833	Rockwell v. Tunnicliff, 62 Barb.	171
v. State, 61 Ala. 401	382	408	
v. State, 68 Ala. 515	75, 227, 691, 757	Rockwood, R. v. 13 How. St. Tr.	486
State v. 1 Dev. 259	677	210	
v. State, 14 Ga. 8 580, 581,	586	Rodaback, State v. 19 Ind. 154	1
v. State, 14 Mo. 138	365	Roddam, R. v. Cowp. 672	351
State v. 81 N. C. 605	484	Roddy v. Finnegan, 43 Md. 490	430
State v. 52 N. H. 492	114,	Rodundo, People v. 44 Cal. 538	429
	164, 833	Roe v. Roe, 40 N. Y. Sup. Ct. 1	550,
v. State, 5 Tex. Ap. 141	294		560
v. State, 11 Tex. Ap. 275	728	v. State, 12 Vt. 93	491, 573
Robertson v. Ephraim, 18 Tex. 118	644	Roeback, R. v. 36 Eng. L. & Eq. 631	33
v. Miller, 1 McMull. (S. C.) 120	557	R. v. 25 L. J. M. C. 51	46
Penn. v. Addison, 246	73	Roelker's Case, 1 Sprague, 276	426
v. Stark, 15 N. H. 114	460	Rogers, Com. v. 7 Met. 500	338, 363,
State v. 30 La. An. 340	69		417, 418
Robey, State v. 8 Nev. 312	129, 144,	Com. v. (Pamph. Rep.)	489
	584	Sup. Ct. Mass. 1884, 17	
Robins, R. v. 1 C. & K. 456	725	Rep. 559	487
v. State, 9 Tex. Ap. 671	679	v. Crain, 30 Tex. 289	271
Robinson v. Blakely, 4 Rich. 586	482	Ex parte, 10 Tex. Ap. 655	114
v. Chadwick, 22 Oh. St. 527	401	v. Lewis, 19 Ind. 405	487
v. Com., 6 Bush, 309	171	People v. 18 N. Y. 9	661
Com. v. 1 Gray, 555	391,	v. Ritter, 12 Wall. 317	553,
	692		556
Com. v. Thach. C. C. 230	61	v. State, 62 Ala. 170	29, 220
v. Dana, 16 Vt. 474	371	v. Turner, 21 L. J. Exch. 9	565, 566
Ex parte, 6 McLean, 355	571	v. Walker, 6 Barr, 371	225,
v. Lane, 22 Miss. 161	593		731
v. Mandell, 3 Cliff. 169	10,	Rogier, R. v. 1 B. & C. 272; 2 D. & R. 431	260
544, 559, 561, 563, 847,	848	Rokeby v. Langston, 2 Keb. 314	354
People v. 19 Cal. 40	675	Roland v. State, 9 Tex. Ap. 277	390
People v. 2 Parker C. R. 235	284	Rolland v. Com., 82 Penn. St. 306	835
v. Quarles, 1 La. An. 460	323	Rollins v. State, 62 Ind. 46	66
R. v. 5 Cox C. C. 183	219	Rolfe, People v. 61 Cal. 540	459
R. v. 1 Craw. & D. 329	603,	Romain, State v. 58 Iowa, 46	828
	604	Rooker v. State, 65 Ind. 86	114
R. v. 1 Holt, 595	97, 98	Rooks v. State, 65 Ga. 33	446
R. v. 2 Leach, 749	45, 46, 52	Rooney, R. v. 7 C. & P. 517	24, 47
v. R. R., 7 Gray, 92	682	Roosa v. Loan Co., 132 Mass. 439	271
v. State, 16 Fla. 835	487	Roper, R. v. 1 Craw. & Dix, 93	573
State v. 9 Foster, 274	105	Rorabaugh, State v. 19 Iowa, 155	494
State v. 68 Ga. 833	227	Roric, State v. 74 N. C. 148	666, 672
State v. 87 Ind. 292	667	Rose v. Blackmore, Ry. & M. 384	478
v. State, 53 Md. 151	24, 150	v. Cunynghame, 11 Ves. 550	644
v. State, 57 Md. 15	262, 263,	v. State, 82 Ind. 344	801
	266	v. Taunton, 119 Mass. 99	225
v. State, 12 Mo. 592	632	Rosenbaum v. State, 33 Ala. 354	484
v. State, 16 N. J. L. 508	40	Rosenstock v. Tormey, 32 Md. 169	225, 644
v. State, 20 W. Va. 713	734		
Robles, People v. 34 Cal. 591	32	Rosenweig v. People, 63 Barb. 634	30, 484
Robson v. Alexander, 1 M. & P. 448	661	Rosier, State v. 55 Iowa, 517	749
Roby, Com. v. 12 Pick. 496	137, 570	Ross v. Buhler, 2 Mart. (N. S.) 313	509
Rocco v. State, 37 Miss. 357	510, 592	v. Close, 3 Dana, 189	811
Roche, R. v. C. & M. 341	666	v. Cutchall, 1 Binney, 399	525
		v. Demoss, 45 Ill. 447	385

TABLE OF CASES.

	SECTION		SECTION
Ross v. Gibbs, L. R., 8 Eq.	522 497, 505	Russell v. Frisbie, 19 Conn.	205 263,
v. Hayne, 3 Greene,	211 494		266
v. State, 62 Ala.	224 32, 263,	v. Hallett, 23 Kan.	276 809
	272, 698, 756	v. Jackson, 9 Hare,	387 498,
v. State, 1 Blackf.	390 129		504
v. State, 4 Lea,	442 580	v. Miller, 26 Mich.	1 683
State v. 29 Mo.	32 584, 698	People v. 46 Cal.	121 429
U. S. v. 92 U. S.	283 707, 835, 836	R. v. Taylor's Med. Jur.	
Rosser, R. v. 7 C. & P.	648 511	99	793
Roswell, State v. 6 Conn.	446 172	v. State, 71 Ala.	348 696
Roth v. State, 10 Tex.	Ap. 27 116, 116 a	v. State, 68 Ga.	612 764
Rothschild v. State, 7 Tex.	Ap. 519 97	v. State, 33 La. An.	135 11,
			441
Rouch v. R. R., 1 Q. B.	51 264	v. State, 53 Miss.	368 417, 751
Roudenbush, U. S. v. Bald.	514 66	v. State, 11 Tex. Ap.	288 68,
Rouse v. Whitel, 25 N. Y.	170 688		80, 263, 439
Rout, State v. 3 Hawks,	618 116, 116 a	Rust v. Shackelford, 47 Ga.	538 434
Rover, State v. 13 Nev.	17 1, 667	Ruston, R. v. 1 Leach,	408 369, 375
Row, R. v. R. & R.	153 651	v. State, 4 Tex. Ap.	432 261 a
Rowe v. Bird, 48 Vt.	578 825	Ruth v. Ford, 9 Kans.	17 401
Com. v. 105 Mass.	590 691	Rutherford v. Com., 2 Metc. (Ky.)	
Ex parte, 7 Cal.	184 473	387	650
State v. 61 Me.	171 173, 667	v. Morris, 77 Ill.	397 417
Rowell v. Lowell, 11 Gray,	420 272,	Ryalls v. R., 11 Q. B.	781 141
	412, 418	Ryan v. Follansbee, 47 N. H.	100 399
State v. 58 N. H.	314 471	v. People, 79 N. Y.	593 24, 477,
v. State, 44 Tex.	63 689		750
Rowland v. Ashby, Ry. & M.	231 667	State v. 30 La. An.	1176 294, 757
v. Burton, 2 Harr. (Del.)		Ryland, People v. 28 Hun,	568;
288	519	S. C. 1 N. Y. Cr. Rep.	123 441
R. v. 1 F. & F.	72 154		
Rowley v. R. R. L. R. 8 Exch.	226 539	S.	
Rowt v. Kile, 1 Leigh,	216 555	Sacket, Com. v. 22 Pick.	394 61, 63
Rowton, R. v. L. & C. 520;	10 Cox,	Sadler v. Sadler, 3 C. B. (N. S.)	
25 58, 59, 60, 61		87	730
Roy. Ins. Co. v. Noble, 5 Abb. Pr.		Safford v. Grout, 120 Mass.	20 459, 821
(N. S.) 55	402	Sager v. State, 11 Tex. Ap.	110 199,
Royal, People v. 58 Cal.	62 403, 405		690
Ruby v. State, 9 Tex. Ap.	353 510	Salander v. People, 2 Col. T.	48 445
Rudd, R. v. 1 Leach,	115 392, 443	Salge, State v. 2 Nev.	321 446, 592,
Rue, R. v. 13 Cox, 209;	34 L. T.		638
(N. S.) 400	651, 652, 677	Salisbury, R. v. 5 C. & P.	155 32
Rufer v. State, 25 Oh. St.	464 689, 699	v. State, 6 Conn.	101 116 a
Ruffner, Com. v. 28 Penn. St.	259 105	Salome Muller's Case (Pamph. N.	
Rugan, State v. 68 Mo.	214 153, 429	Orleans, 1846)	807
Ruhl, State v. 8 Iowa,	447 494, 725	Salt, R. v. 3 F. & F.	834 40
Ruloff v. People, 18 N. Y.	179; 3	R. v. (Staff. Spr. Ass. 1843)	439
Parker C. R. 401;	45 N. Y. 213	Salte v. Thomas, 3 B. & P.	188 526
312, 324, 325, 435, 435 a,	544,	Salter, R. v. 5 Esp.	125; 2 Stark.
632, 797, 799,	805	141	699
Rumford Chemical Works v. Heo-		Salvi, R. v. 10 Cox,	481, n. 570, 585
ker, 11 Blatch.	552 544	Sam v. State, 1 Swan,	61 511
Rumsey v. People, 19 N. Y.	41 412	State v. Wins. (N. C.)	300 801
Runnels v. State, 28 Ark.	121 439, 443,	Sampson v. State, 54 Ala.	241 678
	646, 689	Samuels v. Griffith, 13 Iowa,	103 483
Runyan v. Price, 15 Oh. St.	1 417	Sanborn, Com. v. 116 Mass.	61 627,
Rupp, Com. v. 9 Watts,	114 833		631
Rush v. State, 61 Ala.	213 460		
Rushing, State v. 2 N. & McC.	560 94		

TABLE OF CASES.

	SECTION		SECTION
Sanchez, <i>People v.</i> 24 Cal. 17	300	Scales v. Key, 11 A. & E. 819	816
<i>People v.</i> 22 N. Y. 147	418	Scanlan, <i>State v.</i> 58 Mo. 204	357, 366, 368
Sanders, <i>State v.</i> 30 Iowa, 582	171	Scates, <i>State v.</i> 5 Jones (N. C.),	420 677
<i>State v.</i> 68 Mo. 202	312	Schaben v. U. S. 6 Ct. of Cl. 230	191
<i>State v.</i> 76 Mo. 35	32, 429	Schearer v. Harber, 36 Ind. 536	224
<i>State v.</i> 84 N. C. 728	62, 663	Schell v. Plumb, 55 N. Y. 698	539
Sands v. Robison, 20 Miss. 704	510	<i>v. State</i> , 2 Tex. Ap. 30	227
Sanford v. Babcock, 33 Wis. 400	383	Schenley v. Com., 36 Penn. St. 29	484
<i>People v.</i> 43 Cal. 29	291, 417, 460	Scherpf v. Szadeczy, 4 E. D. Smith, 110	395
San Francisco v. Randall, 54 Cal. 408	100	Schindler, U. S. v. 18 Blatch. C. C. 227	485, 748
Sansom, R. v. 1 Den. 545	666	Schlagel, <i>State v.</i> 19 Iowa, 169	440, 441
<i>State v.</i> 3 Brev. 127	121	Schleneker v. <i>State</i> , 9 Neb. 241	417, 418
Sargent, Com. v. 129 Mass. 115	147	Schneider, <i>State v.</i> 35 Mo. 533	264
<i>v. Hampden</i> , 38 Me. 581	497	Schnieker v. <i>People</i> , 88 N. Y. 192	262, 263
<i>State v.</i> 32 Me. 429	484	Schnier v. <i>People</i> , 23 Ill. 17	449, 757
Sartin v. <i>State</i> , 7 Lea, 679	24	Schoenwold, <i>State v.</i> 31 Mo. 147	1
Sartor, <i>State v.</i> 2 Strobb. 60	522	Schoeppe, Com. v. Taylor's Med. Jur. 25	787
Sartorius v. <i>State</i> , 24 Miss. 602	446, 758	Scholes v. Hilton, 10 M. & W. 16	451
Sater, <i>State v.</i> 8 Iowa, 420	486	Schryver, <i>People v.</i> 42 N. Y. 1	106, 334, 338
Satterlee v. Bliss, 36 Cal. 489	521	Schuchardt v. Allens, 1 Wall. 359	24
Satterthwaite v. <i>State</i> , 6 Tex. Ap. 609	31, 47	Schusler v. <i>State</i> , 29 Ind. 394	20
Satterwhite v. <i>State</i> , 28 Ala. 65	334	Schuyllkill v. Copley, 67 Penn. St. 386	363
Saunders v. Mills, 6 Bing. 213	52	Schweitzer, <i>People v.</i> 23 Mich. 301	441, 491
<i>v. People</i> , 38 Mich. 218	440, 473, 477	Scoggins v. <i>People</i> , 37 Cal. 676	757
<i>R. v.</i> (Worc. Spr. Assiz. 1842)	439	Scott v. Baker, 37 Penn. St. 330	698
<i>v. State</i> , 37 Tex. 710	8, 771	Com. v. 123 Mass. 222	13, 312, 430, 435, 441, 442, 698, 803
Saunderson v. Nashua, 44 N. H. 492	482	<i>v. Com.</i> , 6 S. & R. 229	139
Savage, R. v. 13 Cox, 178	171	<i>v. Hooper</i> , 14 Vt. 535	362
<i>R. v.</i> 5 C. & P. 143	230	<i>v. Jones</i> , 4 Taunt. 865	163
<i>v. State</i> , 18 Fla. 909	266, 294	<i>v. People</i> , 63 Ill. 508	276, 281, 298
Sawtelle, Com. v. 11 Cush. 142	116, 116 a	<i>R. v. D. & B.</i> 47	141
Sawwell, R. v. Wills on Cir. Ev. 180	787	<i>R. v.</i> 25 L. J. M. C. 128; 7 Cox, 164	664
Sawyer's Case, 2 Hale P. C. 141	363	<i>v. Shepherd</i> , 2 W. Black. 892	826
Sawyer v. Birchmore, 3 Myl. & K. 572	502	<i>v. State</i> , 30 Ala. 503	699
<i>v. Boyle</i> , 21 Tex. 28	598	<i>v. State</i> , 48 Ala. 420	273
<i>v. Eifert</i> , 2 Nott & M. 511	60	<i>v. State</i> , 1 Hawks, 24	690
<i>v. People</i> , 91 N. Y. 667;	60, 331, 334	<i>v. State</i> , 64 Ind. 400	475, 477, 485
1 N. Y. Cr. Rep. 249	60, 331, 334	<i>State v.</i> 24 Kan. 68	32, 81
Saxon v. Whittaker, 30 Ala. 237	730	<i>State v.</i> 7 Lea, 232	95
Sayers v. Com., 88 Penn. St. 291	24, 51, 304, 339, 340, 785	<i>State v.</i> 12 La. An. 274	276
<i>v. State</i> , 30 Ala. 18	559	<i>State v.</i> 24 La. An. 161	493
Sayforth v. St. Louis, 52 Mo. 449	458	<i>State v.</i> 56 Miss. 287	24
Scaggs v. <i>State</i> , 8 Sm. & M. 722	264, 691	<i>State v.</i> 31 Mo. 121	154
Scalfe, R. v. 2 Den. C. C. 281; 17 Q. B. 238	229	<i>State v.</i> 39 Mo. 424	632
<i>R. v.</i> 1 M. & Rob. 551; 2 Lew. C. C. 50	304	<i>State v.</i> 45 Mo. 302	557

TABLE OF CASES.

	SECTION		SECTION
Scott, State v. 15 S. C. 434	586	Shakespeare, R. v. 10 East, 83	96
State v. 24 Vt. 129	148	Shall, People v. 9 Cow. 778	621
v. U. S., 1 Morris, 142	580, 585	Shank v. Butsch, 28 Ind. 19	555
Scovill v. Baldwin, 27 Conn. 316	749	Sharman v. Morton, 31 Ga. 34	385
Scranton v. Stewart, 52 Ind. 68	497	Sharp v. Emmett, 5 Whart. 288	483
Scully, R. v. 1 C. & P. 319	70	v. State, 6 Tex. Ap. 650	225
Scurry, State v. 3 Rich. 68	94, 96	U. S. v. 1 Pet. C. C. 118	731
Seaborn v. State, 20 Ala. 15	764	Shattuck v. Train, 116 Mass. 296	408
Sealey v. State, 1 Kelly, 213	483	Shaver, Com. v. 3 W. & S. 338	363
Seals v. State, 3 Bax. 459	764	Shaw v. Charlestown, 2 Gray, 107	419
State v. 16 Ind. 352	171	Com. v. 4 Cush. 594	465
Seaman v. Netherclift, L. R. 1 C.		Com. v. 7 Metc. 52	94
P. D. 540	453, 563	v. People, 3 Hun, 272	294
Seargent v. Seward, 31 Vt. 609	390	People v. 63 N. Y. 36	294
Searle, Com. v. 2 Binn. 332	114	R. v. 6 C. & P. 372	764
R. v. 1 M. & R. 75	417	R. v. R. & R. 526	570
Searls v. People, 13 Ill. 597	35	R. v. State, 60 Ga. 246	756
Sears v. Dennis, 105 Mass. 310	826	R. v. State, 58 N. H. 73	103
v. Schafer, 1 Barb. 408	417	v. Wrigley, 2 East, 500	109
Secrist, State v. 80 N. C. 450	408, 447	Shawley, State v. 5 Hayw. 256	114
Sedgwick v. Watkins, 1 Ves. Jun.		Shay v. Com., 36 Penn. St. 305	445
49	393	Shea, Com. v. 115 Mass. 102	342
Seeley v. Engell, 17 Barb. 530; 13		People v. 8 Cal. 538	272
N. Y. 542	395, 447	Shee, State v. 3 R. I. 535	733
Sego, Com. v. 125 Mass. 210	104, 647, 651, 652	Sheen v. Bumstead, 2 H. & C. 193	257
Seibert, Com. v. Whar. on Hom.		R. v. 2 C. & P. 634	579
§§ 227, 506, 610	69, 73, 83	Sheets v. Selden, 2 Wall. 177	833
Selden v. Bank, 3 Minn. 166	458	Shelburne Bank v. Townsley, 102	
Self v. State, 6 Bax. 244	646	Mass. 177	837, 839
Selke v. Isaacson, 1 F. & F. 194	446	Sheldon v. Benham, 4 Hill, 129	837
Sellers, R. v. Car. C. L. 233	294	v. Clark, 1 Johns. 513	331
Sells v. Hoare, 3 B. & B. 232; 7		v. Frink, 12 Pick. 568	153
Moore, 36	354	v. Wright, 5 N. Y. 497	594
Selma v. Keith, 53 Ga. 178	24	Shellard v. Harris, 5 C. & P. 594	504
Selten, R. v. 11 Cox, 674	736, 764	R. v. 9 C. & P. 277	483, 699
Selvidge v. State, 30 Tex. 60	677	Shelley, R. v. 2 Leach, 381	164
Selway v. Chappell, 12 Sim. 113	359	R. v. 3 T. R. 141	566
Senser v. Bower, 1 Penn. R. 450	827	Shelton, State v. 2 Jones (N. C.),	
Sergeant, R. v. Ry. & M. 352	390, 391, 393, 394, 397	360	278, 288
Serpentine v. State, 1 How. (Miss.)		v. State, 34 Tex. 662	412
256	646, 689	Shepard, Com. v. 1 Allen, 575	46
Serra, R. v. 2 C. & K. 56	362	v. Parker, 36 N. Y. 517	479
Sevrin v. People, 37 Ill. 414	585	Shepardson, People v. 49 Cal. 629	66
Sexton v. North Bridgwater, 116		Shepherd, Com. v. 6 Binn. 283	398, 518, 828
Mass. 200	419	v. Hamilton Co., 8 Heisk.	
R. v. 1 Dea. Cr. L. 424, 427	673	380	460
R. v. 2 Russ. C. & M. 867	666	v. People, 25 N. Y. 406	574
Seymour v. State, 1 Houst. C. C.		R. v. 7 C. & P. 579	647, 673
508	265	State v. 7 Conn. 54	584
v. Wilson, 14 N. Y. 567	431	v. State, 72 Ill. 480	802
Shaakleford v. State, 2 Tex. Ap.		v. Willis, 19 Ohio, 142	456
385	761	Sheppard, R. v. R. & R. 169	736
Shaffer, State v. 59 Iowa, 290	748, 763	v. State, 42 Ala. 531	127
Shaffner v. Com., 72 Penn. St. 60	50	Sherburn, State v. 58 N. H. 535	332, 603
Shaffer v. State, 20 Ohio, 1	171	Sheridan's Case, 31 How. St. Tr.	
Shaible v. Ins. Co., 9 Phil. R. 136;		679	167
1 Weekly Notes, 369	544, 805	Sheridan v. Medara, 10 N. J. Eq.	
Shailer v. Bumstead, 97 Mass. 112	54	469	359

TABLE OF CASES.

	SECTION		SECTION
Sheriff, <i>People v.</i> 29 Barb. 622	504	Sidney <i>v.</i> Sidney, 3 P. Wms. 275	828
Sherington, <i>R. v.</i> 2 Lew. C. C. 123	677	State <i>v.</i> 74 Mo. 390	758
Sherman <i>v.</i> Blodgett, 28 Vt. 149	458	Sigourney <i>v.</i> Sibley, 21 Pick. 101	509
State <i>v.</i> Smith, 20 Ill. 350	153	Sill <i>v.</i> Reese, 47 Cal. 294	552
State <i>v.</i> (Superior Ct. Conn. 1872)	50	Sillick <i>v.</i> Booth, 1 Y. & C. 117	812
Sherry, <i>Com. v.</i> App. to Whart. on Hom.	262	Sills <i>v.</i> Brown, 9 C. & P. 604	418
Shields, <i>State v.</i> 45 Conn. 266	699	Silver, <i>State v.</i> 3 Dev. L. 332	494
State <i>v.</i> 13 Mo. 236	486	Silvus <i>v.</i> State, 22 Oh. St. 90	334
Shinborn, <i>State v.</i> 46 N. H. 497	199,	Simmonds, <i>R. v.</i> 4 Cox, 277	638, 641
459, 552, 560		R. <i>v.</i> 1 C. & P. 84	448
Shinkle <i>v.</i> Cook, 17 Penn. St. 159	551	Simmonds, 5 Ec. & Mar. Cas. 324	389
Shipley, <i>R. v.</i> 4 Doug. 73, 177	739	Simmons <i>v.</i> Com., 5 Binn. 617	111
State <i>v.</i> Todhunter, 7 C. & P. 680	839	State <i>v.</i> Holster, 13 Minn. 249	463
Shippey, <i>State v.</i> 10 Minn. 223	764	State <i>v.</i> Jenkins, 76 Ill. 482	640
Shipply <i>v.</i> People, 86 N. Y. 376	34, 46	State <i>v.</i> McKay, 5 Bush, 25	594
Shitler <i>v.</i> Bremer, 23 Penn. St. 413	553	State <i>v.</i> Simmons, 11 Jur. 830	387
Shoeffler <i>v.</i> State, 3 Wis. 820	664, 668	State <i>v.</i> State, 7 Ham. 116	114
Shoemaker, <i>State v.</i> 7 Mo. 177	129	Simmonsto <i>R. v.</i> 1 C. & K. 164	171, 686
U. S. <i>v.</i> 2 McLean, 114	573	Simms <i>v.</i> State, 60 Ga. 145	510
Shoenberger <i>v.</i> Hackman, 37 Penn. St. 87	749	State <i>v.</i> 68 Mo. 305	338
Shook <i>v.</i> Pate, 50 Ala. 91	545	Simon <i>v.</i> Gratz, 2 Penn. R. 417	508
Shorb <i>v.</i> Kinzee, 80 Ind. 500	555	State <i>v.</i> State, 5 Fla. 285	690
Shore <i>v.</i> Bedford, 5 Man. & Gr. 271	504	State <i>v.</i> 50 Mo. 370	281, 651, 658
Short <i>v.</i> Lee, 2 Jac. & W. 468	833	Simonds, <i>State v.</i> 3 Mo. 415	571
State <i>v.</i> Mercier, 3 Mac. & Y. 205	469	Simons <i>v.</i> Vulcan Co., 61 Penn. St. 202	53
State <i>v.</i> State, 63 Ind. 376	312	Simpson, <i>Com. v.</i> 9 Met. 138	144
Short Mt. Coal Co. <i>v.</i> Hardy, 114 Mass. 191	455	State <i>v.</i> People, 48 Mich. 474	77, 283, 286
Shorter, <i>People v.</i> 4 Barb. 460; 2 Comstock, 193	68, 757	R. <i>v.</i> 1 Lew. C. C. 78	284
Shortz <i>v.</i> Unangst, 3 W. & S. 45	208, 749	R. <i>v.</i> 1 Mood. C. C. 410	673
Shown <i>v.</i> McMackin, 9 Lea, 601	810	State <i>v.</i> Robinson, 12 Q. B. 512	680
Shove <i>v.</i> Wiley, 18 Pick. 558	252	State <i>v.</i> State, 59 Ala. 1	736
Shreve <i>v.</i> Dulany, 1 Cranch, C. C. 499	214	State <i>v.</i> State, 4 Humph. 456	111
Shrewsbury Peerage Case, 7 H. of L. Cas. 1, 13 16, 168, 523, 526,	555	State <i>v.</i> State, 28 Minn. 66	595
Shriedly <i>v.</i> People, 23 Oh. St. 30	44	U. S., 3 Penn. 437	552
Shrivers <i>v.</i> State, 7 Tex. Ap. 450	669, 688	Sims <i>v.</i> Sims, 75 N. Y. 466	439, 489, 596 a,
Shuford, <i>State v.</i> 69 N. C. 486	30	State <i>v.</i> 2 Bailey, 29	602
Shuler, <i>People v.</i> 28 Cal. 490	1	Simson <i>v.</i> State, 31 Ind. 90	368, 369
Shultz <i>v.</i> Moore, 1 McLean, 520	164	Single, <i>State v.</i> 83 N. C. 630	412
State <i>v.</i> State, 13 Tex. 401	1	Sindram <i>v.</i> People, 88 N. Y. 196	751
Shurtleff <i>v.</i> Willard, 19 Pick. 202	359	Singer <i>v.</i> McFarland, 53 Iowa, 540	557
Sias, <i>State v.</i> 17 N. H. 558	578, 580	Singleton <i>v.</i> Johnson, 9 M. & W. 67	100
Sibley <i>v.</i> Phelps, 6 Cush. 172	116 a,	Sing Lum, <i>People v.</i> 61 Cal. 538	830
Sibley <i>v.</i> Waffle, 16 N. Y. 180	497	Sisson <i>v.</i> Conger, 1 Thomp. & C. 564	369
Sichel <i>v.</i> Lambert, 15 C. B. (N. S.) 781	787, 827, 828	State <i>v.</i> R. R., 14 Mich. 489	457
Sickle <i>v.</i> People, 29 Mich. 61	556	Setterlee <i>v.</i> State, 13 Tex. Ap. 587	761
Sidebottom <i>v.</i> Adkins, 27 L. J. Ch. 152; 3 Jur. (N. S.) 63	468, 469	Sizer <i>v.</i> Burt, 4 Denio, 426	203, 205
Sidelinger <i>v.</i> Bucklin, 64 Me. 371	492	Skeen, <i>R. v.</i> 8 Cox, 143	471
		Skidmore <i>v.</i> Briker, 77 Ill. 164	580
		State <i>v.</i> State, 87 N. C. 509	734, 757
		State <i>v.</i> State, 43 Tex. 93	736
		Skinner <i>v.</i> Perot, 1 Ashmead, 57	363, 364

TABLE OF CASES.

	SECTION		SECTION
Skinner v. R. R. L. R. 9 Ex. 298	516	Smith, Com. v. 7 Smith's Laws, Ap- pen. ; 2 Wheel. C. C. 80	697, 756, 785
Slade v. Minor, 2 Cranch, C. C. 139	830	Com. v. 6 S. & R. 568	552
Slaney, R. v. 5 C. & P. 213	463, 551	v. Daniell, L. R. 18 Eq. 649	503, 517
Slater v. Cave, 12 Oh. St. 80	9	v. Hoskins, 7 J. J. Marsh.	502
v. Hill, 13 R. I. 314	109	v. Jeffries, 9 Price, 257	331, 342
People v. 5 Hill (N. Y.), 401	109	v. Knowlton, 11 N. H. 197	811
Slatterie v. Pooley, 6 M. & W. 669	684	v. Kramer, 1 Am. Law Reg.	353
Slattery v. People, 76 Ill. 217	680	v. Martin, C. & M. 58	321
Slaughter v. State, 6 Humph. 410	579, 584	v. Pattison, 45 Miss. 619	607
Slaymaker v. Wilson, 1 Penn. 216	553, 555	People v. (Cal. 1879) 20 Alb.	L. J. 423 ; 4 Pac. Coast L.
Sleeman, R. v. P. & D. 249 ; 6 Cox, 245 ; Dears. C. C. 249	651, 652	J. 213	771
Sleep, R. v. 8 Cox, 472	725	People v. 57 Cal. 130	730
Sleeper v. Van Middlesworth, 4 Denio, 431	816	People v. 2 City Hall Rec.	77, 81
Sliney, Com. v. 126 Mass. 49	679-80	People v. 3 Weekly Dig. 162	580
Sloan v. R. R., 45 N. Y. 125	21	People v. 28 Hun, 628	440
v. State, 55 Iowa, 217	1, 397	People v. 1 N. Y. Cr. Rep.	72
v. Summers, 20 N. J. L. 6	461	People v. 103 Ill. 82	758
Sloane v. People, 47 Ill. 76	758	v. Prescott, 17 Mo. 277	160, 550, 552
State v. 47 Mo. 604	757	R. v. 8 B. & C. 341	603, 604, 609
Slocum, People v. 90 Ill. 274	718	R. v. 2 C. & K. 207	691
Sloggett, R. v. Pearce & D. 656 ; 7 Cox, 139	664	R. v. 1 Cox, 260	801
Small v. Com., 91 Penn. St. 304	30	R. v. 8 Cox, 27	733
State v. 31 Mo. 197	593	R. v. 2 C. & P. 633	40
State v. 11 S. C. 262	442	R. v. 4 C. & P. 411	45
Smalley, State v. 50 Vt. 736	32	R. v. 3 F. & F. 123	758
Smallwood, State v. 75 N. C. 104	448	R. v. L. & C. 607 ; 42 L. T.	N. S. 160
U. S. v. 5 Cranch, C.		R. v. 1 Mood. C. C. 289, 402	97, 390, 391
C. 35	393	R. v. R. & R. 339	227
Smathers v. State, 46 Ind. 447	758	R. v. 1 Stark. 242	668
Smead v. Williamson, 16 B. Mon. 492	390	R. v. 2 Stark. 208	227
Smith v. Blandy, R. & M. (N.P.) 258	688	R. v. 14 Up. Can. Q. B. 565	173
v. Brown, 1 Wend. 231	725	v. Rankin, 20 Ill. 14	548
v. Candler, 3 Hawks, 390	552	v. R. R. L. R. 5 C. P. 98	824
v. Castles, 1 Gray, 108	472	v. Sherwood, 4 Conn. 276	593
v. Coffin, 6 Shep. 157	361, 362	v. Smith, 22 Iowa, 516	603
Com. v. 11 Allen, 243	112	v. Smith, 43 N. H. 536	153
v. Com., 6 B. Monr. 21	457	v. Smith, 4 Paige, 432	816
v. Com., 1 Duv. 224	339	v. Stapleton, Plowd. 193	818
v. Com., 7 Grat. 593	580, 585, 587, 590	v. State, 9 Ala. 990	225, 482
v. Com., 10 Grat. 734	646, 650, 652	v. State, 52 Ala. 407	698
v. Com., 21 Grat. 809	324, 632	v. State, 53 Ala. 486	271
Com. v. 2 Gray, 516	362	v. State, 62 Ala. 29	604
Com. v. 1 Mass. 245	127	v. State, 37 Ark. 274	440
Com. v. 103 Mass. 444	725	State v. 1 Bailey, 283	365
Com. v. 119 Mass. 305	632, 649, 653, 658, 672	State v. 49 Conn. 376	276, 412, 414, 430
Com. v. 12 Met. 238	439, 445	State v. 5 Day, 175	39
Com. v. 6 S. & R. 568	551, 552, 560	v. State, 23 Ga. 297	380

TABLE OF CASES.

	SECTION		SECTION
Smith v. State, 62 Ga. 663	763	Solita v. Yarrow, 1 M. & Rob. 133	556
v. State, 3 Hawks, 390	552	Solliday v. Com., 28 Penn. St. 13	592
v. State, 33 Ind. 159	118	Somerville, Com. v. 1 Va. Cas. 164	579
v. State, 58 Ind. 340	758	v. Hawkins, 10 Com. B.	
v. State, 48 Iowa, 595	258	583	739
v. State, 54 Iowa, 104	312	Soper, State v. 16 Me. 293	445, 513,
State v. 2 Ired. 402	391		515, 698
State v. 12 La. An. 349	153	Sorg v. Congregation, 63 Penn. St.	
State v. 22 La. An. 468	460	156	458
State v. 4 Lea, 428	446	Soto, People v. 49 Cal. 69	664
State v. 32 Me. 369	412	People v. 53 Cal. 415 24, 150,	456
State v. 58 Miss. 867	486	People v. 59 Cal. 367	380
State v. 53 Mo. 139	338, 584	Soule, State v. 10 Nev. 453	698
State v. 86 N. C. 705	439	Soulis's Case, 5 Greenl. 407	393
State v. 49 N. H. 155	573	Sourton, R. v. 5 A. & E. 180	518
State v. 2 Ohio St. 511	405	South v. People, 98 Ill. 261	632
State v. 10 Rh. I. 258	725	Southard v. Rexford, 6 Cow. 254	463,
State v. 12 Rich. 430	69, 75		466, 469
State v. 2 Strobh. 77	764	Southey v. Nash, 7 C. & P. 632	446
v. State, 41 Tex. 352	225, 230	Southwick v. Southwick, 49 N. Y.	
v. State, 42 Tex. 444	312, 314	513	401
v. State, 13 Tex. Ap. 507	220,	Southworth v. Bennett, 58 N. Y.	
	431, 758	659	486
State v. 43 Vt. 324	585	v. State, 5 Conn. 325	147
v. Tebbitt, L. R., 1 P. & D.		Sowers v. Dukes, 8 Minn. 23	460
398	730	Spalding v. Hedges, 2 Penn. St.	
U. S. v. 2 Bond, 323	66	240	537
U. S. v. 4 Day, 121	471	v. Saxton, 6 Watts, 338	153
v. Walton, 8 Gill. 87	551	Spangler v. Com., 3 Binn. 533	116 a
v. Weeks, 54 Iowa, 411	482	Sparkes, R. v. 1 Peake, 77	508
v. Wilson, 3 B. & Ad. 728	9	Sparks, Com. v. 7 Allen, 534	390, 396,
v. Wood, 37 Tex. 616	594		402
Smith's Case, 4 City Hall Rec. 167	40	v. Com., 3 Bush, 111	826
Smitherman v. State, 27 Ala. 23	144	R. v. 1 F. & F. 388	439, 441
Smithers, R. v. 5 C. & P. 332	678	v. State, 59 Ind. 82	262
Smiths v. Shoemaker, 17 Wall. 630		State v. 78 Ind. 166	147
	644, 682	Sparr v. Wellman, 11 Mo. 230	458
Smithwick v. Evans, 24 Ga. 461	376	Sparrow, State v. 3 Murph. 487	446
Smouse, State v. 50 Iowa, 209	138	Spaulding v. Knight, 116 Mass.	
Snell, State v. 9 Rh. I. 112	114	148	225
State v. 46 Wis. 524	757, 758	Spear v. Richardson, 34 N. H. 428	460
Snelling, Com. v. 15 Pick. 337		v. Richardson, 37 N. H. 23	418
	52, 736	State v. 6 Mo. 644	574
Snow, Com. v. 111 Mass. 411	441	Spears v. State, 2 Ohio St. 583	652
v. Gould, 74 Me. 540	496	Speed, R. v. 46 L. T. (N. S.) 174	120 a
v. Paine, 114 Mass. 520	431	Speer v. State, 4 Tex. Ap. 474	661
v. State, 54 Ala. 138; 58 Ala.		Speight, State v. 69 N. C. 72	487
372	225	Speights v. State, 1 Tex. Ap. 551	34
Snowden v. State, 7 Baxt. 482	692	Spence, State v. 2 Harring. 348	552
Snyder v. Com., 85 Penn. St. 519	30,	Spencer v. Com., 2 Leigh, 751	39
	58, 61	R. v. 7 C. & P. 776; 2 Lew.	
v. Laframboise, Breese, 268	698	C. C. 125	651
v. Nations, 5 Blackf. 295	375	v. Roper, 13 Ired. (L.)	
v. Snyder, 6 Binney, 488	390	333	811
v. State, 59 Ind. 105	49, 664	v. State, 50 Ala. 124	334
v. State, 70 Ind. 349	420	v. State, 31 Tex. 64	699
State v. 50 N. H. 150	588	State v. 1 Zab. (21 N. J.	
U. S. v. 4 McCr. 618	34	L.) 196	336, 337, 729, 730
Sodusky v. McGee, 5 J. J. Marsh.		Spensks v. State, 57 Ala. 42	452, 457
621	465	Speyer v. Stern, 2 Sweeny, 516	156

TABLE OF CASES.

	SECTION		SECTION
Spicer, R. v. 1 C. & K. 699; 1 Den.		Starks v. People, 5 Denio, 106	486,
C. C. 82	124		490, 491
v. State, 69 Ala. 159	650, 661,	Starling, State v. 6 Jones (N. C.),	338
	678	366	
Spicott's Case, 5 Rep. 58	379	Statur v. State, 9 Tex. Ap. 273	116,
Spielman, People v. (N. Y. Ct. Ap.			122
1879) 20 A. L. J. 96	48	Staunton v. Parker, 19 Hun, 55	516
Spier's Case, 1 Dev. 491	574	Staup v. Com., 74 Penn. St. 458	445,
Spier v. State, 86 N. C. 600	666		721
Spill v. Maule, L. R. 4 Ex. 232	739	Stazey v. State, 58 Ind. 514	107
Spilsbury, R. v. 7 C. & P. 187	281,	St. Clair, People v. 55 Cal. 524	196
	667, 676	Stearns, Com. v. 10 Met. 256	33, 39
Spirey v. State, 58 Miss. 858	24, 69, 75	Stebbins, State v. 29 Conn. 463	441
Spittle v. Walton, L. R. 11 Eq. 420		Stedman v. Gooch, 1 Rep. 6	603
	370, 371	State v. 7 Porter, 495	584
Spiva v. Stapleton, 38 Ala. 171	408	Steel, R. v. 1 Leach, 452	375
Spooner, People v. 1 Denio, 343	556,	Steele v. People, 45 Ill. 152	39
	559	R. v. 12 Cox, 168	287
Spradling v. Conway, 51 Mo. 51	399	State v. 61 Ala. 213	263, 264,
Sprague v. Duel, 1 Clarke (N. Y.),			296
90	730	Steen v. State, 20 Ohio St. 333	390,
People v. 53 Cal. 422	380, 446		393, 400
Sprowl v. Lawrence, 33 Ala. 671	539	Steere v. Tenney, 50 N. H. 461	191
Spry, R. v. 3 Cox C. C. 221	567	Stegall v. Stegall, 2 Brock. 256	828
Squier v. State, 66 Ind. 317, 604	91	Stein v. Bowman, 13 Pet. 209	399, 402
Squire v. State, 46 Ind. 458	171, 172,	Steinham v. U. S., 2 Paine C. C.	
	810	168	441
Squires, State v. 48 N. H. 364	689	Steinkeller v. Newton, 1 Scott N.	
Stackhouse, People v. 49 Mich. 76	488	R. 148; S. C., 9 C. & P. 313	227
State v. 24 Kan. 445	458	Stephen v. State, 11 Ga. 225	646, 661
Stafford v. State, 55 Ga. 592	32, 654	Stephens, In re, L. R. 9 C. P. 187	544
Stagner v. State, 9 Tex. Ap. 440	296	v. People, 19 N. Y. 549	156
Stainforth, R. v. 11 Q. B. 66	835	v. People, 4 Parker C.	
Staley, State v. 14 Minn. 105	484, 649	R. 396	412, 756
Stalker v. State, 9 Conn. 341	34, 39	Stephenson, R. v. 1 L. & C. 165;	
Stalmaker, State v. 2 Brev. 1	551, 552	34 L. J. M. C. 147	230
Stamper v. Griffin, 12 Ga. 450		v. State, 28 Ind. 272	313
	156, 491	Sterland, U. S. v. 3 Quart. L. J.	
Stanbro v. Hopkins, 28 Barb. 265	475	244; 6 Pitts. L. J. 50	227
Standifer, State v. 5 Porter, 523	580,	Stern v. People, 102 Ill. 540	231
	586, 587, 590	Sternburg v. Callanan, 14 Iowa,	
Stanley, People v. 47 Cal. 113	698,	251	603
	699, 750	Stetter, U. S. v. U. S. Cir. Ct. Phila.	
v. Stanton, 36 Ind. 445	400	Feb. 1852	365
v. State, 26 Ala. 26	417, 460	Stevens v. Com., 4 Leigh, 683	140
State v. 48 Iowa, 221	439-441	v. Fassett, 27 Me. 266	571
Stanly, State v. 4 Jones (N. C.),		v. Hoy, 43 Penn. St. 260	833
290	580, 585	People v. 5 Hill (N. Y.),	
Stannard, R. v. 7 C. & P. 673	60	616	835
Stanton, R. v. 5 Cox, 324	585	People v. 47 Mich. 411	698,
Stape v. People, 85 N. Y. 390	486		699, 700
Staples, State v. 47 N. H. 113	229,	v. State, 31 Ind. 485	339
	472, 742, 749, 750	v. State, 1 Tex. Ap. 591	69, 80
v. Wellington, 58 Me. 453	730	U. S. v. 4 Cranch C. C. 341	261
Stapleton v. Crofts, 18 Q. B. 368	402	Stevenson, Com. v. 127 Mass. 448	363.
R. v. 1 Craw. & Dix. 163	733	v. Hoy, 43 Penn. St.	
Starke, State v. 1 Strobh. 479	336,	191	160.
	338, 730	Steviock v. Com., 78 Penn. St. 460	
Starkey v. People, 17 Ill. 17	281, 297,		427, 428.
	301, 303	Steward v. State, 7 Tex. Ap. 326	170

TABLE OF CASES.

	SECTION		SECTION
Stewart, Com. v. 1 S. & R. 342	255,	Stone v. State, 4 Humph. 27	30, 51,
	260, 261		785
v. Com., 4 S. & R. 194	116	State v. Rice, 147	679
People v. 28 Cal. 395	60, 66	State v. 3 Tex. Ap. 675	440
v. Redditt, 3 Md. 67	272	U. S. v. 12 Rep. 421	651
v. State, 26 Ala. 44	698	v. Watson, 1 Ala. Sel. Cas.	
State v. 51 Iowa, 312	438	236 ; 37 Ala. 279	272, 460
v. State, 2 Lea, 598	281, 284,	Stones v. Menhem, 2 Ex. R. 382	312
	298	Storey v. Lennox, 1 Myl. & C. 525	505
State v. 9 Nev. 130	434	Story, R. v. R. & R. 81	223
v. State, 5 Ohio, 242	144, 584	Stotts, State v. 26 Mo. 307	445
v. State, 19 Ohio St. 302	459	Stoudenmeier v. Williamson, 29	
v. State, 22 Oh. St. 477	66	Ala. 558	538
Steyner v. Droitwich, Skin. 623 ;		Stoughton v. State, 2 Oh. St. 562	102
1 Salk. 281 ; 12 Mod. 85 ; Holt,		Stout, People v. 3 Parker C.R. 670	516
290	530, 537	People v. 4 Parker C. R. 71,	
St. George, R. v. 9 C. & P. 483	493	132	46, 51
St. George's v. St. Margaret's, 1		v. Russell, 2 Yeates, 334	474
Salk. 123	828	Stouvenel v. Stephens, 2 Daly (N.	
Stickney, State v. 41 Iowa, 232	460	Y.), 319	811
Stiles v. State, 57 Ga. 183	263	Stoveld, R. v. 6 C. & P. 489	570
Stilling v. Thorpe, 54 Wis. 528	407,	Stover v. People, 56 N. Y. 315	66,
	538	429, 435 a, 758	
Stitt v. Huidekopers, 17 Wall. 384	382	Stow, Com. v. 1 Mass. 54	330
St. Louis v. State, 8 Neb. 81	51, 785	Stowell, U. S. v. 2 Curtis C. C. 153	573
St. Louis Mut. Ins. Co. v. Graves,		Strachan, R. v. 7 Cox, 65	471
6 Bush, 290	410	Strady v. State, 5 Cold. 300	677, 698
Stobart v. Dryden, 1 M. & W. 615,		Strait v. State, 43 Tex. 486	678
626	280, 288	Strander, Com. v. 11 W. Va. 747	338
Stock, People v. 1 Idaho, 218	80, 757	Strange, <i>Ex parte</i> , 21 Oh. St. 610	833
Stockdale v. Hansard, 9 A. & R.		People v. 61 Cal. 496	429
131	723	v. People, 24 Mich. 1	49
Stocken v. Collen, 7 M. & W. 515	839	Stratton v. State, 45 Ind. 468	490, 491
Stockett v. Jones, 10 Gill & J. 276	602	Straw, State v. 50 N. H. 460	402
Stockflesh v. De Tastet, 4 Camp.		Strawhern v. State, 37 Miss. 422	445
11	661	Street v. State, 43 Miss. 1	698
Stocking v. State, 7 Ind. 326	326, 441	v. Street, 11 Leigh, 498	602
Stockwell v. Holmes, 33 N. Y. 53	493	v. State, 7 Tex. Ap. 5	32, 46
v. Silloway, 113 Mass.		Stretch, R. v. 5 A. & E. 503	350
384	53	Stricker, Com. v. 1 Br. App. xlvii.	828
Stoddart, Com. v. 9 Allen, 380	97	Stringfellow v. State, 26 Miss. 157	637
Stoever v. Whitman, 6 Binney,		Stripp, R. v. Dears. C. C. 648 ; 36	
416	532	Eng. L. & Eq. 587	669
Stoffer v. State, 15 Oh. St. 47	380	Strode v. Magowan, 2 Bush, 621	828
Stokeley, State v. 16 Minn. 282	418	Stroner, R. v. 1 C. & K. 650	448
Stokes v. People, 53 N. Y. 164	329,	Strong v. Bradley, 13 Vt. 9	604
334, 479, 484, 757, 764		v. Brewer, 17 Ala. 706	551
R. v. 3 C. & K. 185	336, 337,	People v. 30 Cal. 151	20, 380
	729, 730	v. Place, 4 Rob. N. Y. 385	323
v. Salamons, 9 Hare, 79	723	v. Slicer, 35 Vt. 40	683
v. State, 5 Bax. 619 ; Alb.		v. State, 86 Ind. 208	34, 53
L. J. May 6, 1876	313,	Strother, U.S. v. 3 Cranch C.C. 432	463
	315, 796	Stroud, R. v. 2 Mood. C. C. 270	97
v. State, 18 Ga. 17	487	Stuart v. Binsse, 10 Bosw. (N. Y.)	
Stolp v. Blair, 68 Ill. 543	492	436	545
Stone v. Blackburne, 1 Esp. 37	447	v. People, 42 Mich. 255	333,
v. Hubbard, 7 Cush. 595	559	750, 758, 763	
R. v. 1 F. & F. 311	615, 638, 641	Stubbs, R. v. 33 Eng. L. & Eq. 552 ;	
R. v. 6 T. R. 527	698, 699, 700,	Dears. C. C. 555 ; 7 Cox,	
	701	48	441

TABLE OF CASES.

	SECTION		SECTION
Stubbs, R. v. 25 L. J. M. C. 16	442	Swan v. People, 98 Ill. 610	750
State v. 49 Iowa, 203	225	R. v. Foster, 104	130
Stuckey v. Bellah, 41 Ala. 700	417	Swansea Vale R. R. v. Budd, L. R.	
Studdy v. Sanders, 2 D. & R.		2 Eq. 274	567
347	503	Swatkins, R. v. 4 C. & P. 559, n. b	667
Stumm v. Hummel, 39 Iowa, 478	312	Swayse, State v. 30 La. An. 1266	
Sturge v. Buchanan, 10 A. & E.			735, 736
598	214, 492	Sweat v. State, 4 Tex. Ap. 617	146
Sturla v. Freocia, 40 L. T. (N. S.)		Sweet v. Sherman, 21 Vt. 23	491
861; S. C. 43 L. T. (N. S.) 209		Sweetzer v. Lowell, 33 Me. 448	559
	233, 530	Sweigart v. Lowmarter, 14 S. & R.	
Sturtivant, Com. v. App. to Whart.		200	542
on Hom. 1, 764, 768,		v. Richards, 8 Penn. St.	
777, 778, 779, 784, 796		436	548, 557, 560
Com. v. 117 Mass. 122	24,	Swift v. Applebone, 23 Mich. 252	224
31, 32, 163, 407, 417, 419,		Swindle v. State, 2 Yerg. 581	440
459, 460, 538, 649, 690,		Swinford, People v. 57 Cal. 68	758
764, 767, 778, 784, 796		Swink, State v. 2 Dev. & Bat. 9	679
Sullivan v. Com., 93 Penn. St.		Swinerton v. Ins. Co., 9 Bosw. (N.	
284	282, 408	Y.) 361	225
v. People, 31 Mich. 1	334	R. v. C. & M. 593	681
People v. 3 Selden, 396	764	Swinney v. State, 8 Sm. & M. 576	
v. State, 66 Ala. 48	58		144, 584
v. State, 51 Iowa, 142	294,	Swinson, People v. 49 Cal. 388	757
	295	Swish's Case, 2 City Hall Rec. 77	508
v. State, 6 Tex. Ap. 319	229	Swisher v. Com., 26 Grat. 963	286
Summer v. State, 5 Blackf. 671	91	Sykes v. Dunbar, 2 Selw. (N. P.)	
Summerbell v. Summerbell, 37 N.		1059; 4 Bl. Comm. 510	513
J. Eq. 603	637	Sylvester v. State, 71 Ala. 17	227, 230,
Summons v. State, 5 Oh. St. 325	227,	477, 658, 680, 750, 757	
	229, 231, 331, 461	v. State, 42 Tex. 496	261
Sumner v. Crawford, 45 N. H.		Symonds v. Peck, 10 How. (N. Y.)	
416	482	Pr. 395	400
v. State, 5 Blackf. 579	1	People v. 19 Cal. 275	264
v. State, 74 Ind. 5291,	121		
v. State, 5 Tex. Ap. 374	426		
Sumners v. State, 5 Tex. Ap. 355	426,		
	516		
Supt. v. Atkinson, 1 Add. 215	555		
Susquehanna R. R. v. Quick, 68			
Penn. St. 189	179, 603		
Sussex Peerage, 11 Cl. & F. 84	163		
Sutcliffe, R. v. 4 Cox, 270	632		
Sutherland, Com. v. 109 Mass.			
342	154, 578, 593		
Sutton v. Darke, 5 H. & N. 649	539		
v. Davenport, 27 L. J. C. P.			
54	748		
v. Fox, 55 Wis. 33	360 a		
v. Johnson, 62 Ill. 209	30		
R. v. 5 B. & Ad. 52	579		
R. v. 4 M. & Sel. 542; 6			
How. St. Tr. 1012, n. 511, 522			
v. Ridgway, 4 B. & Al.			
54	288		
Swails v. State, 7 Blackf. 324	96		
Swain, State v. 68 Mo. 605	429		
Swan v. Com., 101 Penn. St. 14			
Weekly Notes, 67	48		
r. O'Fallon, 7 Mo. 231	559		

T.

T. v. J., L. R. 1 P. & D. 461	389
Tackett, State v. 1 Hawks, 210	69, 74,
	83
Taing, People v. 53 Cal. 602	757
Tait, R. v. 2 F. & F. 553	230
Talbot, Com. v. 2 Allen, 161	758
v. Seeman, 1 Cranch, 1	525
State v. 73 Mo. 347	756
Taliaferro v. State, 40 Tex. 522	691
Tanner v. Hughes, 53 Penn. St. 289	707
Tannett, R. v. R. R., 351	96
Tannock, R. v. 13 Cox, 217	585
Tapp v. Lee, 3 B. & P. 371	379
Tappan, In re, 9 How. Pr. 394	463
Tarbox v. State, 38 Ohio St. 581	32, 46
Tardif v. Baudoin, 9 La. An. 127	376
Tarrant, R. v. 6 C. & P. 182	666
Tate v. Sullivan, 30 Md. 464	837
v. Tate, 26 N. J. Eq. 55	389
Tattershall, R. v. 2 Leach, 984	43
Taulman v. State, 37 Ind. 353	390
Taunt, State v. 16 Minn. 109	119, 201

TABLE OF CASES.

	SECTION		SECTION
Taverner, R. v. 4. C. & P. 413	45	Templeton v. People, 3 Hun, 358;	
Taylor v. Com., 3 Bush, 508	486	60 N. Y. 643	420
Com. v. 5 Cush. 605	114, 549, 650, 652	Tennell, R. v. 44 L. T. 687	650
v. Com., 20 Grat. 825	95	Tenney, Com. v. 97 Mass. 50	580
v. Com., 29 Grat. 780	199	Terrell v. Colebrook, 35 Conn. 188	153
Com. v. 132 Mass. 261	412	State v. 13 Rich. (S. C.) 321	
v. Hawkins, 16 Q. B. 308	739	280, 321, 407, 538	
v. Jennings, 7 Rob. (N. Y.) 581	473	Territory v. Nugent, 1 Mart. 114	469
v. Larkin, 12 Mo. 103	509	Terry v. Ashton, 34 L. T. 97	538
v. Monnot, 4 Duer, 116	457	Testerman, State v. 68 Mo. 408	80, 263
v. Parry, 1 M. & Gr. 604	523	Testick, R. v. 1 East, 181, n.	114
v. People, 12 Hun, 213	439	Tharp v. State, 15 Ala. 749	29
v. People, 59 Cal. 640	285, 294, 667	Thawley, State v. 4 Harring. 562	68, 82, 757
R. v. 3 B. & C. 502	578	Thayer v. Boyle, 30 Me. 375	486
R. v. 8 C. & P. 733	651, 652	v. Chesley, 55 Me. 393	559
R. v. 3 Cox, 84	337	v. Davis, 38 Vt. 163	418
R. v. 4 Cox, 155	336, 729	v. Sterns, 1 Pick. 109	748
R. v. 5 Cox, 138	31	v. Thayer, 101 Mass. 111	35, 38, 389
R. v. 13 Cox, 77	538	Theluson v. Cosling, 4 Esp. 266	525
R. v. 1 C. & P. 84, n.	448	Therasson v. People, 82 N. Y. 238	24
v. R. R., 48 N. H. 304	458	Thibean, State v. 30 Vt. 100	484
v. Robert Campbell, The, 20 Mo. 254	162, 645	Thomas v. Barbour, 49 Ill. 370	401
State v. 62 Ala. 164	363	v. Com., 2 Rob. 795	354, 510
State v. 1 Hawks, 264	579	v. David, 7 C. & P. 350	446, 485
State v. 1 Houst. C. C. 436	92, 324	v. De Graffenreid, 17 Ala. 602	382
State v. 25 Iowa, 273	758	v. Desney, 57 Iowa, 58	96
State v. 11 Lea, 708	263, 703	v. Dunaway, 30 Ill. 373	52
State v. 64 Mo. 358	757, 757 b	v. Dunn, 6 M. & Gr. 274	565, 566
State v. 88 N. C. 694	484	v. Issett, 1 Greene, 470	457
State v. Phill. (N. C.) 508	390	v. Newton, M. & M. 48, n.	465
State v. 3 Oregon, 10	584	v. People, 59 Ill. 160	32
State v. 1 Const. R. 107; 3 Brev. 243	113, 695	People v. 9 Mich. 321	432
State v. 7 Tex. Ap. 659	761	v. People, 67 N. Y. 218	60, 68, 225, 734, 736, 764
State v. 14 Tex. Ap. 340	753	People v. 3 Parker C. R. 256	43
v. Sutherland, 24 Penn. St. 333	553	R. v. 6 C. & P. 353	651, 673
U. S. v. 4 Cranch C. C. 338	304	R. v. 7 C. & P. 345	658, 659
v. Williams, 2 B. & Ad. 845	56	R. v. 13 Cox, C. C., 77	407
Taylor Will Case, 10 Abb. (N. Y.) N. S., 300; 7 Albany L. J. 50	544, 561, 805	R. v. 2 Leach, C. C., 637	666, 667
Teachout v. People, 41 N. Y. 7	664, 668	R. v. Reported Wills Cir. Bv. 75	748
Teal, R. v. 11 East, 307	363	v. Rawlings, 27 Beav. 140	500
Teall v. Barton, 40 Barb. 137	457	State v. 47 Conn., 646	261, 716 a,
Teat v. State, 53 Miss. 439	587	v. State, 27 Ga. 287	446, 462, 494
Tebbetts v. Flanders, 18 N. H. 284	462	v. State, 67 Ga. 460	262, 263, 328, 350, 770
Teese v. Huntingdon, 23 How. 2	487	v. State, 1 Houst. C. C., 511	69
Telicoate's Case, 2 Starkie (N. P.), 483	666, 667	State v. 30 La. An. 600	263
Temple v. Com., 75 Va. 892	469, 470, 471, 472	State v. 11 Lea, 113	349
Templeton v. People, 27 Mich. 501	49, 51, 784	State v. 68 Mo. 605	263, 429

TABLE OF CASES.

	SECTION		SECTION
Thomas, State v. 3 Strobb.	269 492	Thurston v. Cornell, 38 N. Y.	281 431
v. State, 43 Tex.	658 758	State v. 2 McMull.	382 588
v. State, 11 Tex. Ap.	315 68,	v. Whitney, 2 Cush.	104 361
	757, 758	Thurtell's Case, cited 8 C. & P.	
State, 14 Tex. Ap.	70 390	284; S. C., cited Joy	
v. Thomas, 2 Drew. & Sm.		on Conf. 84	392, 678
298	811	State v. 29 Kan.	148 64
v. White, 11 Ind.	132 461	Tibbs v. Allen, 27 Ill.	119 594
Thomasson v. State, 22 Ga.	499 494	Tice v. Reeves, 30 N. J. L.	314 153
Thompson, Com. v. 11 Allen,	23 725	Tichborne Case, 378, 459, 558, 559, 803,	
v. Com., 20 Grat.	724 677,	804, 807, 812, 819	
	689	(See Orton, R. v.)	
Com. v. 99 Mass.	444 699	Tidwell v. State, 70 Ala.	33 107
v. Com., 1 Metc. (Ky.)		Tilley v. Damon, 11 Cush.	247 661
13	392	Tillotson v. Warner, 3 Gray,	574 603
v. Falk, 1 Drew.	21 499	Tilly, State v. 3 Ired.	424 68, 263
v. Lee, 12 Ill.	314 100	Tilton v. Beecher, Abb. Rep.	385, 396,
v. Mosely, 5 C. & P.			402
502	29	Com. v. 8 Met.	232 577
R. v. 3 F. & F.	824 392	Timmens v. State, 4 Minn.	325 96
R. v. 1 Leach, C. C. 4th		Timms v. State, 4 Cold.	138 94
ed. 291	651, 673, 677	Tindle v. Nichols, 20 Mo.	326 510
R. v. L. R. 1 C. C.	377 391	Tingley v. Cowgill, 48 Mo.	291 418
R. v. 1 Mood. C. C.	139 91	Tinley v. Porter, 2 M. & W.	822 350
R. v. 9 W. R.	203 585	Tipper v. Com., 1 Metc. (Ky.)	6 264,
v. R. R., 22 N. J. Rq.			690
111	513	Tippet's Case, R. & R.	509 632
v. Shalkop, 71 Penn.		Tippins v. Coates, 6 Hare,	16 451
St. 161	460	Tipton v. State, Peck (Tenn.)	308 694
v. State, 30 Ala.	28 199	Tisdale v. Ins. Co., 26 Iowa,	171 ;
v. State, 5 Humph.	138 333	28 Iowa, 12	811
State v. 19 Iowa,	299 153	State v. 2 Dev. & Bat.	159
State v. 23 Kan.	338 166, 255		571, 573, 595
v. State, 37 Tex.	121 494	Titford v. Knott, 2 Johns. Cas.	210
v. State, 11 Tex. Ap.			555, 560
51	276	Titherington, People v.	59 Cal. 758
v. Stevens, 71 Penn.			598
St. 161	24	Titlow v. Titlow, 54 Penn. St.	216
v. Trevanion, Skin.	402 492		417, 730
	492	Titus v. Ash, 24 N. H.	319 483, 487
v. Whitman, 18 Wall.		Tod v. Winchelsea, 3 C. & P.	387 231
457	594	Todd v. Hardie, 5 Ala.	698 382
Thoms, People v. 3 Parker, C. R.		Toledo R. R. v. Goddard, 25 Ind.	
256	48, 672, 682	185	695
Thorne, People v. 6 Law Reporter,		v. Williams, 77 Ill.	
54	10	354	472
Thornton, R. v. 1 Mood. C. C.	27, 646,	Toler v. State, 16 Ohio St.	583 333,
	663, 664, 673		341, 742
State v. 26 Iowa,	79 441	Toley, State v. 15 Nev.	64 363
State v. 13 Ired.	256 573	Tolliver, Com. v. 119 Mass.	312 24,
State v. 37 Mo.	360 154, 593		430, 432, 760, 778
Thorp, State v. 72 N. C.	186 460, 463	Tolman v. Johnstone, 2 F. & F.	66 479
Thorpe, R. v. 1 Leach,	391 365	Tom, State v. 8 Or.	179 366
Thrall, People v. 50 Cal.	415 632	Tome v. Parkersburg R. R. Co.,	39
Thrasher, Com. v. 11 Gray,	450 35	Md. 36	406, 544, 556, 558, 561
Thurlow, Com. v. 24 Pick.	374 331, 342	Tomkins v. Saltmarsh, 14 S. & R.	
Thurman v. Bertram (Exch. Div.		275	691
1879), 20 Alb. L. J.	151 312	Tompkins, State v. 71 Mo.	613 556,
			557, 560, 562
		Tomson, Com. v. 2 Cush.	551 97

TABLE OF CASES.

	SECTION		SECTION
Toney, State v. 15 S. C. 409	799	Troax, U. S. v. 3 McLean, 224	441
Tonge, R. v. Kel. 18	439	Trogdan v. Com., 31 Grat. 862	53, 734
Toogood v. Spyring, 1 C., M. R. 181; 4 Tyr. 582, S. C.	739	Trout, Com. v. 76 Penn. St. 379	178, 603
Tooke, R. v. 25 How. St. Tr. 71	449, 551, 604, 609	Troxdale v. State, 9 Humph. 411	380
Toole, R. v. 40 Eng. L. & Eq. 583; Dears. & B. 194	95	True v. Bryant, 32 N. H. 241	520
Tooney v. State, 8 Tex. Ap. 452	263, 271, 751	Truman's Case, 1 East P. C. 470	171
Tootle, State v. 2 Harring. 541	124	Tubbee, R. v. 1 Up. Can. P. R. 103	397
Toshack, R. v. T. & M. 207; 1 Den. C. C. 492	621	Tubby, R. v. 5 C. & P. 530	664
Tosney v. State, 26 Minn. 262	472, 476	Tuberfield, R. v. L. & C. 495; 10 Cox, 1	64
Totten v. U. S., 92 U. S. 105	508	Tuberville v. Stamp, 1 Salk. 13	824
Touney, State v. 27 Mo. 12	60	v. State, 40 Ala. 718	1
Town, State v. Wright (Ohio), 75	764	Tuck, Com. v. 20 Pick. 356	146, 573
Townsend v. Brundage, 6 Thomp. & C. (N. Y.) 527	459	Tucker v. Hood, 2 Bush. 85	690
People v. 3 Hill, 479	143, 591, 801	v. State, 57 Ga. 503	758
State v. 2 Harring. 543	362, 580	v. Williams, 2 Hilt. (N. Y.) 562	377
State v. 1 Houst. C. C. 337	72, 92	Tuckerman, Com. v. 10 Gray, 46, 644, 651, 655, 658,	670
State v. 86 N. C. 676	114	Tucket, R. v. 1 Mood. C. C. 134	620
v. Way, 5 Allen, 426	605	Tuckett, R. v. 1 Cox, 103	731
Townshend v. Townshend, 7 Gill, 10	417	Tuff, R. v. 1 Den. C. C. 334	497
Tozier, State v. 49 Mo. 404	62	Tufts v. Charlestown, 4 Gray, 577	680
Tracy Peerage, 10 Cl. & Fin. 154	559, 563, 743	Tulley v. Alexander, 11 La. An. 628	390
Tracy v. People, 97 Ill. 101	24, 281	Tullis v. Kidd, 12 Ala. 648	408, 409
R. v. 6 Mod. 30	836	Turbeville v. State, 42 Ind. 490	758
Trailor's Case, 4 West. L. J. 25	634	Turk v. State, 2 Ham. pt. ii. 240	510
Trainor, Com. v. 123 Mass. 414	95	Turley v. State, 3 Humph. 323	124
Trammell v. Hemphill, 27 Ga. 525	231	Turnbull, Com. v. 79 Ky. 495	390
Trapp, State v. 14 Rich. 203	94	Turner v. Com., 86 Penn. St. 54	46,
Travers, R. v. 2 Str. 700	366, 369	47, 51, 59, 329, 333, 334,	380, 744, 785
Travis v. Brown, 43 Penn. St. 9	557, 560	R. v. 6 How. St. Tr. 613	58
v. People, 56 Cal. 251	757	R. v. 1 Leach, 536	95
Treadgold, R. v. 39 L. T. (N. S.) 291	108	R. v. 1 Mood. C. C. 341	602,
Treadway v. State, 1 Tex. Ap. 668	483	680, 681, 699	331, 342
Trehearne, R. v. 1 Mood. C. C. 298	106	R. v. 5 M. & S. 205	331, 342
Trelawney v. Colman, 2 Stark. R. 191; 1 B. & A. 90	247, 460	v. State, 40 Ala. 21	579
Trenton Ins. Co. v. Johnson, 4 Zab. 576	323	v. State, 1 Houst. C. C. 76	445
Trepp v. Barker, 78 Ill. 146	402	v. State, 4 Lea, 206	1
Trevor v. Wood, 36 N. Y. 307	162	v. State, 76 Mo. 350	30
Trice, State v. 88 N. C. 627	97, 802	State v. Wright (Ohio), 29	721
Trim, People v. 39 Cal. 75	698	Turpin, State v. 55 Md. 462	400, 757
Trimmer, Com. v. 84 Penn. St. 18	578	State v. 77 N. C. 473	69, 757,
Triscoli v. Newark Co., 37 N. Y. 637	826	757 a, 757 b	117
Trittipio v. State, 10 Ind. 343	571	v. State, 19 Oh. St. 540	117
Trivas, State v. 32 La. An. 1086	282, 300	Tutt, State v. 2 Bailey, 44	560
		Tuttle v. Lawrence, 119 Mass. 276	457
		v. Russell, 2 Day, 201	369
		Tweedy v. Jarvis, 27 Conn. 62	99
		v. State, 5 Iowa, 433	334
		Twist, R. v. 12 Cox. 509; 1 Green's C. C. 44	123
		Twitchell, Com. v. 1 Brewst. 561	60,
		767, 774, 777, 784	784
		Twitty, State v. 2 Hawks, 248	33, 43,
			442

TABLE OF CASES.

	SECTION		SECTION
Two Steilies, King of, v. Wilcox, 1		Valesco v. State, 9 Tex. Ap. 76	124
Sim. (N. S.) 301	466	Van Brunt, People v. 8 Barb. 158	573
Twynning, R. v. 2 B. & A. 386	810, 812	Van Buren v. State, 24 Miss. 512	677
Tyer's Case, R. & R. 402	132	Van Buskirk, State v. 59 Ind. 384	512
Tyler, People v. 35 Cal. 553	487	Van Butchell, R. v. 3 C. & P. 629	297, 281, 284
People v. 36 Cal. 522	435, 435 a	Vance v. State, 65 Ind. 460	96
v. People, 8 Mich. 326	110	State v. 17 Iowa, 138	826
R. v. 1 C. & P. 129	651	State v. 32 La. An. 1177	68, 81, 757
v. State, 11 Tex. Ap. 388	457	Vandencomb, R. v. 2 Leach, 708	579
v. State, 13 Tex. Ap. 205	758	Vandermark v. People, 47 Ill. 122	99
v. Todd, 36 Conn. 218	556, 561	Vane Case, Malins, V. C., Dec. 1876	373
Tylney, R. v. 18 L. J. 36, M. C. 504		Vanhorne, People v. 8 Barb. 158	573
Tyner v. State, 5 Humph. 383	324, 750	Van Huss v. Rainbolt, 2 Coldw. 139	494
Tyrel v. Woodbridge, 27 N. J. L. 416	153	Van Kutsen, People v. 5 Parker C. R. 66	580
U.		Vann, State v. 82 N. C. 631	338, 689, 730
Udderzook's Case, 76 Penn. St. 340; S. C., Whart. on Hom. Appendix 544, 778, 784, 804, 805, 819		Van Omeron v. Dowick, 2 Camp. 44	405
Uhl v. Com., 6 Gratt. 706	363, 486, 733	Van Rensselaer v. Akin, 22 Wend. 549	615
Ullman v. State, 13 Tex. Ap. 201	741	Van Santvoord, People v. 9 Cow. 660	103
Ulrich v. People, 39 Mich. 245	413, 654, 796	Van Sickle, Com. v. Brighly R. 69; 7 Penn. L. J. 82	91
Umfried, State v. 76 Mo. 404	225	v. People, 29 Mich. 61	557, 558
Underwood v. Linton, 44 Ind. 72	644	U. S. v. 2 McLean, 219	486, 487
v. People, 32 Mich. 1	339	Van Tuyl v. Van Tuyl, 8 Abb. (N. Y.) Pr. N. S. 5; 57 Barb. 235	170
State v. 6 Ired. 96	384 a	Van Wyck v. McIntosh, 14 N. Y. 439, 556, 557, 559	690
State v. 49 Me. 181	111	Van Zandt, State v. 71 Mo. 541	146
State v. 75 Mo. 13	688	Varney, Com. v. 10 Cush. 402	302
State v. 76 Mo. 630	66	Varona v. Socarras, 8 Abb. (N. Y.) Pr. 302	430
v. Waldron, 33 Mich. 232	459	Varrell v. State, 58 N. C. 148	38
Upchurch, R. v. 1 Mood. C. C. 465	652, 662, 673	Vasques, State v. 16 Nev. 42	429
Upham, State v. 38 Me. 261	62, 334	Vass v. Com. 3 Leigh, 786	299
Uprichard, Com. v. 3 Gray, 434	111	Vassault v. Austin, 32 Cal. 597	608
Upthegrove v. State, 37 Ohio St. 662	69	Vaughan, Com. v. 9 Cush. 594	46
Upton, R. v. 1 C. & K. 55	171	v. Com., 17 Grat. 576	650, 651, 674
State v. 1 Dev. 513	96	v. Com., 2 Va. Cas. 273	587, 590
Utica Ins. Co. v. Badger, 3 Wend. 102	553	v. Perrine, 2 Penn. 144	469
Utley v. Merrick, 11 Met. 302	363	R. v. 5 St. Tr. 29	386
Uwahah, People v. 61 Cal. 412	698	v. Worrall, 2 Madd. 322	359
Uxbridge v. Staveland, 1 Ves. Sr. 56	464	Vaughn v. Perrine, 2 Pen. (N. J.) 534	469, 472
V.		Vaux's Case, 4 Co., 44 a	578, 579
Vaigneur, State v. 5 Rich. 391	658, 664, 678	Veal, State v. 8 Tex. Ap. 474	273
Vaillant v. Dodemead, 2 Atk. 524	469, 498	Veatch v. State, 56 Ind. 584	435
Valentine, State v. 7 Ired. 225	363	Veiths v. Hagge, 8 Iowa, 163	359

TABLE OF CASES.

SECTION		SECTION	
Velarde, <i>People v.</i> 59 Cal. 457	232, 625	Wakefield, <i>R. v.</i> 2 Lew. C. C. 279;	
Vent <i>v.</i> Pacey, 4 Russ. 193	499	1 Russ. C. & M. 218,	
Verdin <i>v.</i> Robertson, 10 Ct. Sess.		n. 6 390, 394, 397	
Cas. (3d series) 35	645	<i>v.</i> Ross, 5 Mason, 19	362
Verelst, <i>R. v.</i> 3 Camp. 432	833	Wakley <i>v.</i> Johnson, Ry. & M. 422	52
Vermilyea, <i>People v.</i> 7 Cow. 168	445	Walker <i>v.</i> Blassingame, 17 Ala.	
Vernon, <i>People v.</i> 35 Cal. 49	262,	810	379
	263, 691	Com. <i>v.</i> 13 Allen, 570	680
<i>R. v.</i> 12 Cox, 153	118, 199,	<i>v.</i> Com., 28 Grat. 969	763
	210	<i>v.</i> Com., 1 Leigh, 574	30
Vialle, <i>Com. v.</i> 2 Allen, 512	725	<i>v.</i> Curtis, 116 Mass. 98	544
Victor, <i>In re</i> , 31 Oh. St. 206	365	<i>v.</i> Kearney, 2 Stra. 1148	364
Viers' Case, (Pamp.)	325	<i>People v.</i> 38 Mich. 156	758
Vilas <i>v.</i> Reynolds, 6 Wis. 214	545	<i>People v.</i> 88 N. Y. 816; 1	
Vincent, <i>R. v.</i> 9 C. & P. 275	256	N. Y. Cr. Rep. 7, 22	336,
<i>v.</i> State, 3 Heisk. 120	366		338
State <i>v.</i> 1 Honst. C. C. 11	667	<i>R. v.</i> 3 Camp. 264	98
State <i>v.</i> 24 Iowa, 570	225,	<i>R. v.</i> 6 C. & P. 657	664
312, 326, 329, 333, 334,		<i>R. v.</i> 1 F. & F. 535	230
412, 492, 691, 804		<i>R. v.</i> 2 M. & Rob. 212	273
<i>v.</i> State, 10 Tex. Ap. 330	144	<i>R. v.</i> 2 Sid. 6	354
Vinton <i>v.</i> Peck, 14 Mich. 287	556, 559	<i>v.</i> State, 49 Ala. 398	743
Virrier, <i>R. v.</i> 12 A. & E. 317	387	<i>v.</i> State, 52 Ala. 192	276, 281
Vittum, <i>State, v.</i> 9 N. H. 519	100	<i>v.</i> State, 58 Ala. 393	91, 414
Vogel <i>v.</i> Gruaz, Sup. Ct. U. S.		<i>v.</i> State, 63 Ala. 110	24, 784
1884	497	<i>v.</i> State, 39 Ark. 220	293, 294
Voke, <i>R. v.</i> R. & R. 531	31, 33, 49	<i>v.</i> State, 6 Blackf. 1	486
Vosburg, <i>Com. v.</i> 112 Mass. 419	263	State <i>v.</i> 41 Iowa, 217	758
		<i>v.</i> State, 37 Tex. 366; 42	
		Tex. 360	276, 333, 334
		<i>v.</i> State, 6 Tex. Ap. 576;	
		7 Tex. Ap. 246	225, 796
		<i>v.</i> State, 7 Tex. Ap. 245	315,
			677
		<i>v.</i> State, 7 Tex. Ap. 627	764
		<i>v.</i> State, 13 Tex. Ap. 618	96,
		262, 349, 690	
		<i>v.</i> State, 14 Tex. Ap. 609	555
		State <i>v.</i> 34 Vt. 296	650
		<i>v.</i> Walker, 14 Ga. 242	494
		<i>v.</i> Wingfield, 18 Ves. 443	533
		Walkley, <i>R. v.</i> 6 C. & P. 175	651,
			699, 700
		Wallace, <i>Com. v.</i> 7 Gray, 222	716 a
		<i>v.</i> Harris, 32 Mich. 394	749
		<i>v.</i> Hull, 28 Ga. 68	821
		<i>R. v.</i> 3 Ir. L. R. (N. S.)	
		38	739
		<i>v.</i> State, 28 Ark. 531	689
		State <i>v.</i> 9 N. H. 515	35, 169,
		173 a, 530	
		State <i>v.</i> 10 Tex. Ap. 255	101
		Waller <i>v.</i> State, 40 Ala. 325	579
		State <i>v.</i> 80 N. C. 401	35
		Walls <i>v.</i> Bailey, 49 N. Y. 467	9
		Walrod <i>v.</i> Ball, 9 Barb. 271	816
		Walsh, <i>R. v.</i> 1 Den. C. C. 199	684
		<i>v.</i> Trevanion, 15 Sim. 577	500
		Walston <i>v.</i> Com., 16 B. Monr. 15	276
		Walter <i>v.</i> Com., 88 Penn. St. 137	580

TABLE OF CASES.

	SECTION		SECTION
Walter v. Haynes, Ry. & M. 149	837	Warringham, R. v. (Surrey Spring Assizes, 1851)	652
v. People, 32 N. Y. 147	338	Wash v. Com., 16 Grat. 530	39
R. v. 7 C. & P. 267	667	v. Foster, 3 Mo. 205	603
Walters v. People, 6 Parker C. R. 15	31	Washbrook, R. v. 4 B. & C. 732	594
State v. 45 Iowa, 389	46, 721	Washburn v. Cuddihy, 8 Gray, 430	407, 538
Walton, Com. v. 2 Brewst. 487	388	v. People, 10 Mich. 372	366
v. Gavin, 16 Q. B. 48	833	Washington v. Cole, 6 Ala. 212	408
v. State, 88 Ind. 9	698	v. Scribner, 109 Mass. 487	513
Waltz v. State, 52 Iowa, 227	24, 679	v. State, 53 Ala. 29	689
Wammack, State v. 70 Mo. 410	94	v. State, 58 Ala. 355	124
Ward, Com. v. 2 Mass. 397	114	v. State, 63 Ala. 189	483
v. Dulaney, 23 Miss. 410	828	v. State, 8 Tex. Ap. 377	31, 756
v. People, 3 Hill (N. Y.), 395	650, 652, 655, 670	Washington Bank v. Prescott, 20 Pick. 339	252
v. People, 6 Hill (N. Y.), 144	465	Wasson, R. v. 1 Craw. & D. 197	393
People v. 15 Wend. 231	646, 648	Waterbury v. Sturdevant, 18 Wend. 353	698
R. v. L. R., 1 C. C. 356	736, 764	Waterman, Com. v. 122 Mass. 43	682, 698
R. v. 6 C. & P. 366	603	State v. 1 Nev. 543	333, 339
v. Sinfeld, 42 L. T. (N. S.) 253	474	Waters v. People, 104 Ill. 541	758
v. State, 28 Ala. 53	96, 487	R. v. 12 Cox, 390	570
v. State, 50 Ala. 120	650, 677	R. v. 7 C. & P. 250	91
v. State, 8 Blackf. 101	301	R. v. 1 Den. C. C. 356	830
v. State, 49 Conn. 429	40, 44, 472, 491	v. State, 53 Ga. 567	106
v. State, 1 Humph. 253	573	State v. 39 Me. 54	144, 584
v. State, 2 Mo. 98	469, 473	v. Waters, 35 Md. 531	231
v. State, 74 Mo. 253	103	Watkins, State v. 9 Conn. 47	46, 51, 785, 786
State v. 39 Vt. 225	557, 560	U. S. v. 3 Cranch C. C. 441	105
Wardell, Com. v. 128 Mass. 82	92	Watson v. Anderson, 13 Ala. 202	420
Wardroper, R. v. 8 Cox, 284	733	v. Brewster, 1 Penn. St. 381	553
Ware, People v. 1 N. Y. Cr. Rep. 166	484	Com. v. 109 Mass. 354	24
v. State, 35 N. J. L. 553	396, 402	v. Com., 95 Penn. St. 418	29, 333, 442
v. State, 67 Ga. 349	150, 333, 734	v. England, 14 Sim. 28	809
v. Ware, 8 Greenl. 42	483	v. Moore, 2 Cush. 133	52
Warickshall, R. v. 1 Leach, 263	678	R. v. 6 C. & P. 653	452
Waring v. Tel. Co., 44 How. (N. Y.) Pr. 69	682	R. v. 32 How. St. Tr. 7	176, 513, 698
Warman, R. v. 2 C. & K. 195; 1		R. v. 2 Stark, 116 478, 484	682
Den. C. C. 183	91, 92	R. v. 2 T. R. 199	213
Warner v. Com., 2 Va. Cas. 95	171, 173	v. State, 63 Ala. 19	206, 217
v. Lucas, 10 Ohio, 336	463, 469	v. State, 64 Ga. 61	116 a, 122
People v. 5 Wend. 271	114, 120 a	v. State, 63 Ind. 548	276
v. State, 25 Ark. 447	366	v. State, 36 Miss. 593	111
State v. 14 Ind. 572	580, 585, 586	v. State, 5 Mo. 497	144
Warren v. Nichols, 6 Met. 261	231	State v. 31 Mo. 361	441, 442
People v. 1 Parker C. R. 338	587, 590	State v. 63 Me. 128	200
v. State, 1 Greene (Iowa), 106	758	State v. 65 Me. 74	405, 408, 457, 489
Warren, State v. 9 Tex. Ap. 619	296	State v. 7 S. C. 63	334

TABLE OF CASES.

	SECTION		SECTION
Watson, State v. 9 Tex. Ap. 237	440,	Welland, R. v. R. & R. 494	124
	446	Wellar v. People, 30 Mich. 16	69, 764
Watts v. Clegg, 48 Ala. 561	607	Wells v. Drayton, 1 Mill (S. C.),	
v. Frazier, 7 A. & E. 223	52	111	679
Way v. Butterworth, 106 Mass. 75	510	Ex parte, 18 How. 307	365, 443
v. v. R. R., 40 Iowa, 341	726	v. Fisher, 1 Moo. & R. 99	390,
v. State, 35 Ind. 409	761		397
State v. 5 Neb. 283	35	S. C., under name of Wells	
Waybright v. State, 56 Ind. 122	750	v. Fletcher, 5 C. & P. 12	390
Wayland v. Ware, 109 Mass. 248	166	R. v. M. & M. 326	441
Weare v. State, 38 N. H. 314	100	v. R. R., 30 Wis. 605	645
Weasel, State v. 30 La. An. 919	700	v. Shipp, 1 Miss. (Walk.)	
Weaver, R. v. L. R. 2 C. C. 85	532	383	462
State v. 57 Iowa, 730	225	State v. Cox R. 424	60
State v. 13 Ired. 491	114	State v. 11 Neb. 409	24
v. Traylor, 5 Ala. 564	483	v. State, 4 Tex. Ap. 20	96
Webb v. Alexander, 7 Wend. 281	154	v. Tucker, 3 Binn. 366	399
R. v. 4 C. & P. 564	664	Welsh v. Barrett, 15 Mass. 380	252
R. v. 6 C. & P. 595	442	v. Cochran, 63 N. Y. 181	835
R. v. 2 Russ. on Cr. 982	390	R. v. 11 Cox, 336	736, 764
State v. 25 Iowa, 235	261	R. v. 1 Den. C. C. 199	684
v. State, 29 Oh. St. 350	486,	State v. 7 Porter, 463	625
	491, 494	Welton, R. v. 9 Cox, 281	230
v. Terr., 2 New Mex. 147	829	Wentworth, Com. v. 118 Mass. 441	725
State v. 8 Tex. Ap. 115	30	v. Lloyd, 10 H. of L.	
State v. 9 Tex. Ap. 490	335,	Cas. 589	749
	339, 418	State v. 65 Me. 234	430,
Webber v. Davis, 5 Allen, 393	164		432, 435, 465
Webster, Com. v. 5 Cush. 295 (S.		State v. 37 N. H. 196	46,
C., Bemis's Report) 1, 10,			657, 756
60, 61, 64, 66, 93, 333,		v. Wentworth, 71 Me.	
334, 559, 748, 764, 768,		72	811
808, 847, 851		Wentz, Com. v. 1 Ashm. 269	121, 828
v. Mann, 56 Tex. 119	363	People v. 37 N. Y. 303	662,
v. People, 92 N. Y. 422;			673
S. C., 1 N. Y. Cr. Rep.		Wergrich v. People, 89 Ill. 90	271
191	120 a, 131	Wertz v. May, 21 Penn. St. 274	491
Weed v. Ins. Co., 70 N. C. 566	729	v. State, 42 Ind. 161	109
U. S. v. 5 Wall. 62	835	Wescombe, R. v. Annual Register	
Weeks v. Hull, 19 Conn. 376	487, 490	for 1829, 142	747
R. v. L. & C. 18	46	Wesley v. State, 37 Miss. 327	68, 75
State v. 30 Me. 182	146	Weason v. Iron Co., 13 Allen, 95	225
Weems v. Weems, 19 Md. 334	417	West, People v. 49 Cal. 610	334
Wehrkamp v. Willett, 4 Abb. App.		West, R. v. D. & B. 109; 7 Cox,	
548, 559	396, 401	183	116 a, 123
Weidman v. Kohr, 4 S. & R. 174	166	R. v. Phill. Ev. 28 n.	443
Weighurst v. State, 7 Md. 442	605	v. State, 48 Ind. 483	99
Weinberg v. State, 25 Wis. 370	171	v. State, 1 Houst. 371, 373	336,
Weinzorpflin v. State, 7 Blackf. 186			538, 634, 784
	483, 573	State v. 6 Jones (N. C.), 505	
Weiss v. R. R., 79 Penn. St. 387	732		736, 764
Welburn, R. v. 1 East P. C. 358	281	State v. 69 Mo. 401	108, 438
Welch, Com. v. 97 Mass. 493	733	v. State, 22 N. J. L. 212	555, 560
State v. 26 Me. 30	390	v. State, 7 Tex. Ap. 150	296, 298
v. Walker, 4 Porter, 20	402,	v. State, 1 Wis. 209	329, 330
	608	v. State, 2 Zab. 212	574
v. Ware, 32 Mich. 77	24	Westbeer, R. v. 1 Leach, 12; 2 Str.	
Welcome v. Batchelder, 23 Me. 85	509	1133	129
Weldon v. Burch, 12 Ill. 374	471	Westchester R. R. v. McElwee, 67	
v. State, 10 Tex. Ap. 400	442	Penn. St. 311	683

TABLE OF CASES.

	SECTION		SECTION
Westerman v. Westerman, 25 Oh.		White, People v. 14 Wend. 111	61, 64,
St. 500	398, 401, 402	People v. 22 Wend. 167	148
West. Un. Tel. Co. v. Hopkins, 49		R. v. 4 F. & F. 383	1
Ind. 223	162	R. v. 1 Leach, 286	94, 362,
Westfall, State v. 49 Iowa, 328	280, 699		368, 374
Westfield v. Warren, 3 Halst. 349	170	v. Stafford, 35 Barb. 419	396
Westlake, People v. 62 Cal. 303	412,	v. State, 31 Ind. 262	341
	771	v. State, 53 Ind. 595	431
Wetherbee v. Norris, 103 Mass. 566		v. State, 69 Ind. 273	96
	58, 487	State v. 19 Kan. 445	499
v. Wetherbee, 38 Vt.		v. State, 52 Miss. 216	441, 465
454	418	v. State, 76 Mo. 96	418
Wetmore v. U. S. 10 Pet. 647	525, 537	v. State, 15 S. C. 381	147
Weymouth, Com. v. 2 Allen, 144	605	U. S. v. 5 Cranch C. C. 38,	
Weyrich v. People, 89 Ill. 90	225, 271,	75, 457	105, 227, 231, 362,
	786	461, 476, 483, 484, 486,	698
Whaley v. State, 11 Ga. 123	225, 461,	v. Wilson, 13 Ves. 87	730
	689, 690, 750, 795	Whitefield v. R. R., 1 E., B. & E.	
Wharton Peerage, 12 Cl. & F.		115	739
302	523	State v. 75 N. C. 356	654
Wharton, State v. Taylor's Med.		Whitehead v. Foley, 28 Tex. 268	390
Jur. 25	787	R. v. 3 C. & K. 202	54
Wheat v. State, 6 Mo. 455	331, 342	R. v. 1 C. & P. 67	263
Wheater, R. v. 2 Mood. C. C. 45	664	R. v. L. R., 1 C. C. 33;	
Wheatley v. Williams, 1 M. & W.	533	10 Cox C. C. 234; 35	
	503	L. J. M. C. 186; 14	
Wheelden v. Wilson, 44 Me. 1	429, 431	W. R. 677	359, 371
Wheeler v. Alderson, 3 Hagg. 574	417	Whitford v. Southbridge, 119 Mass.	
v. Blandin, 24 N. H. 168	462	564	732
Com. v. 2 Mass. 172	573	Whiting v. Nicholl, 46 Ill. 241	811
v. Hill, 16 Me. 329	497	Whitley v. State, 38 Ga. 50	294, 579
v. Le Marchant, 44 L. T.		Whitman, Com. v. 121 Mass. 361	557
N. S. 632	508, 516	v. Freeze, 23 Me. 185	456
People v. 60 Cal. 581	538	Whitmore v. Johnson, 10 Humph.	
R. v. 1 Leach, 311	625	610	607
State v. 3 Vt. 344	148	Whitney v. Boston, 98 Mass. 312	484
State v. 35 Vt. 261	96	v. Bunnell, 8 La. An.	
Wheele, R. v. 8 C. & P. 250	668	429	557
Wheeling's Case (Salisbury Sum-		v. Durkin, 48 Cal. 562	264
mer Assizes, 1789)	632	Whiton v. Ins. Co., 109 Mass. 30	522,
Whelan, R. v. 8 Ir. L. R. 314; 14			525, 538
Cox, C. C. 595	376	Whitson, People v. 43 Mich. 419	698,
Whipp v. State, 34 Oh. St. 87	393		758
Whipple, People v. 9 Cow. 707	363,	Whittaker, Com. v. 131 Mass. 224	
	439, 443	261, 323, 329, 343	
Whitaker's Case, N. Y. 1880	754, 849	Whittemore, Com. v. 11 Gray,	
Whitaker, U. S. v. 6 McLean, 342	66	201	658
Whitbread, R. v. 1 C. & P. 84	448	Whittier v. Franklin, 46 N. H. 23	54,
Whitcher v. McLaughlin, 115 Mass.			460, 825
168	532	v. Gould, 8 Watts, 485	553
White's Case, R. & R. 508	632	State v. 21 Me. 341	29, 342,
White v. Ambler, 4 Seld. 170	536		357, 366, 368
v. Bailey, 10 Mich. 155	494	State v. 38 Me. 574	573
v. Com. 80 Ky. 487	63, 66	U. S. v. 5 Dill. 35	440
v. Fox, 1 Bibb. 369	510, 512	Whittingham, State v. 33 La. An.	
v. Green, 5 Jones (N. C.) L.		47	537
47	690	Whitton v. Ins. Co., 109 Mass. 44	407
v. Mann, 26 Me. 361	811	v. State, 37 Miss. 379	723
v. People, 32 N. Y. 465; 55		Whitworth, R. v. 1 F. & F. 382	281
Barb. 606	97		
58		888	

TABLE OF CASES.

	SECTION		SECTION
Whizenant v. State, 71 Ala.	383 427,	Willey v. Portsmouth, 35 N. H.	303 418
	455	Williard, Com. v. 22 Pick.	476 468
Wicker, R. v. 18 Jur.	252 230	v. Harvey, 24 N. H.	314 605
Widdup, R. v. 42 L. J. M. C.	9 664	U. S. v. 1 Paine,	539 457
Wiens v. State, 66 Mo.	13 312, 776	William, State v. 1 Vroom,	102 581
Wiggin v. R. R., 120 Mass.	201 644	Williams's Case, 3 Bland. Ch.	221 539
Wiggins v. Burkham, 10 Wall.	129 679	Case, 1 Leach,	529 156
v. Day, 9 Gray,	97 698	Est. 8 Week. N.	310 810
v. Holly, 11 Ind.	2 462	Williams v. Allen, 40 Ind.	295 494
v. People, 4 Hun,	540 225	v. Baldwin, 7 Vt.	503 399
v. People, 93 U. S.	465 757,	v. Brickell, 37 Miss.	682 162, 645, 682
	757 b	v. Cheney, 3 Gray,	215 615
v. Plumer, 11 Fost. (31	N. H.) 251 266	Com. v. 2 Ashm. 69	92, 276, 281, 282
U. S. v. 14 Peters,	334 344	Com. v. 2 Cush.	582 125,
Wight v. Rindskoff, 43 Wis.	344 439, 443		132, 588, 799
Wightman, State v. 26 Mo.	515 586	Com. v. 105 Mass.	62 263,
Wiheh v. Law, 3 Stark. R.	63 530, 532		459, 557, 560
Wike v. Lightner, 11 S. & R.	198 487	Com. v. 127 Mass.	282 91,
Wilbanks v. State, 10 Tex. Ap.	642 348, 384		126
Wilbourne, State v. 87 N. C.	529 321, 341, 749	v. Com. 29 Penn. St. R.	102 762
Wilbur v. Flood, 16 Mich.	40 474	v. Com. 91 Penn. St.	493 131, 387
v. Selden, 6 Cow.	162 229, 231	Com. v. Thach. C. C.	722 588
Wilcox v. Rome, etc., Railroad Co.,	39 N. Y. 358 532	v. Drexel, 14 Md.	566 555, 556
v. State, 31 Tex.	586 586	Ex parte, 13 Price,	670 352
v. State, 6 Lea,	571 580	v. Eyton, 27 L. J. Ex.	176; 2 H. & N. 771; 4 H. & N. 357
Wild, R. v. 1 Mood. C. C.	452 647, 662	v. Farrington, 2 Cox. Ch.	R. 202 471
Wilder, State v. 7 Blackf.	582 138	v. Fitch, 18 N. Y.	546 29
v. St. Paul, 12 Minn.	192 229	v. Manning, 41 How.	(N. Y.), Pr. 454 644
Willey, R. v. 1 M. & S.	188 579	v. Miner, 18 Conn.	464 52
Wilds v. Blanchard, 7 Vt.	141 486	v. Ogle, 2 Str.	883 96
v. R. R., 29 N. Y.	315 824	People v. 3 Abb. Ct. App.	Dec. 596 262
Wiles, State v. S. C. Min., 9 Rep.	472 584	People v. 57 Cal.	108 758
Wiley, People v. 3 Hill (N. Y.),	194 116, 116 a, 132	People v. 29 Hun,	520 459
v. State, 3 Cold.	362 672	People v. 101 Ill.	382 116 a, 122, 632
v. State, 52 Ind.	516 128	People v. 1 N. Y. Cr. Rep.	336 441, 803
Wilhelm v. Cornell, 3 Grant,	178 602	v. People, 54 Ill.	423 698, 757
Wilke v. People, 53 N. Y.	525 390	People v. 24 Mich.	156 111
Wilkes, R. v. 7 C. & P.	272 441, 442	People v. 3 Parker, C.	R. 84 271, 785, 786
Wilkins v. Anderson, 11 Penn. St.	399 604	People v. 19 Wend.	377 445
v. Babbershall, 32 Me.	184 483	R. v. 2 Camp.	506 113, 134
v. Burton, 5 Vt.	76 644	R. v. 12 Cox,	101 227
v. Earle, 44 N. Y.	172 816	R. v. 7 C. & P.	320 95, 366, 367
v. Malone, 14 Ind.	153 471	R. v. 8 C. & P.	284 392, 396, 402, 415, 559
Wilkinson v. Moseley, 30 Ala.	562 417, 418	R. v. 4 F. & F.	515 230
v. Pearson, 23 Penn. St.	177 417		
Willet v. Fister, 18 Wall.	91 373, 379		
Willet, People v. 92 N. Y.	29; 27		
Hun, 469; 1 N. Y. Cr.	Rep. 355 680		

TABLE OF CASES.

	SECTION		SECTION
Williams R. v. 1 Mood. C. C. 107	130	Willshire, R. v. 6 Q. B. D. 366	; 44
v. State, 44 Ala. 24	170, 390,	L. T. N. S. 222	171, 810
	394, 395	Wilson v. Boerem, 15 Johns. 286	288
v. State, 45 Ala. 57	24	Com. v. 2 Cush. 590	30, 46,
v. State, 52 Ala. 411	1, 66		753, 799
v. State, 54 Ala. 131	170,	Com. v. 1 Gray, 337	68, 418,
	171, 172		492, 493, 538, 757
v. State, 61 Ala. 33	550	v. Fulliam, 50 Iowa, 123	741
v. State, 19 Ga. 402	229	v. Gilbert, 2 B. & P. 281	109
v. State, 33 Ga. 85	390	v. Granby, 47 Conn. 59	271
v. State, 55 Ga. 391	440, 700	v. McClure, 50 Ill. 366	153
v. State, 69 Ga. 266	308	People v. 49 Cal. 13	338
v. State, 8 Humph. 583	49	People v. 3 Parker C. R.	
State v. 10 Humph. 101	588		199
v. State, 16 Ind. 401	212, 214	v. People, 4 Parker C. R.	
v. State, 47 Ind. 568	698		619
State v. 20 Iowa, 98	99	v. People, 94 Ill. 299	263,
State v. 2 Jones (N. C.),			266, 698
194	758	R. v. 1 Den. C. C. 284	; 2
State v. 7 Jones (N. C.),		Cox, 426; 2 C. & K. 527	
446	93, 325, 326, 804		94, 96, 114
State v. 54 Mo. 170	750	R. v. 26 L. J., M. C. 45	761
State v. 69 Mo. 110	739	v. Rastall, 4 T. R. 753	497,
State v. 3 Murph. 216	116 a		498, 508
State v. 68 N. C. 62	294, 297	v. R. R., L. R. 14 Eq. 477	
State v. 10 Tex. Ap. 526	631		497, 505
State v. 11 Tex. Ap. 275	758	v. State, 52 Ala. 299	446
State v. 12 Tex. Ap. 127	366	v. State, 33 Ark. 557	263
State v. 1 Williams		v. State, 24 Conn. 57	580, 585
(Vt.), 724	742	State v. 30 Conn. 500	97
State v. 14 W. Va. 851	365	State v. 66 Ga. 591	24, 116,
State v. 27 Vt. 724	751		122
U. S. v. 1 Cliff. C. C. 5	326,	State v. 3 Heisk. 278	658
	668	State v. 24 Kan. 189	227, 273,
U. S. v. 1 Dillon, 485	639		276, 300
U. S. v. 15 Int. Rev. Rec.		State v. 23 La. An. 558	280,
199	471		288
v. Willard, 23 Vt. 369	231	State v. 31 N. J. L. 77	402
v. Williams, 46 Wis. 464	827	State v. 41 Tex. 320	414
Williamson v. Carroll, 16 N. J. L.		v. State, 43 Tex. 472	325
217	355.	v. State, 45 Tex. 76	588
v. State, 16 Ala. 431	733	v. State, 3 Wis. 798	487
v. State, 13 Tex. Ap.		U. S. v. Bald. 78	363, 445,
514	29, 167		494
Willingham, State v. 33 La. An.		U. S. v. 7 Peters, 150	365
537	1, 484	Winans v. R. R., 21 How. 101	420
Willis v. Bernard, 8 Bing. 376	247	Winchell v. Edwards, 57 Ill. 41	748
v. Com., 32 Grat. 929	721	Winder v. Diffenderfer, 2 Bland,	
v. Hulbert, 117 Mass. 151	24		166
v. People, 3 Park. C. R. 473		Windsor v. McVeigh, 93 U. S. 264	594
	263	State v. 5 Harring. (Del.)	
v. Quimby, 31 N. H. 485	460		512
State v. 9 Iowa, 582	441	Winehart v. State, 6 Ind. 30	723
State v. 63 N. C. 26	334	Wings, State v. 66 Mo. 181	329, 722,
v. Underhill, 6 How. (N.			764
Y.) Pr. 396	395	Wink, R. v. 6 C. & P. 397	492
Willoughby v. Dewey, 54 Ill. 266	24	Winkley v. Caimo, 32 N. H. 268	818
Willson v. Betts, 4 Denio, 201	552	State v. 14 N. H. 480	483
Wilner, State v. 40 Wis. 304	730	Winn v. Patterson, 9 Pet. 663	201
Wilshaw, R. v. C. & M. 145	230, 666	Winnemore, Com. v. 1 Brewst. 356	362

TABLE OF CASES.

	SECTION		SECTION
Winnemore, Com. v. 2 Brewst.	378	Wood, U. S. v. 3 Wash. C. C.	440
	353, 361		227, 231
Winner, State v. 17 Kans.	298	v. Willard, 36 Vt.	81
Winsett v. State, 56 Ind.	26		545
	448	Woodard v. Spiller, 1 Dana,	179
Winsor, R. v. 7 B. & S.	490		555
v. R. L. R., 1 Q. B.	390	Woodbeck v. Keller, 6 Cow.	118
State v. 5 Harring. (Del.)	445		387
	512	Woodburne, R. v. 16 St. Tr.	54
Winston, <i>Ex parte</i> , 52 Ala.	419		149
Winter v. State, 20 Ala.	39	Woodbury v. Obear, 7 Gray,	467
v. Wroot, 1 M. & Rob.	404		418
Winters, People v. 29 Cal.	658	Woodcock's Case, 1 Leach C. C.	500
	753,		393
v. R. R., 39 Mo.	468	Woodcock v. Houldsworth, 16 M.	
Wintle, <i>In re</i> , L. R., 9 Eq.	373		& W. 124
Wintzengerode, State v. 9 Oregon,	153		415
	650, 799	R. v. 1 Leach, 500	281
Wisdom, State v. 8 Porter,	511	R. v. 2 Leach, 563	295
	690	Wooden v. Peo, 1 Park. C. C.	465
Wise v. State, 2 Kans.	419		405
State v. 7 Rich.	412	Woodford v. Ashley, 11 East,	508
Witham, State v. 47 Me.	165		103 a, 115
State v. 72 Me.	531	v. People, 62 N. Y.	117;
	23, 31,	3 Hun, 310; 5 Thomp.	
35, 430, 436,	664	& C. 539	589
Withee v. Row, 45 Me.	571	Woodhall, R. v. 12 Cox,	240
Witherow, State v. 3 Murph.	153		148
Witt v. Klindworth, 3 S. & T.	143	Woodhead, R. v. 2 C. & K.	520
	272, 757 b		448
v. State, 6 Cold.	5	Woodman v. Dana, 52 Me.	9
v. Witt, 3 Swab. & Tr.	143		557, 560
Woburn v. Henshaw, 101 Mass.	193	State v. 3 Hawks,	384
	163, 496, 499		103
Wolcott, People v. Sup. Ct. Mich.		Woodrow, R. v. 15 M. & W.	404
1884, 17 Rep.	275		725
State v. 21 Conn.	272	Woodruff, State v. 67 N. C.	89
	441,		312
Wolf v. Com., 30 Grat.	833	Woods, Com. v. 10 Gray,	477
v. Wyeth, 11 S. & R.	149		96
Wolff, State v. 15 Mo.	168	v. Gummert, 67 Penn. St.	136
Wolstenholme v. Wolstenholme, 3	Lans. 457		53
	644	v. Keyes, 14 Allen,	238
Wolverton v. Com., 75 Va.	909		231
v. State, 16 Ohio,	173	v. State, 63 Ind.	353
	171,		433
Womack v. Dearborn, 7 Port.	513	Woodside, Com. v. 105 Mass.	594
State v. 7 Cold.	508		443, 656
Wong Ah, People v. 54 Cal.	151	Woodsidcs v. State, 2 How. (Miss.)	656
Wood, Com. v. 11 Gray,	85*		277, 764
Com. v. 12 Mass.	313	Woodward, Com. v. 102 Mass.	155
v. Cullen, 13 Minn.	394		438
v. McGuire, 17 Ga.	303	v. Easton, 118 Mass.	403
v. Peel, cited Taylor's Ev.	500		484
	312	v. Gates, 38 Ga.	205
People v. 15 Wend.	231		459
R. v. 14 Cox,	46	R. v. 1 Mood. C. C.	323
v. State, 62 Ga.	406		109
v. State, 58 Miss.	741	v. State, 4 Barter,	332
State v. 53 N. H.	484		459, 462
State v. 53 Vt.	560	State v. 1 Houst. C. C.	455
U. S. v. 14 Pet.	430		69
	387	State v. 34 Me.	293
			342
		Woody, People v. 45 Cal.	289
			1
		Woodridge v. State, 13 Tex. Ap.	443
			96
		Wooley v. R. R., L. R.	4 C. P.
			602
			496
		Woolford R. v. 1 M. & Rob.	384
			146
		Woolmer v. Devereux, 2 M. & Gr.	758; 3 Scott, N. R.
			224
			566
		Woolray v. Rowe, 1 Ad. & El.	114
			685
		Woolverton v. Com., 75 Va.	909
			572
		Wootken v. Wilkins, 39 Ga.	223
			288
		Worcester R. v. 6 M. & S.	194
			396
		Workman v. State, 4 Sneed.	425
			392
		v. State, 15 S. C.	540
			391
		World v. State, 50 Md.	49
			57, 261,
			602 a, 607

TABLE OF CASES.

SECTION		Y.		SECTION
Worrall, U. S. v. 2 Dall. 388; Wh.				
St. Tr. 189	113	Yahoola Co. v. Irby, 40 Ga. 479	225	
Worth v. Gilling, L. R. 2 C. P. 1	54,	Yanke v. State, 51 Wis. 464	24, 48	
	825	Yarborough v. State, 41 Ala. 405	44, 47	
Wortham v. Com., 5 Rand. (Va.)				
699	571, 573, 699	v. State, 71 Ala. 376	476	
Worthingham, State v. 23 Minn.		Yates v. People, 32 N. Y. 509	725	
528	828	R. v. C. & M. 139	387	
Worthington, State v. 64 N. C. 594	688	v. State, 37 Tex. 202	758	
v. Scribner, 109 Mass.		v. Yates, 76 N. C. 143	355	
487	497	Ybarra, People v. 17 Cal. 166	276	
Wortley, R. v. 2 Den. C. C. 334	53	Yeadon, R. v. 9 Cox, 91	144, 584	
Wray, <i>Ex parte</i> , 30 Miss. 673	764	Yervin, R. v. 2 Camp. 638	485	
Wreden, People v. 59 Cal. 392	417, 482	Yoe v. People, 49 Ill. 410	538	
Wright, Com. v. 1 Cush. 46	114	Yoes v. State, 4 Eng. (Ark.) 42	380	
v. Comsty, 41 Penn St.		York, Com. v. 7 Law Rep. 497; 9		
102	229	Met. 93	68, 83, 334, 721, 764	
v. Hardy, 22 Wis. 348	418	State v. 37 N. H. 175	651, 674	
v. Holgate, 3 C. & K. 158	518	Yost v. Devault, 9 Iowa, 60	461	
v. Maseras, 56 Barb. 521	680	Yoter v. Sanno, 6 Watts, 164	513	
v. Murray, 6 Johns. 286	617	Youndt v. State, 64 Ind. 443	114	
v. Paige, 36 Barb. 143	486	Young v. Com., 6 Bush, 312	64, 287	
v. People, 38 Mich. 744	733	v. Com., 8 Bush, 366	487, 651,	
v. People, 1 N. Y. Cr. Rep.			654, 662, 689	
462	645, 676, 679	v. Dearborn, 22 N. H. 372	231	
People v. 4 Neb. 407	339	v. Gilman, 46 N. H. 484		
People v. 69 Ind. 163	1		400, 401	
R. v. 1 Lew. C. C. 48	673	v. Honner, 2 M. & Rob. 537	554	
v. State, 5 Ind. 290	148, 573,	v. Makepeace, 103 Mass. 50		
	585		225, 412	
State v. 4 Jones (N. C.),		People v. 31 Cal. 564	510	
308	468	R. v. 5 Cox, 296	390	
v. State, 50 Miss. 332	667	R. v. 2 C. & K. 466	440	
v. State, 41 Tex. 246	88	v. State, 68 Ala. 569	632, 661,	
v. State, 43 Tex. 170	699		796	
v. State, 7 Tex. Ap. 574	440	State v. 39 N. H. 283	445	
v. State, 10 Tex. Ap. 476	103	v. State, 2 Yerg. 292	688	
v. State, 9 Yerg. 342	69	State v. Winston (N. C.),		
v. Tatham, 7 A. & E. 313;		126	668	
4 Bing. N. C. 489	225, 227,	v. Thompson, 14 Ill. 380	603	
	233, 313, 731	Yslas, People v. 27 Cal. 630	486	
v. Tatham, 5 Cl. & F. 692	417			
U. S. v. 16 Fed. Rep. 112	341			
v. Wood, 23 Penn. St. 120	546			
v. Woodgate, 2 C., M. &				
R. 573; Tyr. & Gr. 12	739			
Writhpole's Case, Cro. Car. 147	579	Zabriskie v. Smith, 13 N. Y. 322	272	
Wroe v. State, 20 Oh. St. 460	63, 144,	Zantzinger v. Weightman, 2		
	294, 298, 466, 469	Cranch, C. C., 478	456, 457	
Wyatt v. Gore, Holt, 299	514	Zeibart, State v. 40 Iowa, 169	736	
Wycherly, R. v. 8 C. & P. 262	312	Zeiger, People v. 6 Parker C. R.		
Wyckoff, State v. 2 Vroom, 68	110, 112	355	725	
Wylde, R. v. 6 C. & P. 380	174	Zellers, State v. 2 Halst. 220	72, 352,	
Wylie, R. v. 1 B. & P. (N. R.) 93	46		446, 764	
Wyman, Com. v. Thach. C. C. 432	362	v. State, 7 Ind. 659	96, 97	
People v. 15 Miss. 70	690	Zepp, Com. v. 5 Penn. L. J. 256	579	
Wynne v. State, 56 Ga. 113	312, 415	Zitske v. Goldberg, 38 Wis. 207	231	
Wyvil's Case, 5 Co. s. 496; 2		Zorn v. State, 71 Mo. 415	429	
Hawk. P. C. s. 13	365			

INDEX.

[THE FIGURES REFER TO THE SECTIONS.]

- ABORTION, inferences as to, 327.
 accomplice in, 440.
- ABSENCE, presumption of death from, 811.
- ABSTRACT OF DOCUMENT, when receivable, 203.
- ACCESSARY, conduct and conviction of principal evidence against, 602, 702.
 (See ACCOMPLICES; Co-CONSPIRATORS.)
- ACCOMPLICES AND CO-DEFENDANTS.
 Accomplices competent for prosecution, 439.
 an accomplice is a voluntary co-worker, 440.
 corroboration required to sustain, 441.
 to what corroboration must extend, 442.
 right of, to pardon, 443.
 latitude allowed in cross-examining, 444.
 co-defendants at common law not admissible for each other, 445.
 when state's evidence confession cannot be put in evidence against, 656.
 presumed to destroy letters, 207.
 admissions of, when evidence, 698 *et seq.* (See Co-CONSPIRATORS.)
- ACQUIESCENCE, how far an estoppel, 679 *et seq.*
 how far accompliceship, 440.
- ACTS may be hearsay, 223-6.
- ADDITION, variance as to, 101.
- ADMINISTRATION, PROBATE, AND INQUISITION.
 Letters of administration not conclusive proof of death or other recitals, 597.
 probate, when conclusive, 598.
 inquisition of lunacy only *prima facie* proof, 599.
- ADMISSION, may prove loss of document, 208.
 when involved in confession, 623. (See CONFESSIONS.)
 by silence or conduct, 679.
- ADMISSIONS, as distinguished from confessions (see CONFESSIONS), 628.
 proof of establishing marriage, 172.
- ADULTERIES, when to be proved cumulatively, 35.
- ADULTERY, hearsay not admissible to prove, 247.
 confessions of suspicious, 637.

INDEX.

ADULTERY—(continued).

- number of witnesses required in prosecutions for, 389.
- inferences from, in homicide, 785.
- other acts admissible to prove, 35.

AFFIRMATION, involves negation, 320

- as a mode of qualifying witness, 355.

AFFIRMATIVE TESTIMONY stronger than negative, 385.

AGE, may be inferred from inspection, 311.

- when provable by reputation, 236.
- or by opinion, 459.

AGENCY may be proved by parol, 164.

AGENCY OF CRIME must be substantially proved, 91.

- material variance is fatal, 92.
- unknown instruments may be so described, 93.

AGENT, due appointment of, inferred, 833.

- proof of act by, sustained by proof of principal, 102.
- admissions of, are receivable against principal, 695.
- wrongful act of agent when imputable without proof of criminal design in principal, 696.
- admissions of attorneys and referee receivable, 697.

AGGRAVATION, variance as to, 142.

ALABAMA, rule in, as to defendant's statements, 427.

ALIAS DICTUS, effect of, in proof, 98.

ALIBI, burden of proof as to, 333.

- nature of, as a defence, 333, n., 742.
- inference from forgery of, 742.

ALTERATION of document, presumptions from, 741 *et seq*

ALMANAC, admissibility of, 539.

ANALOGY, the mode by which conclusions are reached, 5.

ANCIENT RECORD, when admissible, 606.

ANCIENT REGISTERIES, when admissible, 190.

ANIMAL HABITS, constancy of, inferred, 825.

ANIMALS, variance as to, 124.

- when to be brought into court for inspection, 312.

"APPARENCY" the test of danger, 69, 70.

APPEARANCE, presumptions of identity from, 803.

ARREST, privilege from, 356.

ARTICLES OF PROPERTY, how to be proved, 121.

ARTISTS, when experts (see EXPERTS), 415.

ASSIGNMENT, proof of any, will sustain indictment, 131.

ASSOCIATION, effect of, on credibility, 378.

ATHEISM, when disqualifying witness, 361.

ATTACHMENT, when granted for refusal to answer, 450.

- for refusal to obey subpoena, 349.

ATTEMPTS, prior, admissible to prove intent, 49.

INDEX.

- ATTORNEY**, communications with privileged (see **PRIVILEGED COMMUNICATIONS**), 496 *et seq.*
may be witness for his client, 385.
- ATTORNEY-GENERAL**, consultations with, when privileged, 512.
- AUTHORITY**, influence of, in criminal issues, 2.
of officer or agent, when inferred, 833.
- AUTREFOIS ACQUIT** (see **JUDGMENT**), 570.
must be specially pleaded, 592.
parol evidence may be received to explain, 593.
party setting up must prove, 332.
- AVERMENTS**, when divisible, 129.
negative, proof of, 128.
- BAD CHARACTER**, when evidence of, is admissible (see **CHARACTER**), 57, 68.
- BAIL**, witness may be required to find, for appearance, 352.
- "BANK NOTE,"** variance as to proof of, 116 *a.*
- BAPTISMS**, registry of, when evidence, 532.
- BASTARDY**, when likeness can be judged by inspection, 312.
number of witnesses required in, 388.
- BIAS** of witness, how affecting credibility, 376.
witness may be examined as to, 477.
- BIGAMY**, proof of marriage in, 171.
admissibility of first wife in, 397.
- BILL OF EXCHANGE**, variance as to proof of, 116 *a.*
- BIRTH**, may be proved by parol, 163.
may be proved by reputation, 236.
due period of, presumption of, 816.
- BLIND PERSONS**, limitation as to testimony of, 369.
- BLOOD-STAINS**, inferences from, 777-8.
cannot be proved beyond doubt to be human, 777 *a.*
examination of experts as to, 423.
- "BLUSHING,"** inferences from, 751.
- "BOND,"** variance as to proof of, 116 *a.*
- BOOKS**, admissibility of (see **DOCUMENTS**).
- BOOKS OF HISTORY AND SCIENCE: MAPS AND CHARTS.**
Approved books of history and geography by deceased authors receivable, 537.
books of inductive science not usually admissible, 538.
otherwise as to books of exact science, 539.
- BOOKS OF STATUTES**, when evidence, 522.
- BURDEN OF PROOF**,
Prevalent theory is that burden of proof is on affirmative, 319.
true view is that burden is on party undertaking to prove a point, 320.
negatives are susceptible of proof, 321.
burden is properly on prosecution, 322.

INDEX.

BURDEN OF PROOF—(continued).

- party who sets up another's tort must prove it, 323.
- burden on prosecution to prove *corpus delicti*, 324.
- corpus delicti* consists (1) of a criminal act, and (2) of the defendant's agency in such act, 325.
- identification of body after death not essential, 326.
- in infanticide, burden on prosecution to prove prior life of child, 327.
- death must be connected with injury, 328.
- burden, as to all essential ingredients of offence, is on prosecution, 329.
- distinction between burden and presumption of innocence, 330.
- burden on defendant of defences purely extrinsic, 331.
- so of licenses and *autrefois acquit*, 332.
- alibi* not an extrinsic defence, 333.
- otherwise as to provocation, 334.
- necessity must be substantively proved, 335.
- discussion as to insanity, 336.
- when sanity is of essence it must be proved beyond reasonable doubt, 340.
- burden is on party to prove what it is his duty to prove, 341.
- license to be proved by party to whom such proof is essential, 342.
- burden of proving formalities is on him to whom it is essential, 343.
- court may instruct jury that a presumption of fact makes a *prima facie* case, 344.

BURGLARY, inferences from stolen goods, 763.

BUSINESS ENTRIES OF DECEASED PERSONS.

- Entries of deceased or non-procurable persons in the course of their business admissible, 251.
- so of notes of counsel and other officers, 252.
- so of notaries' entries, 253.

BUSINESS MEN, when experts (see EXPERTS), 415, 416.

- regularity of, presumed, 834.

CALCULATIONS, books of, when admissible, 539.

CAPACITY of witness, how affecting credibility, 373 *et seq.*

CAREFULNESS, when inferred, 732.

CASUS, defence of, how to be met, 36.

- burden as to, 335, 823.

CATTLE, variance as to proof of, 124.

- habits of, inference from, 825.

CAUSAL CONNECTION, burden on prosecution to prove, 320, 325-8.

- proof of, necessarily inferential, 12.

CERTAINTY, not possible in juridical inquiries, 20.

CERTIFICATES, generally inadmissible, 195, 534.

CHALLENGES, proof of venue in, 113.

CHANGE, burden of proof as to, 816.

CHARACTER relevant in criminal issues, 57.

- "character" is convertible with reputation, 58; see 259, 261.

INDEX.

CHARACTER—(continued).

- burden on party assailing character, 59.
- provable by reputation, 259.
- defendant may show a character inconsistent with the crime charged, 60.
- prosecution cannot rebut by particular facts, 61.
- no presumption to be drawn from non-production of such evidence, 62.
- prosecution cannot rebut by showing bad character subsequent to homicide, or in localities where defendant had not lived, 63.
- prosecution cannot impeach unless defendant puts in issue, 64.
- tendency or ability to commit offence inadmissible, 65.
- weight to be attached to character, 66.
- bad character of party injured generally irrelevant, 68.
- but in cases of self-defence relevant to prove deceased's ferocity, strength, and vindictiveness, in order to show *bona fides* of defendant's belief that he was in extreme danger, 69.
- England, 70.
- New York, 71.
- New Jersey, 72.
- Pennsylvania, 73.
- North Carolina, 74.
- South Carolina, Georgia, Alabama, Kentucky, Tennessee, Mississippi, 75.
- Indiana, 76.
- Michigan, 77.
- Minnesota, 78.
- Iowa, 79.
- Missouri and Texas, 80.
- California and other States, 81.
- inconclusiveness of the cases cited to the contrary, 82.
- in Massachusetts such evidence is now inadmissible, 83.
- summary of the law, 84.

CHARACTER OF WITNESS, how assailed and defended, 486 *et seq.*

CHARTER, how to be averred and proved, 102 *a.*

CHEMISTS, admissible as experts, 412.

CHILDREN, presumptions of capacity of, 800.

when admissible witnesses, 366.

CHINESE, mode of swearing, 354.

CHRONIC INSANITY, presumption as to continuance of, 730.

CIRCUMSTANCES, the incidents of all proof, 11.

"CIRCUMSTANTIAL EVIDENCE," not distinguishable from direct, 10.

"CIRCUMSTANTIAL VARIETY," incidental to statements by witnesses, 381.

CIRCUMSTANTIALITY, a test of credibility, 17, 379.

CIVIL PROCEEDINGS, do not bar criminal, 575.

CLERGYMEN, admissible to prove marriage, 173.

official entries of, 530, 532.

when communications to privileged, 507.

INDEX.

- CLIENT, communications to counsel privileged, 496 *et seq.*
bound by attorney, 697.
- CLOTHES, inculpatory inferences from, 767.
may be inspected in court, 312.
character of may be proved without producing them, 163-7, 767 *et seq.*
- CO-CONSPIRATORS, admissions of, when admissible, 698.
declarations of, admissible against each other, 698.
and so of acts, 698.
but not after conspiracy is at an end, 699.
rule not affected by the parties being co-defendants, 700.
decoy not a co-conspirator, 700 *a.*
form of prosecution not material, 701.
principal's acts admissible against accessory, 702.
declarations of co-conspirators in each other's favor, 703.
- CO-DEFENDANTS, when admissible for or against each other (see AC-COMPLICES), 439.
when affected by each other's admissions, 700.
when by each other's acts, 698.
- COERCION, invalidates confessions, 646 *et seq.*
of wife when presumed, 733.
- COHABITATION as a proof of marriage, 170, 827.
inference from, 827.
- COIN, how to be proved, 122.
- COLLATERAL FACTS, when proof of is admissible, 30.
- COLLATERAL MATTERS, when witnesses may be examined as to, 484.
- COLOR OF PERSON, may be decided by inspection, 312.
- COLOR-BLINDNESS, effect on testimony, 373.
- COMMISSION of officer need not ordinarily be produced, 164, 834.
- COMMUNITY, reputation of, when admissible, 232.
- COMPARISON OF HANDS, proof of writing by, 455-8.
- COMPETENCY OF WITNESSES, to be decided by court, 357.
competency is presumed, 358.
ordinarily competency should be excepted to before oath, 359.
distinction between primary and secondary does not apply to witnesses, 360.
atheism at common law disqualifies, 361.
evidence may be taken as to religious belief, 362.
infamy at common law disqualifies, 363.
removal of disability by statute, 363 *a.*
excepted cases where convict may testify, 364.
removal of disability by pardon, 365.
admissibility of infants depends on intelligence, 366.
no absolute presumption from infancy, 367.
court may examine witness or continue trial, 368.
deficiency of percipient powers if total excludes, 369.
in insanity the same tests are applicable, 370.

INDEX.

COMPETENCY OF WITNESSES—(continued).

witness may be examined by judge as to capacity, 371.

inquisition only *primâ facie* proof, 372.

COMPULSION, proof of, 14.

COMPULSORY EXAMINATION OF PERSON, when results may be proved, 315.

CONCUBINAGE, inference of, 247, 389, 637.

continuance of, 827.

CONDUCT, when involving confessions, 679, 683.

CONFESSIONS.

General Characteristics.

Confessions not strictly evidence, 623.

must relate to existing conditions, 624.

when extra-judicial do not conclude, 625.

intent necessary to give weight to, 626.

credibility a question of fact, 627.

confession of guilt deductive; admission of a fact inductive, 628.

confession to be brought home to party charged, 629.

imperfection of medium to be considered, 630.

confessions when voluntary generally admissible, 631.

but without proof of *corpus delicti* inadequate, 632.

meaning of *corpus delicti*, 633.

credibility to be tested objectively, 634.

and also subjectively, 635.

and so as to terms of statement, 636.

confessions of adultery to be closely scrutinized, 637.

Judicial Confessions.

Confessions by plea conclusive, 638.

so of pleas of abatement, 639.

in pleading that which is not disputed is admitted, 640.

pleadings in other cases may be admissions, 641.

and so of process, 642.

Written Confessions.

Written confessions entitled to peculiar weight, 643.

letters are thus admissible, 644.

so of telegrams, 645.

Admissibility of Confessions as determined by Threats or Promises.

Confession induced by threats is admissible, 646.

mere adjuration to speak the truth does not exclude, 647.

nor does a statement of the wrongfulness of concealing, 648.

nor the bare fact of the confession being made to a person in authority, 649.

but confession induced by authoritative promises is inadmissible, 650.

promise must be made by person in authority, 651.

promise made by master does not exclude when offence does not concern master, 652.

condition of party confessing is to be considered, 653.

INDEX.

CONFESSIONS—(*continued*).

- mere advice does not exclude, 654.
- nor does expectation of compromise, 655.
- confession of accomplice called as State's evidence cannot be used against him, 656.
- collateral inducement does not exclude, 657.
- issue is whether the influence applied was such as to lead to a false statement, 658.
- assurances of secrecy do not exclude, 659.
- nor do spiritual inducements, 660.
- when duress excludes, 661.
- answers to interrogatories admissible, 662.
- even when questions are leading, 663.
- not excluded by the fact that the statement was under oath, 664.
- nor made on a former trial, 664, 669.
- otherwise when compelled to answer under oath, 665.
- examination of prisoner when admissible, 666.
- parol evidence of written examination inadmissible, 667.
- answers under oath are inadmissible, 668.
- otherwise as to voluntary statements, 669.
- artifice does not exclude, 670.
- not necessary that the inducement should be held out directly to the defendant, 671.
- presence of person in authority does not necessarily exclude, 672.
- apparent authoritative influence should be applied, 673.
- what expressions are to be construed as likely to produce a false confession, 674.
- voluntariness a distinct issue, 674 a.
- Sleep and Drunkenness.*
 - Confessions during sleep inadmissible, 675.
 - how far drunkenness excludes, 676.
- How far Original Improper Influence vitiates Subsequent Confessions.*
 - When influence ceases confession becomes admissible, 677.
- How far Extraneous Facts reached through an Inadmissible Confession may be received.*
 - Extraneous facts reached through an inadmissible confession may be proved, 678.
- Admissions by Silence or Conduct.*
 - Statements silently acquiesced in may be treated as admissions, 679.
 - but not so when accused was not in a position to speak, 680.
 - and not so as to parties hearing testimony of witness, 681.
 - letters in possession of a party not admissible against him, 682.
 - admissions may be by acts, 683.
- What Confessions may prove.*
 - Party's admission may prove contents of writing, 684.
 - confession not excluded because party could be examined, 685.

INDEX.

CONFESSIONS—(*continued*).

may prove marriage, 686.

but not record facts, 687.

How Confessions are to be construed.

Whole confession must be proved, 688.

How Admissibility is to be determined.

Question of admissibility is for court, 689.

Self-serving Declarations.

Self-serving declarations inadmissible for defendant, 690.

exception as to *res gestae*, 691.

coincident declarations admissible to prove authority, 692.

and so as to state of party's mind, 693.

weight of self-serving declarations, 694.

Agents.

Admissions of agents are receivable, 695.

wrongful act of agent when imputable without proof of criminal design in principal, 696.

and so of admissions of attorneys and referee, 697.

Co-conspirators.

Declarations of admissible against each other, 698.

but not after conspiracy is at an end, 699.

rule not affected by the parties being co-defendants, 700.

decoy not a co-conspirator, 700 *a*.

form of prosecution not material, 701.

principal's acts admissible against accessory, 702.

declarations of co-conspirators in each other's favor, 703.

CONFESSIONS TO PRIEST, how far privileged, 507.

CONFIDENCES IN MARRIAGE, cannot be disclosed, 898.

CONFUSION, appearance of, as evidence of guilt, 751.

CONSPIRACY, proof of venue in, 111.

inferential proof of, 32, 698.

CONSPIRATORS, declarations of (see *CONFESSIONS*), 698.

CONSTANCY OF NATURE, inferred, 823.

CONSTITUTIONALITY of statutes regulating presumptions, 715 *a*.

of statutes regulating admission of witnesses, 360 *a*.

CONTEMPT, in witness refusing to attend, 349.

attachment granted on rule, 350.

and so in refusing to answer, 450.

CONTINUANCE, general presumptions of, 816 *et seq*.

CONTINUANCE OF LIFE, when presumed, 810.

CONTRADICTION OF WITNESS, limits as to (see *EXAMINATION*), 484.

CONVERSATIONS, how to be proved, 461.

CONVICT, when entitled to testify, 364.

CONVICTION, when a bar (see *JUDGMENTS*), 474.

when to be collaterally impeached, 596 *a*, 599 *a*.

cannot be proved by parol, 153

INDEX.

CONVICTION OF CRIME, when relevant to impeach witness, 489, 596 *a*.

when excluding witness, 303.

proof of, 602.

when admissible for other purposes (see **JUDGMENTS**), 602 *a*.

COÖPERATION, when constituting accompliceship, 440.

COPIES.

Secondary evidence of documents admits of degrees, 174.

photographic copies are secondary, 175.

all printed impressions are of same grade, 176.

press copies are secondary, 177.

examined copies must be compared, 178.

exemplifications made admissible by statute, 179.

statute does not exclude other proofs, 181.

only extends to court of record, 182.

statute must be strictly followed, 183.

office copy admitted when authorized by law, 184.

original records receivable in same court, 185.

office copies admissible in same State, 186.

so of copies of records generally, 187.

seal of court essential to copy, 188.

of deeds, registry is admissible, 189.

ancient registries admissible without proof, 190.

certified copy of official registry receivable, 191.

exemplification of recorded deeds admissible, 192.

in such case subscribing witness need not be called, 193.

when deeds are recorded in other States exemplifications must be under act of Congress, 194.

certificates inadmissible by common law; otherwise by statute, 195.

certificates cannot bind as to facts not of record, 196.

notaries' certificates admissible, 197.

copies of public documents receivable, 198.

CORONER, effect of evidence taken before, 230, 668, 680.

CORPORATE ACT, regularity of presumed, 836 *a*.

CORPORATIONS, when charter must be proved, 164 *a*.

proceedings of, may be proved by parol, 163.

how name of must be proved, 102 *a*.

records of, when evidence, 527.

CORPUS DELICTI, meaning of term, 633.

burden on prosecution to prove, 324, 787.

corpus delicti, a criminal act, 325.

identification of body after death not essential, 326.

in infanticide, burden on prosecution to prove prior life of child, 327.

death must be connected with injury, 328, 787.

burden as to all essential ingredients of offence is on prosecution, 329.

must be proved before confessions can be received, 632.

CORROBORATION required for accomplice, 441-2.

COSTS OF WITNESS, practice as to, 347.

INDEX.

- COUNSEL** may be witnesses for their clients, 385.
notes of, when admissible, 252.
communications with, when privileged (see **PRIVILEGED COMMUNICATIONS**), 496 *et seq.*
opinions of, when admissible, 225.
- COUNTERFEITING**, cumulative proof of (see **FORGERY**), 39, 43.
- COURT**, jurisdiction of (see **JUDGMENT**).
- COURT-ROOM**, when witnesses may be required to leave, 446.
- COURTS**, regularity of proceedings of inferred, 829.
- COURTS-MARTIAL**, effect of proceedings of, 576.
- COVERTURE**, inferences as to, 820.
- CREDIBILITY OF WITNESSES**, tests of, 360.
capacity to perceive a condition of credibility, 373.
and so of capacity to narrate, 374.
deaf and dumb witnesses not incompetent, 375.
bias to be taken into account in estimating credibility, 376.
and so of want of knowledge of topic, 377.
and so of capacity to remember, 378.
want of circumstantiality a ground for discredit, 379.
falsum in uno, falsum in omnibus, not universally applicable, 380.
literal coincidence in oral statements suspicious, 381.
affirmative testimony stronger than negative, 382.
when credit is equal, preponderance to be given to numbers, 383.
credibility of witnesses is for jury, 384.
intoxicated witnesses may be excluded, 384 *a.*
counsel in case may be witnesses, 385.
rules as to defendants, 429.
- CRIME**, conviction of, when disqualifying, 303.
when such conviction is impeachable, 599 *a.*
- CRIMES**, independent, when relevant (see **RELEVANCY**), 31.
professional confidences as to, not privileged, 505.
- CRIMINATION**, witness not compelled to, 463.
- CROSS-EXAMINATION** (see **WITNESSES**), 454.
- CUMULATIVE PROOF**, the process by which conclusions are reached, 6.
- DATE**, how to be proved (see **TIME**), 103-6.
- DEAD ANIMALS**, variance as to proof of, 124.
- DEAD BODIES**, caution as to identification of, 804.
- DEAF AND DUMB PERSONS**, when competent as witnesses, 375.
- DEAFNESS** of witness, how affecting credibility, 375.
- DEATH** may be proved by reputation, 236, 245, 809.
effect of on identity, 804.
presumptions as to, 228, 809.
from lapse of years, 809.
continuance of life presumed, 810.
period of death to be inferred from facts of case, 811.

INDEX.

DEATH—(continued).

- fact of death presumed from other facts, 812.
- letters testamentary not collateral proof, 813.
- inference of death without issue, 814.

DEATH OF WITNESS ON FORMER TRIAL, when to be presumed, 228.

DECEASED PERSONS, DECLARATIONS OF.

- Such declarations receivable, 248.
- no objection that such declarations are based on hearsay, 249.
- declarations must be self-dis-serving, 250.
- business entries by, when admissible, 251.
- identification of, 804.
- threats of, in homicide cases, 757.

DECEASED WITNESS, when testimony of is admissible, 227.

DECEASED'S BAD CHARACTER, when admissible in homicide cases, 69.

DECLARATIONS, self-serving, inadmissible, 690.

DECLARATIONS CONCERNING PARTY'S OWN HEALTH AND STATE OF MIND.

- Declarations of a party as to his own injuries admissible, 271
- so as to his condition of mind when such is at issue, 272.
- so as to prosecutrix in rape, 273.
- so as to person whose assent to an act has to be proved, 274.
- inadmissible when self-serving, 690.
- otherwise when part of the *res gestae*, 691.

DECLARATIONS OF DECEASED PERSONS, when admissible, 248.

DECLARATIONS OF RELATIVES, when admissible to prove pedigree, 233.

DECLARATIONS OF THIRD PARTIES inadmissible, 221.

- objections to such evidence, 222.
- acts may be hearsay, 223.
- interpretation is not hearsay, 224.
- testimony of non-witnesses not ordinarily receivable when reported by another, 225.
- so of acts concerning strangers, 226.

DECOY, not an accomplice, 440.

- not a co-conspirator, 700 *a*.

DEED, registry of, when admissible, 180, 192, 194.

- variance as to proof of, 116 *a*.

DEFENDANTS, may be severed in trial, 136.

DEFENDANTS AS WITNESSES.

- Defendant at common law may make statement, 427.
- by statute may be sworn as witness, 428.
- party is subject to the ordinary limitation of witnesses, 429.
- may be cross-examined to the same extent, 430.
- may be examined as to his motives, 431.
- cannot avoid relevant questions on the ground of self-crimination, 432.

INDEX.

DEFENDANTS AS WITNESSES—(continued).

- may be contradicted on material points and impeached, 433.
- may be re-examined, 434.
- what he says may be used against him on subsequent trial, 664, 669.
- no presumption against defendant for not testifying, 435.
- counsel not to allude to non-testifying, 435 a.
- distinctive provisions in particular States, 436.
- husband and wife not affected by statute, 437.
- otherwise as to co-defendants, 438.

DEGREES, question of, as to secondary evidence, 174.

DEGREES OF CRIME, how affected by test of doubt, 721.

DEMONSTRATION, not possible in legal procedure, 7.

DEMURRER, when operating as an admission, 616.

DEPOSITIONS, matter of local practice, 306.

DESCRIPTION, when to be proved, 101.

DESIGN, inference of, 737 *et seq.*

DESTROYED DOCUMENTS, proof of, 118, 199.

DETECTIVE, not an accomplice, 440.

DIAGRAMS, when admissible in evidence, 545.

DICTIONARIES, when admissible in evidence, 538.

DILIGENCE, how proved and disproved, 56.

"DIRECT" EVIDENCE, characteristics of, 10.

DISCRIMINATION, power of, necessary to witness, 373.

DISGRACE, when witness may be compelled to expose himself to, 472.

DISGUISE, inference from, 750.

DIVISIBLE AVERMENTS.

Defendant may be convicted of part of offence charged, 129

may be convicted of minor offence, 130.

any proved assignment will be sufficient, 131.

one of several articles in larceny is enough, 132.

and so of several objects in conspiracy, 133.

and so of divisible predicates, 134.

and so of cumulative intents, 135.

defendants may be severally convicted, 136.

divisibility extended by statute, 137.

DIVORCE, cannot be proved by parol, 153.

DOCKET ENTRIES, when admissible evidence, 605.

DOCUMENTS.

General Rules.

A document is an instrument in which facts are recorded, 519.

pencil writing is sufficient, 520.

admission of part involves admission of whole, 521.

Statutes: Legislative Journals: Executive Documents.

Public statutes prove their recitals, 522.

otherwise as to private statutes, 523.

INDEX.

DOCUMENTS—(continued).

- journals of legislature proof as to recited facts, 524.
- so of executive documents, 525.

Non-judicial Registries and Records.

- Official registry admissible when statutory, 526.
- so of records of public corporations, 527.
- books and registries kept by public institutions admissible, 528.
- log-book admissible under act of Congress, 529.

Records and Registries of Birth, Marriage, and Death.

- Registries of marriage and death admissible when duly kept, 530.
- so when kept by deceased persons in course of their duties, 531.
- registry only proves facts which it was the duty of the writer to record, 532.
- entries must be at first hand and prompt, 533.
- certificate at common law inadmissible, 534.
- and so of copies, 535.

family records admissible to prove family events, 536.

Books of History and Science: Maps and Charts.

- Approved books of history and geography by deceased authors receivable, 537.
- books of inductive science not usually admissible, 538.
- otherwise as to books of exact science, 539.

Gazettes and Newspapers.

- Gazette evidence of public official documents, 540.
- newspapers admissible to impute notice, 541.
- but not generally for other purposes, 542.
- knowledge of newspaper notice may be proved inferentially, 543.

Pictures, Photographs, and Diagrams.

- Pictures and photographs in cases of identity admissible, 544.
- and so of plans and diagrams, 545.

Proof of Documents.

- Documents must be proved by party offering, 546.
- documents over thirty years old prove themselves, 547.
- ancient documents may be verified by experts, 548.
- handwriting* may be proved by writer himself, or by his admissions, 549.
- party may be called upon to write, 550.
- witness of signature to document, 550 *a*.
- seeing a person write qualifies a witness to speak as to signature, 551.
- witness familiar with another's writing may prove it, 552.
- burden on opposite side to prove witness incompetent, 553.
- on cross-examination witness may be tested by other writings, 554.
- by English common law, comparison of hands not permitted, 555.
- exception made as to test paper already in evidence, 556.
- in some jurisdictions comparison is admitted, 557.
- test papers made for purpose inadmissible, 558.
- experts admitted to test writings, 559.

INDEX.

DOCUMENTS—(continued).

photographers in such cases admissible as experts, 561.

experts may be cross-examined as to skill, 562.

their testimony to be closely scrutinized, 563.

Parol proof of, 152 *et seq.*

Inspection of Documents by Order of Court, 312, 845.

Rule may be granted to compel production of papers, 564.

inspection must be ordered, but not surrender, 565.

production of criminatory document will not be compelled, 566.

documents when produced for inspection may be examined by interpreters and experts, 567.

cannot be proved by parol (see PAROL PROOF).

cannot be varied by parol, 620.

formalities of presumed regular, 832.

variance as to (see VARIANCE), 114.

DOGS, variance as to proof of, 124.

inspection of, 312.

habits of, 825.

DOMICIL, inferences as to, 817.

DOUBT, to acquit, must be reasonable, 1, 718.

effect on degree of offence, 721.

DRESS, inculpatory inferences from, 767.

DROWNING, inferences as to, 783.

DRUNKENNESS, effect of in invalidating a confession, 675.

when excluding witness, 384 *a.*

opinion as to, 460.

DUEL, proof of venue as to, 113.

DUMBNESS, how far affecting testimony, 375.

DURATION, inferences as to, 816.

DURESS, when invalidating confession, 651.

DYING DECLARATIONS.

General grounds of admissibility, 276.

evidence does not conflict with constitutional limitations, 277.

but cannot be received to prove facts distinct from homicide, 278.

such facts may be received to sustain declarant's mental capacity, 279.

declarations of dying persons not admissible as to another's death who was simultaneously killed, 280.

declaration must be under a solemn sense of impending dissolution, 281.

yet this may be inferentially shown, 282.

no objection that medical attendant had hope, 283.

expressions indicating belief in impending death, 284.

even a faint hope excludes, 285.

need not have been immediately before death, 286.

prior declarations may be affirmed immediately before death, 287.

only admissible when death is the subject of the charge, 288.

admissible from husband against wife, and *vice versa*, 289.

INDEX.

DYING DECLARATIONS—(continued).

- deceased must have been competent as a witness, 290
- infants and insane persons, 290.
- infidels, 291.
- infamous persons, 292.
- may be proved by signs, 293.
- evidence must have been admissible had deceased been sworn, 294.
 - matters of opinion, 294.
- declarations reduced to writing, 295.
- admissible without above limitations when part of the *res gestae*, 296.
- admissibility is for the court, 297.
- are to be examined and impeached by same tests as are applicable to evidence adduced on trial, 298.
- inadmissible if clearly fragmentary, 299.
- no objection that questions were leading if deceased spoke intelligently, 300.
- substance may be proved, 301.
- character of deceased for truth may be impeached, 302.
- jury to judge of credibility, 303.
- admissible when in defendant's favor, 304.

ELECTION, when several offences are proved, 104.

ENGINEERS, when experts, 413-4.

ENTRIES by deceased persons, when admissible, 252.

ESCAPE, presumptions from, 750.

inference from attempt to evade justice, 750.

prevarication and embarrassment may be proved, 751.

evidence to explain flight admissible, 752.

ESSENTIAL ALLEGATIONS, variance as to, 143, 146.

ESTOPPEL BY CONDUCT (see ADMISSIONS), 679.

ESTOPPEL BY JUDGMENT.

Judgment on same subject matter binds, 570.

parties must be the same, 570 *a*.

jurisdiction a prerequisite of admissibility of former proceedings, 571.

preliminary proceedings no bar, 572.

nor is a *nolle prosequi*, or dismissal, or *ignoramus*, 573.

verdict of acquittal without judgment a bar, otherwise with conviction, 574.

criminal prosecutions not barred by civil suits, 575.

military courts may make final rulings, 576.

judgment on *nolo contendere* estops, 577.

offences must be identical, 578.

when evidence in second case is enough to have secured judgment in first, then first judgment estops, 579.

when the same act has two indictable aspects, conviction of the one bars the other, 580.

INDEX.

ESTOPPEL BY JUDGMENT—(*continued*).

- illustrations in liquor cases, 581.
- prior acquittal on ground of misnomer inadmissible, 582.
- and so of prior acquittal from variance, 583.
- prior prosecution of minor offence inclosed in major is admissible in a subsequent trial of major, 584.
- otherwise when there could be no conviction on first trial of major offence, 585.
- in prosecution for minor offence, it is admissible to put in evidence former prosecution of case containing major and minor, 586.
- when two persons are simultaneously killed by one blow, a prosecution for killing one is not barred by a prosecution for killing the other, 587.
- on a trial for stealing the goods of A., a former prosecution for stealing the goods of B. is not a bar, 588.
- "simultaneous" does not mean coincidence in a point of time, 589.
- in battery, prosecution for prior simultaneous battery of another is a bar, 590.
- judgment on successive offences not exhaustive, 591.
- autrefois acquit* must be specially pleaded, 592.
- parol evidence admissible to identify or distinguish, 593.

ETHERIZED PERSONS, when witnesses, 369.

EVASION OF JUSTICE, inference from, 750 *et seq.*

EVIDENCE: PRELIMINARY CONSIDERATIONS.

- Guilt must be shown beyond reasonable doubt, 1.
- object of is juridical conviction, 4.
- analogy the means of juridical proof, 5.
- conclusions to be reached by a cumulation of probabilities, 6.
- no evidential fact can be demonstrated, 7.
- even scientific conclusions cannot be demonstrated, 8.
- the highest expert testimony fails in this respect, 9.
- fallacy of distinction between "direct" and "circumstantial" evidence, 10.
- all evidence is circumstantial, 11.
- causation always an inference, 12.
- and so of identity of party charged, 13.
- and so of his free agency, 14.
- and so of his sanity, 15.
- and so of his intent, 16.
- witnesses dependent on character for credibility, 17.
- perjury always possible, 18.
- prejudice is conditioned by circumstances, 19.
- reasoning in such cases to be logical, 20.
- juridical value of hypothesis, 21.

EVIDENCE: TAMPERING WITH, inferences from, 741 *et seq.*

EVIDENCE: WITHHOLDING, presumptions from, 749.

INDEX.

EXAMINATION OF PRISONERS, admissibility of, 666.

EXAMINATION OF WITNESSES.

Judge may order separation of witnesses, 446.

voir dire a preliminary examination, 447.

all witnesses on back of indictment must be produced, and so of all witnesses to transaction, 448.

interpreter to be sworn, 449.

witnesses refusing to answer punishable by attachment, 450.

witness is no judge of the materiality of his testimony, 451.

court may examine witness, 452.

witness is protected as to answers, 453.

examination and cross-examination governed by same rules as in civil suits, 454.

leading questions excluded, 454 a.

witness cannot be asked as to conclusion of law, 455.

nor as to motives of other persons, 456.

nor can opinion ordinarily be given, 457.

otherwise when opinion is fact at shorthand, 458.

so as to noises, smells, and identifications, 459.

so as to facts which cannot be expressed in concrete, 460.

witness may give substance of conversation, 461.

vague impressions are inadmissible, 462.

witness cannot be compelled to criminate himself, 463.

nor to expose himself to fine or forfeiture, 464.

privilege in this respect can only be claimed by witness, 465.

danger of prosecution must be real, 466.

exposure to civil liability no excuse, 467.

nor to police or liquor prosecutions, 468.

court determines as to danger, 469.

waiver of part waives all, 470.

pardon and indemnity do away with protection, 471.

for the purpose of discrediting witness, answers will not be compelled to questions imputing disgrace, 472.

otherwise when such questions are material, 473.

witness may be asked whether he has been in prison, 474.

questions may be asked as to religious belief, 475.

and so as to questions of motive, or veracity, or *res gestae*, 476.

and so as to bias, 477.

presumption from refusing to answer, 478.

witness's answers as to prior conduct conclusive, 479.

compelled answers cannot be used against witness, 480.

Reëxamination.

party may reëxamine witness, 493.

witness may be recalled, 494.

witness may be re-cross-examined, 495.

EXECUTION OF DOCUMENT, when presumed, 832.

INDEX.

EXEMPLIFICATIONS, when admissible as proof, 178.

EXPENSES OF WITNESS, practice as to, 348.

EXPERTS.

Expert testifies as a specialist, 403.

may be examined as to laws other than the *lex fori*, 404.

but cannot be examined as to matters non-professional, or of common knowledge, 405.

whether conclusion belongs to specialty is for court, 406.

expert may be examined as to scientific authorities, 407.

expert must be skilled in his specialty, 408.

court decides as to impeaching or sustaining, 409.

limits to be defined by court, 410.

but not to include matters of ordinary observation, 411.

medical man, an expert in his school, may be examined as such, 412.

so of scientists, 413.

so of practitioners in a business specialty, 414.

so of artists, 415.

so of persons familiar with a market, 416.

on questions of sanity not only experts but friends and attendants may be examined, 417.

expert may be examined as to hypothetical case, 418.

may explain his opinion, 419.

his testimony to be jealously scrutinized, 420.

especially when *ex parte*, 421.

post-mortem observations, 422.

examination of blood-stains, 423.

examination of handwriting, 424.

as to terms of art, opinions on conceded facts, obscure terms, etc., 425.

he may be specially feed, 426.

EXPERT TESTIMONY, inherent fallibility of, 9, 420.

EXTRA-JUDICIAL STATEMENTS, when hearsay, 225.

EXTRANEOUS CRIMES, proof of, inadmissible, 30 *et seq.*

EYE, evidence by inspection, 311.

FABRICATION OF EVIDENCE, inference from, 741 *et seq.*

FACT, KNOWLEDGE OF, when presumed, 725.

FAINTNESS, not a test of primariness, 160.

FALSE PRETENCES, only one assignment need be proved, 131.

FALSIFICATION OF EVIDENCE, inferences from, 741 *et seq.*

FALSUM IN UNO FALSUM IN OMNIBUS, scope of maxim, 380.

FAMILY FACTS, provable by family reputation, 233.

hearsay may prove pedigree, 233.

marriage may be so proved, 234.

relationship of declarants necessary to admissibility, 235.

such declarations may extend to facts of birth and death, 236.

writings of deceased ancestor admissible for same purpose, 237.

INDEX.

FAMILY FACTS—(*continued*).

- and so may conduct, 238.
- declarations may go to facts from which relationship may be inferred, 239.
- must have been *ante litem motam*, 240.
- declarant must be dead, 241.
- ancient family records and monuments admissible for same purpose, 242.
- so of inscriptions on tombstones and rings, 243.
- so of pedigrees and armorial bearings, 244.
- death may be proved by reputation, 245.
- so may marriage, 246.
- peculiarity in suits for adultery, 247.
- FAMILY RECORDS, admissible to prove pedigree, 242.
- FATHER, cannot be examined as to legitimacy of child, 518.
- FEES, allowable to witness, 347.
 - in felonies expenses need not be prepaid, 348.
 - may be specially given to expert, 426.
- "FELONIOUSLY," when to be rejected as surplusage, 148.
- FI. FA., when admissible as evidence, 611.
- FLIGHT, inference from, 750.
- FLORIDA, rule in, as to defendant's statements, 436.
- FOOTPRINTS, inferences from, 796.
 - inspection of, 315.
- FOREIGN JUDGMENTS, when impeachable, 596.
- FOREIGN LAW, proof of, 404.
 - presumption of similarity, 822.
- FOREIGN MARRIAGE, proof of, 172.
- FORGERIES, INDEPENDENT, when provable, 39.
 - when successive may be proved, 34.
- FORGERY, distinctive inferences in, 39, 844.
 - circumstantial proof of, 26.
 - opinion of alleged writer himself, 845.
 - those whose know his hand, 846.
 - experts, 847.
 - chemical and microscopic tests, 848.
 - circumjacent tests, 849.
 - falsity of contents, 850.
 - proof of writing by third party, 851.
 - variance as to instrument (see *VARIANCE*), 114.
- FORGERY OF EVIDENCE, inference from, 741 *et seq.*
- FORMAL LANGUAGE, variance as to, 147.
- FORNICATION, proof of, 35, 247.
- FRAUD, how inferred, 24 *et seq.*
 - may be proved to impeach judgment, 594, 595.
- FRUITS OF OFFENCE, inference from, 758.

- GAMING, not provable by reputation, 260.
- GAZETTEERS, not admissible evidence, 537.

INDEX.

GAZETTES AND NEWSPAPERS.

Gazette evidence of public official documents, 540.

newspapers admissible to impute notice, 541.

but not generally for other purposes, 542.

knowledge of newspaper notice may be proved inferentially, 543.

GENUINENESS OF DOCUMENT, inferences from, 728.

GESTATION, presumption of regularity in, 816.

GOOD CHARACTER, evidence of as a defence (see CHARACTER), 57.

evidence of as to witness (see WITNESS), 486.

GOOD FAITH, how proved and disproved, 55.

when presumed, 727.

"GOODS AND CHATTELS," variance as to proof of, 116 a.

GOODS, NUMBERS, AND SUMS.

Articles described must be substantially proved, 121.

coin must be specifically proved, 122.

proof must come up to some one article charged, 123.

animals must be substantially proved as described, 124.

variance in number immaterial, 125.

variance as to value immaterial, unless value be descriptive, 126.

collective value does not sustain specific, 127.

GOVERNMENT, proclamations of, when evidence, 525.

communications with, when privileged, 513.

GOVERNOR OF STATE, when privileged as witness, 513.

GRAND JURY, effect of allegation of "unknown" by, 97.

members of, how far privileged, 511.

GUILTY KNOWLEDGE, when provable by other crimes, 39.

inferences as to, 725, 734.

HABEAS CORPUS, may issue to bring in imprisoned witness, 351.

HABIT, inferences as to, 819, 826.

HAIR, inferences from, 779.

identity proved by, 804.

HANDWRITING, proof of, 549.

tests of, 39, 424, 550, 844.

comparison of hands, 555-8.

HANGING, inferences as to, 782.

HEALTH, may be proved by party's own statement, 271.

HEARSAY.

Generally Inadmissible.

Hearsay in its largest sense convertible with non-original, 220.

non-original evidence generally inadmissible, 221.

objections to such evidence, 222.

acts may be hearsay, 223.

interpretation is not hearsay, 224.

testimony of non-witnesses not ordinarily receivable when reported by another, 225.

so of acts concerning strangers, 226.

INDEX.

HEARSAY—(continued).

Exception as to Witness on Former Trial.

- Evidence of deceased witness in former trial admissible, 227.
- death of witness may be presumed from lapse of time, 228.
- so of witnesses out of jurisdiction or subsequently incompetent, 229.
- so of insane or sick witness, 230.
- mode of proving evidence in such case, 231.

Exception as to Matters of General Interest.

- Reputation of community admissible as to matters of public interest, 232.

Exception as to Pedigree, Relationship, Birth, Marriage, and Death.

- Hearsay may prove pedigree, 233.
- marriage may be so proved, 234.
- relationship of declarants necessary to admissibility, 235.
- such declarations may extend to facts of birth and death, 236.
- writings of deceased ancestor admissible for same purpose, 237.
- and so may conduct, 238.
- declarations may go to facts from which relationship may be inferred, 239.
- must have been *ante litem motam*, 240.
- declarant must be dead, 241.
- ancient family records and monuments admissible for same purpose, 242.
- so of inscriptions on tombstones and rings, 243.
- so of pedigrees and armorial bearings, 244.
- death may be proved by reputation, 245.
- so may marriage, 246.
- peculiarity in suits for adultery, 247.

Exception as to Self-disserving Declarations of Deceased Persons.

- Such declarations receivable, 248.
- no objection that such declarations are based on hearsay, 249.
- declarations must be self-disserving, 250.

Exception as to Business Entries of Deceased Persons.

- Entries of deceased or non-procurable persons in the course of their business admissible, 251.
- so of notes of counsel and other officers, 252.
- so of notaries' entries, 253.

Exception as to General Reputation when such is material.

- Admissible to bring home knowledge to a party, 254.
- but inadmissible to prove facts, 255.
- hearsay is admissible when hearsay is at issue, 256.
- so to prove condition of party's mind, 257.
- so as explanatory of admissible acts, 257 a.
- value so provable, 258.
- and so as to character, 259.
- but not conclusions of law; e. g., nuisance, gaming-house, barratry, 260.
- otherwise when notoriety is at issue, 261.

INDEX.

HEARSAY—(continued).

Exception as to refreshing Memory of Witness.

For this purpose hearsay admissible, 261 a.

Exception as to res gestae.

Res gestae admissible though hearsay, 262.

must spring immediately from act, 263.

retrospective narratives not part of *res gestae*, 264.

coincident business declarations admissible, 265.

what is done or exhibited at occurrence may be proved, 266.

test of secondariness does not apply, 267.

statements in preparation of crime inadmissible, 268.

declarations inadmissible to explain inadmissible acts ; nor are declarations admissible without acts, 269.

inadmissible if the witness himself could be obtained, 270.

Exception as to Declarations concerning Party's own Health and State of Mind.

Declarations of a party as to his own injuries admissible, 271.

so as to his condition of mind when such is at issue, 272.

so as to prosecutrix in rape, but not in other cases, 273.

so as to person whose assent to an act has to be proved, 274.

Exception as to Dying Declarations (see DYING DECLARATIONS), 276.

HISTORY, BOOKS OF, when admissible, 537.

HOMICIDE, effect of doubt on degrees of, 330, 718.

proof of *corpus delicti* in (see CORPUS DELICTI), 326, 784.

liability to, inferences from, 784.

proof of venue in, 110.

presumptions as to intent in (see PRESUMPTIONS), 738, 764.

how to be distinguished from suicide, 781.

indications as to, 764 *et seq.*

by hanging, 782.

by drowning, 783.

by poisoning, 787.

HONESTY, when presumed, 727.

HORSES, variance as to proof of, 124.

HOT BLOOD, burden of proof as to, 334.

continuance of, 734, 738, 784.

HOURLY, variance as to, 106.

HUMAN NATURE, presumptions as to (see PRESUMPTIONS), 711, 826.

HUSBAND, homicide of wife, inferences in cases of, 784.

supremacy of, when inferred, 733.

coercion by, 733.

HUSBAND AND WIFE AS WITNESSES.

At common law inadmissible for or against each other, 390.

and so for or against each other's co-defendants, 391.

rule does not apply where acquittal of one co-defendant does not affect the other, 392.

INDEX.

HUSBAND AND WIFE AS WITNESSES—(continued).

- exception in case of violence, 393.
- exception in case of abduction and rape, 394.
- when admissible against, admissible for, 394 *a*.
- may be witnesses to prove marriage collaterally, 395.
- cannot be compelled to criminate each other, 396.
- distinctive rules as to bigamy, 397.
- cannot testify as to confidential relations, 398.
- effect of death and divorce on admissibility, 399.
- general statutes do not remove disability, 400.
- otherwise as to special enabling statutes, 401.
- husband and wife may be admitted to contradict each other, 402.

HYPOTHESIS, value of in legal investigations, 21, 23.

HYPOTHETICAL CASE, may be put to expert, 418.

IDEM SONANS, effect of, 96.

IDENTIFICATION OF DECEASED, when necessary in homicide, 326, 804.

IDENTITY, INFERENCES AS TO.

- Opinions as to, 459.
- burden of proof as to, 329.
- inferable from name, 802.
- from continuousness of appearance and voice, 803.
- cautions in applying this inference to deceased persons, 804.
- inference from photographs, 805.
- identification dependent upon opportunities of observation and accuracy of narration, 806.
- comparative weight of opinions, 807.
- witness's memory may be tested, 808.
- proof of dependent on circumstances, 13, 27, 806.
- when determinable by inspection, 312.
- of deceased persons, 326, 804.

IDIOTS, incompetent as witnesses, 370.

IGNORAMUS, no bar to indictment, 573.

IGNORANCE, no excuse for crime, 723-5.

IMPEACHING AND SUSTAINING WITNESS.

- Rules in criminal the same as in civil issues, 481.
- opposing witness can be impeached by proving that he formerly stated differently, 482.
- witness must first be asked as to such statements, 483.
- witness cannot be contradicted on matters collateral, 484.
- witness's answer as to motives may be contradicted, 485.
- his character for truth may be attacked, 486.
- questions to be limited by time and place, 487.
- bias may be shown, 488.
- infamy may be shown to impeach credibility, 489.

INDEX.

IMPEACHING AND SUSTAINING WITNESS—(*continued*)

impeaching witness may be attacked and sustained, 490.

impeached witness may be sustained, 491.

but not by proof of former statements, 492.

IMPEACHING CHARACTER OF DEFENDANT, 59.

IMPEACHING JUDGMENT.

Judgment may be collaterally impeached for want of jurisdiction, 594.
so for fraud, 595.

foreign judgments impeachable for want of jurisdiction or fraud, 596.

judgments of conviction may be impeached collaterally (see JUDGMENT),
596 *a*.

IMPERTINENT ALLEGATIONS need not be proved, 139.

IMPRESSIONS OF WITNESS, when admissible as evidence, 462.

IMPRISONMENT, may be proved by parol, 154, 166, 616.

witness may be asked whether he has not been in, 474.

effect of on confessions, 661.

INDEMNITY, when taking away privilege of witness, 471.

INDICATORY EVIDENCE (see PRESUMPTIONS).

INDICTMENT, variance from (see VARIANCE), 91 *et seq*.

INDUCEMENT, variance as to, 142.

INDUCTION, the ordinary process of reasoning in legal procedure, 7.

INFAMY, when disqualifying witness, 363.

INFANCY, when disqualification of witness, 366-8.

how far affecting responsibility for crime, 801.

INFANTICIDE, proof of *corpus delicti* in, 327.

INFERENCES (see PRESUMPTIONS).

INFIDELITY, when disqualifying witness, 361.

INFORMER, not an accomplice, 440.

INNOCENCE, PRESUMPTION OF.

Defendant to have the benefit of reasonable doubt, 718.

presumption applicable to matters of defence, 719.

rule only operates in favor of defendant as to guilt charged, 719 *a*.

extrinsic defence to be made out by preponderance of proof, 720.

when there is doubt as to major offence defendant may be convicted of
minor, 721.

INNUENDO, proof of, 620 *a*.

INQUISITION OF LUNACY, when admissible, 599.

does not necessarily exclude witness, 372.

IN REM JUDGMENTS, effects of, 600.

INSANE WITNESS, when testimony of can be reproduced, 230.

INSANITY, burden of proof as to, 336-40.

presumptions as to, 729.

opinion as to, 417.

as affecting competency of witness, 370.

of dying declarant, 290.

INSOLVENCY, inference from, 821.

INDEX.

INSPECTION is evidence to eye and touch, 311.

is valuable as cumulative proof, 312.

not to be accepted when better evidence is to be had, 313.

instruments may be tested in court, 314.

results of compulsory examination of person may be given, 315.

INSPECTION OF DOCUMENTS BY ORDER OF COURT.

Rule may be granted to compel production of papers, 564.

inspection must be ordered, but not surrender, 565.

production of criminatory document will not be compelled, 566.

documents, when produced for inspection, may be examined by interpreters and experts, 567.

INSTRUMENT, INFERENCES FROM.

Inculpatory tools, 799.

inspection of, 814.

character of weapon, 734, 764.

condition of weapon, 765.

position of weapon, 766.

condition of dress, 767.

ownership of weapon, 766.

wound, 769.

marks of powder on person, 770.

direction of wound, 771.

skill in wound, 772.

left-handedness, 773.

adaptation of instrument to wound, 774.

number of wounds, 775.

other indications on injured person, 776.

blood-stains, 777.

indications as to whether marks on body were made after death, 780

whether wounds were homicidal or suicidal, 781.

inferences in hanging, 782.

in drowning, 783.

INSTRUMENT OF CRIME, variance as to, 92.

INSTRUMENT OF WRITING, cannot be varied by parol (see DOCUMENTS), 620.

INTENTION: PRESUMPTION OF.

Probable consequences presumed to have been intended, 734.

process is one of logic, 735.

illustrations of rule, 736.

Roman law to the same effect, 737.

malice not to be arbitrarily inferred from killing, 738.

nor from other hurtful act, 739.

combination of other intents no defence, 740.

may be proved by other crimes, 46.

party may be examined as to, 431.

INTENTION, variance as to, 149.

INDEX.

INTENTS, enough to prove one of several, 136.

INTERPRETATION is not hearsay, 224.

INTERPRETER, practice as to, 449.

INTOXICATION, effect of in invalidating a confession, 675.

inferences from, 730.

when requiring exclusion of witness (see DRUNKENNESS), 384 a.

INVIOABILITY OF PRIVILEGE (see PRIVILEGE), 496 *et seq.*

ISSUE, evidence must be limited to, 30.

JEALOUSY, inferences from, 784.

JEW, mode of swearing, 354.

JOURNALS OF CONGRESS, when evidence, 524.

JOURNALS OF COURTS, when evidence, 604.

JOURNALS OF LEGISLATURES, when evidence, 524.

JUDGES, consultations of privileged, 509.

proceedings of presumed regular, 829.

JUDGMENTS AND JUDICIAL RECORDS.

Binding Effect of Judgments.

Judgment on same subject matter binds, 570.

parties must be the same, 570 a.

jurisdiction a prerequisite of admissibility of former proceedings, 571.

preliminary proceedings no bar, 572.

nor is a *nolle prosequi*, or dismissal, or ignoramus, 573.

verdict of acquittal without judgment a bar, otherwise with conviction, 574.

criminal prosecutions not barred by civil suits, 575.

military courts may make final rulings, 576.

judgment on *nolo contendere* estops, 577.

offences must be identical, 578.

when evidence in second case is enough to have secured judgment in first, then first judgment estops, 579.

when the same act has two indictable aspects, conviction of the one bars the other, 580.

illustrations in liquor cases, 581.

prior acquittal on ground of misnomer inadmissible, 582.

and so of prior acquittal from variance, 583.

prior prosecution of minor offence inclosed in major is admissible in a subsequent trial of major, 584.

otherwise when there could be no conviction on first trial of major offence, 585.

in prosecution for minor offence, it is admissible to put in evidence former prosecution of case containing major and minor, 586.

when two persons are simultaneously killed by one blow, a prosecution for killing one is not barred by a prosecution for killing the other, 587.

on a trial for stealing the goods of A., a former prosecution for stealing the goods of B. is not a bar, 588.

"simultaneous" does not mean coincidence in a point of time, 589.

INDEX.

JUDGMENTS AND JUDICIAL RECORDS—(continued).

in battery, prosecution for prior simultaneous battery of another is a bar, 590.

judgment on successive offences not exhaustive, 591.

autrefois acquit must be specially pleaded, 592.

parol evidence admissible to identify or distinguish, 593.

When Judgment may be impeached.

Judgment may be collaterally impeached for want of jurisdiction, 594.
so for fraud, 595.

foreign judgments impeachable for want of jurisdiction or fraud, 596.

judgments of conviction may be impeached collaterally, 596 *a*.

Administration, Probate, and Inquisition.

Letters of administration not conclusive proof of death or other recitals, 597.

probate of will not conclusive as to strangers, but otherwise as to parties, 598.

inquisition of lunacy only *prima facie* proof, 599.

Judgments in rem.

Effect of judgments *in rem* in criminal cases, 600.

Judgments viewed Evidentially.

Proof of prior convictions when aggravated sentence is sought, 601.

conviction of principal evidence against accessary, 602.

judgments to establish other facts, 602 *a*.

to prove judgment as such, record must be complete, 603.

minutes of court admissible to prove action of court, 604.

docket entries not admissible when full record can be had, 605.

rule relaxed as to ancient records, 606.

for evidential purposes portions of record may be admitted, 607.

but such portions must be complete, 608.

verdict inadmissible without record, 609.

parts of ancient records may be received, 610.

officers' returns admissible, 611.

return of *nulla bona* admissible to prove insolvency, 612.

Records as Admissions.

Record may be received when involving admission of party against whom it is offered, 613.

a party may be bound by his admissions of record, 614.

pleadings may be received as admissions, 615.

a demurrer may be an admission, 616.

certificate of clerk admissible to prove facts within range of his duty, 617.

JUDICIAL CONFESSIONS.

Confessions by plea conclusive, 638.

so of pleas in abatement, 639.

in pleading that which is not disputed is admitted, 640.

pleadings in other cases may be admissions, 641.

INDEX.

- JUDICIAL NOTICE, when taken, 308.
- JUDICIAL PROCEEDINGS, presumed to be regular, 830.
- “JUNIOR,” when term is to be proved, 100.
- JURISDICTION, variance as to proof of, 107.
- JURORS, consultations of privileged, 370, 371.
when witnesses, 511.
- JURY, when to view premises, 312.
when to inspect instruments of crime, 311, 797.
- KNOWLEDGE, when inferable from reputation, 254, 257.
when inferable from act, 391, 734 *et seq.*
- KNOWLEDGE, PRESUMPTIONS OF.
Of Knowledge of Law.
Such knowledge always presumed, 723.
ignorance admissible to disprove malice, 724.
Of knowledge of fact, 725.
- LARCENY, divisibility of articles in, 132.
proof of venue in, 111.
variance as to writing stolen, 116.
proof of from possession of stolen goods, 758.
defendant's exculpatory declarations in, 263, 691, 761.
- “LAW,” ambiguity of term, 716.
knowledge of, presumption of, 723.
foreign, proof of, 404
- LAWS, physical and social, constancy of inferred, 824–26.
- LAWYER, may be witness for his client, 385.
communications with privileged (see PRIVILEGED COMMUNICATIONS),
496 *et seq.*
- LEADING QUESTIONS, practice as to, 454 *a.*
- LEFT-HANDEDNESS, inference from, 773.
- LEGISLATIVE JOURNALS, when evidence, 524.
- LEGISLATIVE PROCEEDINGS, presumed to be regular, 831.
when privileged, 514.
- LEGISLATURE, acts of, may be proved by parol, 163.
- LEGITIMACY, presumptions as to, 828.
proof of marriage in questions of, 171.
- LETTER, in party's possession, how far evidence against him, 682.
- LETTERS, when admissions, 644.
delivery to be inferred from mailing, 837.
and at usual period, 838.
post-mark *prima facie* proof, 839.
presumption from ordinary habits of forwarding, 840.
letters in answer to one mailed presumed to be genuine, 841.
but not so as to telegrams, 842.
presumption from habits of forwarding letters, 843.
illegal, venue in, 113.

INDEX.

LIABILITY TO ATTACK, inferences from, 784.

LIBEL, proof of intent in, 52.

presumption as to intent in, 739.

variance as to writing, 114.

proof of meaning of, 620 *a*.

LICENSE, variance as to, 128.

party claiming must prove, 332, 342.

LIFE, love of, when presumed, 726.

inference of continuance of, 809.

LIFE INSURANCE, as a motive to homicide, 784.

LIKENESS, when determinable by inspection, 812.

by photographs and pictures, 544, 805.

LIMITATIONS, STATUTE OF, proof of offence covered by, 105.

LOCALITY, variance as to, 109.

LOGIC, effect of in determining relevancy, 25.

the basis of presumptions of fact, 710 *et seq.*

LOSS OF DOCUMENT, how to be shown, 119.

LOSS OF SHIP, when inferred, 815.

LOST DOCUMENTS.

Lost or destroyed documents may be proved by parol, 118, 199.

so of papers out of power of party to produce, 200.

accidental destruction of papers does not forfeit this right, 201.

abstracts and summaries when receivable, 203.

so as to records, 204.

witness of lost document must be sufficiently acquainted with original, 205.

court must be satisfied that original is non-producible and would be evidence if produced, 206.

loss may be inferentially proved, 207.

or by admission of opponent, 208.

probable custodian must be inquired of, 209.

search in proper places must be proved, 210.

third person in whose hands is document must be subpoenaed to produce, 211.

LOVE OF LIFE, when inferred, 726.

LUNACY, burden of proof as to, 336-40.

inferences as to, 729.

inquisitions of, when evidence, 599.

when excluding witness, 370.

MACHINISTS, admissible as experts, 413.

MAJOR AND MINOR OFFENCE, when divisible, 144.

MAJOR OFFENCE, effect of judgment on as bar, 586.

MALICE, inference of, 738.

proof of, 34 *et seq.*, 784-5.

variance as to proof of, 149.

INDEX.

MAPS, when admissible as evidence, 544.

MARITAL HOMICIDES, distinctive inferences in, 785.

MARKS on things non-producible, when admissible, 167 *et seq.*

MARRIAGE.

By private international law marriage may be proved by parol, 170.

in charges of penal marriage strict proof is required, 171.

in such cases foreign marriage not proved by uncorroborated confession,
172.

witness present may prove marriage, 173.

foreign certificate must be duly proved, 173 *a.*

how far provable by reputation, 246.

presumptions as to regularity of, 827.

may be proved collaterally by husband or wife, 395.

MARRIAGE REGISTERS, when admissible, 530.

MATERIALITY, variance as to (see VARIANCE), 91 *et seq.*

tests of (see RELEVANCY), 23 *et seq.*

MEANS OF EFFECTING CRIME, variance as to, 91.

MECHANICS, when experts (see EXPERTS), 414.

MEDICAL ATTENDANT, when privileged as witness, 516.

MEDICAL BOOKS, when admissible, 538.

MEDICAL WITNESSES, when experts (see EXPERTS), 412.

MEMORY, defects of as affecting credibility, 378.

of witness, may be refreshed, 261 *a.*, 454 *a.*

may be prompted, 454 *a.*

MENDACITY, in witness (see WITNESS).

MENTAL CONDITION, when inferable from hearsay, 257.

may be proved by party's own statement, 272.

MENTAL DISEASE, may be proved by expert, 417.

MICROSCOPISTS, admissible as experts, 413-5, 848.

MICHIGAN, rule in as to defendant's statements, 436.

MIDDLE NAME, when to be proved, 99.

MILITARY COURTS, effect of records of, 576.

MIND, condition of, may be proved by party's own statement, 272.

MINOR OFFENCE, defendant may be convicted of, 130, 144.

effect of judgment on as a bar, 584.

MONEY, variance as to proof of, 116 *a.*, 122.

MONUMENTS, may be proved by parol, 168.

MOTIVE, witness may be examined as to, 476.

inferences as to, 734 *et seq.*, 784.

MURDER (see HOMICIDE).

MUTABILITY, presumptions as to, 816.

NAMES OF PERSONS.

Such names must be proved as averred, 94.

enough if indictment gives name in popular use, 95.

INDEX.

NAMES OF PERSONS—(continued).

- sufficient if name be *idem sonans*, 96.
- variance between "known" and "unknown" may be fatal, 97.
- alias dictus* allows alternative proof, 98.
- middle name when distinctive must be proved, 99.
- variance between "Junior" and "Senior," 100.
- variance as to description is fatal, 101.
- proof of acts by agent will sustain averment of acts by principal, 102.
- corporation name must be proved, though charter need not be produced, 102 a.
- presumption of identity from, 802.

NAMES OF THINGS (see VARIANCE).

NARRATION, capacity for, how affecting credibility, 373.

NARRATIVES, not part of *res gestae*, 270.

NATURE, constancy of inferred, 823 *et seq.*

NECESSITY, burden of proof as to, 335.

NEGATIVE AVERMENTS.

- Burden on defendant to prove matter peculiarly in his own knowledge, 128.

NEGATIVE TESTIMONY, value of, 382.

NEGATIVES are susceptible of proof, 321.

NEGLIGENCE, burden as to proof of, 323.

- cumulative proof of, 54.

- when inferred from ignorance, 725.

NEWSPAPERS, when admissible as evidence, 541.

NOISES, mode of proving, 459.

NOLLE PROSEQUI, no bar, 573.

NOLO CONTENDERE, effect of plea of, 577.

NOTARIES, entries by, when admissible, 253.

NOTARY, certificates of, admissible, 197.

NOTICE, JUDICIAL, 308.

- when inferable from reputation, 254.

NOTICE TO PRODUCE DOCUMENT, practice as to, 212-5.

NOTORIETY, provable by reputation, 261.

- what constitutes, 308.

NUISANCES, estoppel as to, 591.

- not provable by reputation, 260.

NULLA BONA, return of, when admissible, 612.

NUMBER, variance as to, 123-5.

NUMBER OF WITNESSES.

- In treason two witnesses are required, 386.

- rule in perjury, 387.

- in bastardy, 388.

- in divorce cases, 389.

- preponderance by, 383.

- inferences from preponderance as to, 383.

INDEX.

OATH AND ITS INCIDENTS.

Oath is an appeal to a higher sanction, 353.

witness is to be sworn by the form he deems most obligatory, 354.

affirmation may be substituted for oath, 355.

OBSERVATION, defects in, how affecting credibility, 373.

OCCUPANCY, inferences as to, 818.

OFFENCES, independent, when admissible (see RELEVANCY), 31.

OFFICE COPIES, when admissible, 184.

OFFICER, due appointment of presumed, 164, 833.

regularity of acts of presumed, 835.

OFFICERS, deceased, notes by, when admissible, 252.

OFFICERS' RETURNS, when admissible as evidence, 611.

OFFICIAL RECORDS, when admissible in evidence, 526.

OFFICIAL REPORTS, when admissible, 525, 530.

OLD GRUDGE, inferences from, 784.

OPINION, not ordinarily admissible, 225, 455-58-60.

otherwise as to experts, 403 *et seq.*

OPINION OF EXPERTS, to be jealously criticized, 419-20.

ORAL EVIDENCE, must be at first hand (see HEARSAY), 220 *et seq.*

"ORDER," variance as to proof of, 116 *a.*

ORDER OF EVIDENCE, at discretion of court, 357.

OWNERSHIP, variance as to, 94, 140.

continuance of, when inferred, 818.

PARDON, cannot be proved by parol, 153.

when restoring competency, 365.

effect of, in destroying privilege of witness, 471.

PARENT, cannot be examined as to legitimacy of child, 518.

PAROL EVIDENCE, may identify or distinguish records, 593.

inadmissible to vary documents, 620.

rule as to meaning of libel, 620 *a.*

PAROL PROOF OF DOCUMENTS is inadmissible, 152.

record facts cannot be proved by parol, 153.

otherwise as to incidents collateral to records, 154.

of administrative records parol evidence is inadmissible, 155.

parol evidence not admissible on cross-examination, 156.

statutory designation of writings not necessarily exclusive, 157.

primary means immediate, 158.

general test is immediateness, 159.

no primary testimony is rejected because of faintness, 160.

written secondary evidence inadmissible, 161.

of telegrams original must be produced, 162.

Exceptions to Rule.

Rule does not apply where parol evidence is as primary as written, 163.

public officers' commissions need not be produced, 164.

nor charters of acting corporations, 164 *a.*

INDEX.

PAROL PROOF OF DOCUMENTS—(continued).

- so where the party charged admits the contents of the document, 165.
- summaries of voluminous documents can be received, 166.
- so of parol evidence of things fleeting and unproducible, 167.
- so of documents which cannot be brought into court, 168.
- statute may require marriage to be proved by record, 169.
- by private international law marriage may be proved by parol, 170
- in charges of penal marriage strict proof is required, 171.
- in such cases foreign marriage not proved by uncorroborated confession, 172.
- witness present may prove marriage, 173.
- foreign certificate must be duly proved, 173 a.
- Different Kind of Copies.*
 - Secondary evidence of documents admits of degrees, 174.
 - photographic copies are secondary, 175.
 - all printed impressions are of same grade, 176.
 - press copies are secondary, 177.
 - examined copies must be compared, 178.
 - exemplifications made admissible by statute, 179.
 - statute does not exclude other proofs, 181.
 - only extends to court of record, 182.
 - statute must be strictly followed, 183.
 - office copy admitted when authorized by law, 184.
 - original records receivable in same court, 185.
 - office copies admissible in same State, 186.
 - so of copies of records generally, 187.
 - seal of court essential to copy, 188.
 - of deeds, registry is admissible, 189.
 - ancient registries admissible without proof, 190.
 - certified copy of official registry receivable, 191.
 - exemplification of recorded deeds admissible, 192.
 - in such case subscribing witness need not be called, 193.
 - when deeds are recorded in other States exemplifications must be under act of Congress, 194.
 - certificates inadmissible by common law; otherwise by statute, 195.
 - certificates cannot bind as to facts out of record, 196.
 - notaries' certificates admissible, 197.
 - copies of public documents receivable, 198.
- Secondary Evidence may be received when Primary is unproducible.*
 - Lost or destroyed documents may be proved by parol, 199.
 - so of papers out of power of party to produce, 200.
 - accidental destruction of paper does not forfeit this right, 201.
 - copies of copies inadmissible, 202.
 - abstracts and summaries when receivable, 203.
 - so as to records, 204.
 - witness of lost document must be sufficiently acquainted with original, 205.

INDEX.

PAROL PROOF OF DOCUMENTS—(*continued*).

court must be satisfied that original is non-producible and would be evidence if produced, 206.

loss may be inferentially proved, 207.

or by admission of opponent, 208.

probable custodian must be inquired of, 209.

search in proper places must be proved, 210.

third person in whose hands is document must be subpoenaed to produce, 211.

So when Document is in Hands of Opposite Party.

Notice to produce is necessary when document is in hands of opposite party, 212.

after refusal secondary evidence can be given, 213.

notice must be timely, 214.

notice to produce does not make a paper evidence, 215.

notice not necessary for document on which prosecution is brought, 216.

nor of notice to produce, 217.

collateral facts as to instrument may be proved without notice, 218.

PART OF DOCUMENT cannot be usually admitted alone, 521.

PARTISANSHIP, effect of on testimony, 373.

PARTY, statement by of his injuries when admissible, 271.

when a witness, and under what limitations, 427 *et seq.*

PEDIGREE, may be proved by hearsay, 233 *et seq.*

PENCIL WRITING may constitute a document, 520.

PENNSYLVANIA, distinctive law of as to defendants' testimony, 427 *et seq.*

PERJURY, dates in must be truly proved, 103 *a.*

number of witnesses required in, 387.

record of former suit admissible in, 602 *a.*

only one assignment need be proved, 131.

PERSONAL PROPERTY, how to be proved, 121.

inferences as to continuance of, 818.

PERSONS, names of, how to be proved, 94 *et seq.*

PHOTOGRAPHERS, admissible as experts, 415.

PHOTOGRAPHIC COPIES are secondary, 175.

PHOTOGRAPHS, when admissible in evidence, 544.

value as tests, 561.

inferences from, 805.

PHYSICIANS, when privileged as witnesses, 516.

when experts (see EXPERTS), 412.

PICTURES, when admissible in evidence, 544.

PLACE must be proved within jurisdiction of court, 107.

proof may be inferential, 108.

when place is descriptive variance is fatal, 109.

venue in homicides, 110.

venue in larceny, conspiracy, and treason, 111.

venue as to extra-territorial principal, 112.

venue in cases of illegal letters and challenges, 113.

INDEX.

- PLANS, when admissible in evidence, 545.
- PLEA OF GUILTY, when an estoppel, 615.
- PLEADINGS, when admissible as admissions, 615, 641.
- POISONING, cumulative cases of, when admissible, 37, 50.
inferences in, 787.
exact demonstration not required, 787.
body must be identified, 788.
possession of poison by defendant, 789.
position of deceased, 790.
conduct of suspected parties, 791.
duration of working of poison, 792.
sickness, 793.
inference of malice, 37, 50, 794.
- POLICE SECRETS, when privileged, 515.
- POLITICAL SECRETS, when privileged, 513.
- POLYGAMY, proof of marriage in, 171.
- POST-MARK, inferences from, 839.
- POST-MORTEM EXAMINATIONS, cautions as to, 412.
inferences as to, 769, 776, 788.
- POWDER ON PERSON, inferences from, 770.
force of, as modifying wound, 771.
- PREGNANCY, when determinable by inspection, 317.
- PREJUDICE OF WITNESS, effect of circumstances in producing, 19.
how affecting credibility, 373, 376.
- PREMEDITATION, inference of, 737 *et seq.*
inferable from facts, 46.
- PREPARATIONS, inference from, 753.
- PREPONDERANCE OF WITNESSES, weight of, 383.
President of U. S. privileged as witness, 513.
proclamations of, when evidence, 513.
- PRESS COPIES are secondary, 176.
- PRESUMPTIONS.
General Considerations.
A presumption of law is a postulate; a presumption of fact is an argument from a fact to a fact, 707.
prevalent classification of presumptions, 708.
presumptions of law unknown to classical Romans, 709.
such distinctions of scholastic origin, 710.
gradual reduction of irrebuttable presumptions, 711.
in modern Roman law they are denied, 712.
in our own law they are unnecessary, 713.
presumptions of law as distinguishable from presumptions of fact, 714.
presumptions of fact may by statute be made presumptions of law, 715.
constitutionality of statutory presumptions, 715 *a.*
fallacy arising from ambiguity of terms "law," "legal," and "presumption," 716.

INDEX.

PRESUMPTIONS—(continued).

Psychological Presumptions, 717.

- Of innocence*—defendant to have the benefit of reasonable doubt, 718.
 - presumption applicable to matters of defence, 719.
 - rule operates only in favor of defendant as to guilt charged, 719 a.
 - extrinsic defence to be made out by preponderance of proof, 720.
 - when there is doubt as to major offence defendant may be convicted of minor, 721.
 - inference to be from all the facts, 722.
- Of knowledge of law*—such knowledge always presumed, 723.
- ignorance admissible to disprove malice, 724.
- Of knowledge of fact, 725.*
- Of love of life, 726.*
- Of good faith, 727.*
 - a genuine document is presumed to be true, 728.
 - sanity* is presumed until the contrary appear, 729.
 - insanity once established is presumed to continue, 730.
 - to be inferred from facts, 731.
- prudence* in avoiding danger presumed, 732.
- supremacy of husband* is presumed, 733.
- Of intent, 734.*
 - probable consequences presumed to have been intended, 734.
 - process is one of logic, 735.
 - illustrations of rule, 736.
 - Roman law to the same effect, 737.
 - malice not to be arbitrarily inferred from killing, 738.
 - nor from other hurtful act, 739.
 - combination of other intents no defence, 740.

Against spoliator, 741.

- Forgery of evidence for self-exculpation, 742.
- not conclusive of guilt, 743.
- presumption varies with case, 744.
- with intent of injuring others, 745.
- by force, 746.
- for speculative or moral end, 747.
- suppression or destruction of evidence, 748.
- holding back evidence, 749.

Attempts at escape, 750.

- inference from attempt to evade justice, 750.
- prevarication and embarrassment may be proved, 751.
 - evidence to explain flight admissible, 752.
- Antecedent preparations and prior attempts, 753.*
 - Such proof admissible for prosecution, 753.
 - acts to ward off suspicion, 754.
 - such proof is open to rebuttal, 755.

INDEX.

PRESUMPTIONS—(continued).

defendant's declarations of intent and threats admissible for prosecution 756.

deceased's threats admissible for defence, 757.

possession of stolen goods or of other fruits of crime is an inference of guilt, 758.

possession must be recent, 759.

ear-marks to be proved, 760.

defendant's explanation to be considered, 761.

similar inferences in embezzlement and murder, 762.

in burglary, 763.

Inferences from Mechanism of Crime.

Inference from instrument used, 764.

inculpatory tools, 799.

condition of weapon, 765.

position of weapon, 766.

condition of dress, 767.

ownership of weapon, 768.

wound, 769.

marks of powder on person, 770.

direction of wound, 771.

skill in wound, 772.

left-handedness, 773.

adaptation of instrument to wound, 774.

number of wounds, 775.

other indications on injured persons, 776.

blood-stains, 777.

such stains cannot be determined to be human beyond reasonable doubt, 777 a.

collateral inferences, 778.

things adhering to weapon, 779.

indications as to whether marks on body were made after death, 780.

whether wounds were homicidal or suicidal, 781.

inferences in hanging, 782.

in drowning, 783.

Inferences from Liability to Attack, 784.

Rapacity, old grudge, jealousy, 784.

Distinctive Inferences in Marital Homicides, 785.

Adultery, 785.

old quarrels, 786.

Distinctive Inferences in Poisoning.

Exact demonstration not required, 787.

body must be identified, 788.

possession of poison by defendant, 789.

position of deceased, 790.

conduct of suspected parties, 791.

INDEX.

PRESUMPTIONS—(*continued*).

duration of working of poison, 792.

sickness, 793.

inference of malice, 794.

Inferences from Extrinsic Indicatory Proof, 794.

Inference from footprints and other marks on soil, 796.

scene of guilt and view by jury, 797.

similar inferences in other cases, 798.

inferences from inculpatory instruments, 799.

Physical Presumptions.

Of Incompetency through infancy, 800.

Infants incapable of matrimony, 800.

and of crime, 801.

Of identity, 802.

Identity inferable from name, 802.

from continuousness of appearance and voice, 803.

cautions in applying this inference to deceased persons, 804.

inference from photographs, 805.

identification dependent upon opportunities of observation and accuracy of narration, 806.

comparative weight of opinions, 807.

witness's memory may be tested, 808.

Of death, 809.

From lapse of years, 809.

continuance of life presumed, 810.

period of death to be inferred from facts of case, 811.

fact of death presumed from other facts, 812.

letters testamentary not collateral proof, 813.

of death without issue, 814.

Of loss of ship from lapse of time, 815.

Presumptions of Uniformity and Continuance, 816.

Burden on party seeking to prove change in existing conditions, 816.

residence, 817.

occupancy, 818.

habit, 819.

coverture, 820.

solvency, 821.

Foreign law is presumed to be the same as our own, 822.

Constancy of nature presumed, 823.

Of physical sequence, 824.

Of animal habits, 825.

Of conduct of men in masses, 826.

Presumptions of Regularity.

Marriage presumed to be regular, 827.

presumption as to concubinage, 827 *a.*

legitimacy as a rule presumed, 828.

INDEX.

PRESUMPTIONS—(continued).

Regularity in judicial proceedings, 829.

In error necessary facts will be presumed, 830.
legislative proceedings, 831.

Formalities of document presumed, 832.

Officer and agent presumed to be regularly appointed, 833.
regularity imputed to *persons exercising profession*, 834.
acts of public officer presumed to be regular, 835.
burden on party assailing public officer, 836.
due authority in official or corporate act presumed, 836 a.

Due delivery of letters presumed, 837.

Delivery to be inferred from mailing, 837.

and at usual period, 838.

post-mark *prima facie* proof, 839.

presumption from ordinary habits of forwarding, 840.

letters in answer to one mailed presumed to be genuine, 841.
but not so as to telegrams, 842.

presumption from habits of forwarding letters, 843.

Distinctive Inferences in Forgery, 844.

Opinion of alleged writer himself, 845.

those who know his hand, 846.

experts, 847.

chemical and microscopic tests, 848.

circumjacent tests, 849.

falsity of contents, 850.

proof of writing by third party, 851.

PREVARICATION, inference from, 751.

PRIESTS, when communications to privileged, 507.

PRIMARINESS, when essential to admissibility (see PAROL PROOF), 152
et seq.

PRINCIPAL, when act of agent to be imputed to, 112.

conviction of, evidence against accessory, 602.

PRINCIPAL'S ACTS, admissible against accessory, 703.

PRIOR ATTEMPTS, inference from, 753.

PRIVILEGE OF WITNESSES, as to crimination, 463.

as to disgrace (see EXAMINATION OF WITNESSES), 472.

PRIVILEGED COMMUNICATIONS.

Lawyer not permitted to disclose communications of client, 496.

not necessary that relationship should be formally instituted, 497.

nor is privilege lost by termination of relationship, 498.

client cannot be compelled to disclose communications made by him to his
lawyer, 499.

privilege must be claimed in order to be applied, and may be waived,
500.

communications, to be privileged, must be made to party's exclusive ad-
viser, 501.

INDEX.

PRIVILEGED COMMUNICATIONS—(continued).

- lawyer not privileged as to information received by him extra-professionally, 502.
- information received out of scope of professional duty not privileged, 503.
- privilege does not extend to communications in view of breaking the law, 504.
- communications between party and witnesses privileged, 505.
- telegraphic communications not privileged, 506.
- priests not privileged at common law as to confessional, 507.
- judges cannot be compelled to disclose grounds of judgment, 509.
- nor jurors as to their deliberations, 510.
- juror if knowing facts must testify as witness, 511.
- prosecuting attorney privileged as to confidential matter, 512.
- state secrets are privileged, 513.
- and consultations of legislature and executive, 514.
- police secrets privileged, 515.
- medical attendants not privileged, 516.
- no privilege to ties of blood or friendship, 517.
- parents cannot be examined as to access in cases involving legitimacy, 518.
- communications between husband and wife privileged, 398.
- PROBABILITY, the test of truth in legal issues, 6.
- PROBABLE CONSEQUENCES, when inferred to be intended, 734.
- PROBABLE EVIDENCE, characteristics of, 7.
- PROBATE, proceedings in, when relevant and admissible, 598.
- PROCESS, when an admission, 642.
- PRODUCE, notice to, practice as to, 118, 216.
- PROFESSIONAL MEN, inferences as to, 334.
- PROMISES, when invalidating confessions, 646.
- PROMISSORY NOTE, variance as to proof of, 116 a.
- PROOF, BURDEN OF.

- Prevalent theory is that burden of proof is on affirmative, 319.
- true view is that burden is on party undertaking to prove a point, 320.
- negatives are susceptible of proof, 321.
- burden is properly on actor, 322.
- party who sets up another's tort must prove it, 323.
- corpus delicti* must be proved by prosecution, 324.
- distinction between burden and presumption of innocence, 330.
- burden on defendant of defences purely extrinsic, 331.
- so of licenses and *autrefois acquit*, 332.
- alibi* not an extrinsic defence, 333.
- otherwise as to provocation, 334.
- necessity must be substantively proved, 335.
- discussion as to insanity, 336.
- when sanity is of essence it must be proved beyond reasonable doubt, 340.
- burden is on party to prove what it his duty to prove, 342.

INDEX.

PROOF, BURDEN OF—(*continued*).

- license to be proved by party to whom such proof is essential, 342.
- burden of proving formalities is on him to whom it is essential, 343.
- court may instruct jury that a presumption of fact makes a *prima facie* case, 344.

PROOF OF DOCUMENTS.

- Document must be proved by party offering, 546.
- documents over thirty years old prove themselves, 547.
- ancient documents may be verified by experts, 548.
- handwriting* may be proved by writer himself, or by his admissions, 549.
- party may be called upon to write, 550.
- witness of signature to document, 550 *a*.
- seeing a person write qualifies a witness to speak as to signature, 551.
- witness familiar with another's writing may prove it, 552.
- burden on opposite side to prove witness incompetent, 553.
- on cross-examination witness may be tested by other writings, 554.
- by English common law, comparison of hands not permitted, 555.
- exception made as to test paper already in evidence, 556.
- in some jurisdictions comparison is admitted, 557.
- test papers made for purpose inadmissible, 558.
- experts admitted to test writings, 559.
- photographers in such cases admissible as experts, 561.
- experts may be cross-examined as to skill, 562.
- their testimony to be closely scrutinized, 563.

PROOF OF GUILT.

- Must be beyond reasonable doubt, 1.
- proof is sufficient reason for a proposition, 2.
- evidence is proof admitted on trial, 3.
- object of evidence is juridical conviction, 4.
- analogy the means of juridical proof, 5.
- conclusions to be reached by a cumulation of probabilities, 6.
- no evidential fact can be demonstrated, 7.
- even scientific conclusions cannot be demonstrated, 8.
- the highest expert testimony fails in this respect, 9.
- fallacy of distinction between "direct" and "circumstantial" evidence, 10.
- all evidence is circumstantial, 11.
- causation always an inference, 12.
- and so of identity of party charged, 13.
- and so of his free agency, 14.
- and so of his sanity, 15.
- and so of his intent, 16.
- witnesses dependent on character for credibility, 17.
- perjury always possible, 18.
- prejudice is conditioned by circumstances, 19.
- reasoning in such cases to be logical, 20.
- juridical value of hypothesis, 21.

INDEX.

- "PROPHECIES OF DEATH," indicative value of, 754.
- PROSECUTING ATTORNEY, when privileged as witness, 512.
when communications to are privileged, 513-515.
- PROSECUTOR, competent as witness, 358, 392.
- PROVOCATION, burden of proof as to, 334.
- PRUDENCE, cumulative proof of, 56.
when inferred, 732.
- PUBLIC DOCUMENTS, provable by copies or abstracts, 166.
when admissible as evidence, 522.
when copies receivable, 198.
- PUBLIC INSTITUTIONS, records of, when admissible, 528.
- PUBLIC MATTERS, when provable by reputation, 232.
- PUBLIC OFFICERS, commissions need not be proved, 164, 183.
presumed to do their duty, 835.
- PUBLIC REGISTRY, admissible when statutory, 526.
so of records of public corporations, 527.
books and registries kept by public institutions admissible, 528.
log-book admissible under act of Congress, 529.
- QUARRELS, inferences from, 784-6.
- RAILROAD, negligence by (see NEGLIGENCE).
- RAPE, declaration of prosecutrix admissible in, 273.
inference of intent as to, 734.
- "REASONABLE DOUBT," characteristics of, 1, 330 *et seq.*, 718.
- RECEIVING STOLEN GOODS, cumulative proof of, 44.
inferences from, 758.
exculpatory statements in, 263, 692, 761.
- "RECENT," meaning of term, 759.
- RECORD FACTS, cannot be proved by admissions, 687.
- RECORDS AS ADMISSIONS.
Record may be received when involving admission of party against whom it is offered, 613.
a party may be bound by his admissions of record, 614.
pleadings may be received as admissions, 615.
a demurrer may be an admission, 616.
certificate of clerk admissible to prove facts within his range, 617.
- RECORDS AS EVIDENCE.
Proof of prior convictions when aggravated sentence is sought, 601.
conviction of principal evidence against accessory, 602.
judgments to establish other facts, 602 *a.*
to prove judgment as such, record must be complete, 603.
minutes of court admissible to prove action of court, 604.
docket entries not admissible when full record can be had, 605.
rule relaxed as to ancient records, 606.
for evidential purposes portions of record may be admitted, 607.

INDEX.

RECORDS AS EVIDENCE—(continued).

- but such portions must be complete, 608.
- verdict inadmissible without record, 609.
- parts of ancient records may be received, 610.
 - officers returns admissible, 611.
- return of *nulla bona* admissible to prove insolvency, 612.
- when provable by exemplification or other copy (see COPIES), 178 *et seq.*
- cannot be proved by parol, but otherwise as to their incidents, 153.
- to be admissible, 607.
- must be complete, 603.
- may be identified or distinguished by parol, 154, 593.
- when impeachable, 594, 599 *a.*
- variance in setting forth is fatal, 114, 115.

RECORDS AND REGISTRIES OF BIRTH, MARRIAGE, AND DEATH.

- Registries of marriage and death admissible when duly kept, 530.
 - so when kept by deceased persons in course of their duties, 581.
 - registry only proves facts which it was the duty of the writer to record, 532.
 - entries must be at first hand and prompt, 533.
 - certificates at common law inadmissible, 534.
 - and so of copies, 535.
 - family records admissible to prove family events, 536.
- REFEREE, admissions of, 697.
- REFRESHING MEMORY, right of witness as to, 203.
 - for this purpose hearsay admissible, 261 *a.*
- REGISTRIES, when admissible as evidence, 189, 526, 530.
- REGISTRY OF DEED, when admissible, 189.
- REGULARITY, PRESUMPTIONS OF.

- Marriage* presumed to be regular, 827.
 - presumption as to concubinage, 827 *a.*
 - legitimacy* as a rule presumed, 828.
 - Regularity in judicial proceedings*, 829.
 - in error necessary facts will be presumed, 830.
 - legislative proceedings, 831.
 - Formalities of document presumed*, 832.
 - officer and agent* presumed to be regularly appointed, 833.
 - so of persons exercising profession or business*, 834.
 - acts of public officer* presumed to be regular, 835.
 - burden on party assailing public officer, 836.
 - due authority in official or corporate act presumed, 836 *a.*
 - post-office* regularity presumed (see LETTERS), 837.
- RELATIONSHIP, how far affecting credibility of witness, 376.
 - how provable, 233, 236.
- RELATIVES, declarations of admissible to prove pedigree, 233.

INDEX.

RELEVANCY is that which conduces to the proof of a pertinent hypothesis, 23.

whatever so conduces is relevant, 24.

process is one of logic, 25.

illustrated by questions of authenticity of documents, 26.

so by questions of identity, 27.

conditions may be prior, contemporaneous, or subsequent, 28.

collateral disconnected facts generally irrelevant, 29.

hence collateral crimes are inadmissible, 30.

Exception when extraneous crime forms part of res gestae, 31.

Exception in cases of system and herein of conspiracy, 32.

Illustrated by successive blows, 33.

by successive forgeries, 34.

by successive adulteries, 35.

by successive firings, 36.

by successive poisonings, 37.

by subsequent offences, 38.

Exception in cases where guilty knowledge is to be shown, 39.

In cases of guilty knowledge in counterfeiting, 39.

in cases of guilty knowledge in receiving stolen goods, 44.

subsequent offences admissible for this purpose, 45.

Exception in cases where intention is disputed, 46.

Exception in questions of identity, 47.

Conditions of such exceptions, 48.

proof of prior attempts in like manner admissible, 49.

distinctive rules in cases of poisoning, 50.

in cases of marital homicide, 51.

in cases of libel, 52.

in cases of fraud, 53.

in cases of negligence, 54.

in cases of good faith, 55.

in cases of prudence and diligence, 56.

Character relevant in criminal issues, 57.

"Character" is convertible with reputation, 58.

burden on party assailing character, 59.

defendant may show a character inconsistent with the crime charged, 60.

prosecution cannot rebut by particular facts, 61.

no presumption to be drawn from non-production of such evidence, 62.

prosecution cannot rebut by showing bad character subsequent to homicide, or in localities where defendant had not lived, 63.

prosecution cannot impeach unless defendant puts in issue, 64.

tendency or ability to commit offence inadmissible, 65.

weight to be attached to character, 66.

bad character of party injured generally irrelevant, 68.

but in cases of self-defence relevant to prove deceased's ferocity, strength, and vindictiveness, in order to show *bona fides* of defendant's belief that he was in extreme danger, 69.

INDEX.

RELEVANCY—(continued).

- England, 70.
- New York, 71.
- New Jersey, 72.
- Pennsylvania, 73.
- North Carolina, 74.
- South Carolina, Georgia, Alabama, Kentucky, Tennessee, Mississippi, 75.
- Indiana, 76.
- Michigan, 77.
- Minnesota, 78.
- Iowa, 79.
- Missouri and Texas, 80.
- California, 81.
- inconclusiveness of the cases cited to the contrary, 82.
- in Massachusetts such evidence is now admissible, 83.
- summary of the law, 84.

RELIGIOUS BELIEF, how affecting competency, 361.
when witness may be asked as to, 475.

REPORTS, OFFICIAL, when admissible, 525, 530.

REPUTATION, when admissible to prove matters of public interest, 232.
when admissible to prove matters of family interest, 233.
to prove pedigree, 233.
to prove marriage, 234, 246.
to prove death, 236, 245.
when used as convertible with character, 58 *et seq.*

REPUTATION OF PARTY, when relevant (see **CHARACTER**), 54.

REPUTATION OF WITNESS, how assailed, 486.

REPUTATION, WHEN SUCH IS MATERIAL.

- Admissible to bring home knowledge to a party, 254
- but inadmissible to prove facts, 255.
- hearsay is admissible when hearsay is at issue, 256.
- so to prove condition of party's mind, 257.
- value so provable, 258.
- and so as to character, 259.
- but not conclusions of law; *e. g.*, nuisance, gaming-house, barratry, 260.
- otherwise when notoriety is at issue, 261.

RES GESTAE.

- Res gestae* admissible though hearsay, 262.
- must spring immediately from act, 263.
- retrospective narratives not part of *res gestae*, 264.
- coincident business declarations admissible, 265.
- what is done or exhibited at occurrence may be proved, 266.
- test of secondariness does not apply, 267.
- statements in preparation of crime inadmissible, 268.
- declarations inadmissible to explain inadmissible acts; nor are declaration admissible without acts, 269.

INDEX.

RES GESTAE—(continued).

- inadmissible if the witness himself could be obtained, 270.
- when defendant's statements are, 692.

RES INTER ALIOS ACTA, inadmissible, 220 *et seq.*, 226, 519, 595.
when judgment is, 596 *a.*

RESIDENCE, presumption as to, 817.

RETURNS OF OFFICERS, when admissible as evidence, 611.

REVENGE, as motive, 784.

RUMOR (see REPUTATION, HEARSAY).

SACERDOTAL COMMUNICATIONS, when privileged, 507.

SANITY, essential as an ingredient of guilt, 15.

- burden of proof as to, 386-40.
- is presumed until the contrary appear, 729
- insanity once established is presumed to continue, 730.
 - to be inferred from facts, 731. .
- expert testimony as to, 417.

SCENE OF GUILT, inferences from, 797.

- visit to, 311 *et seq.*, 797.

SCIENTER may be shown by proof of independent crimes, 39.

- in cases of guilty knowledge in counterfeiting, 39.
- in cases of guilty knowledge in receiving stolen goods, 44.
- subsequent offences admissible for this purpose, 45.
- inferences as to, 725, 734.

SCIENTIFIC BOOKS, when admissible, 538.

SCIENTIFIC CONCLUSIONS, when demonstrable, 8.

SCIENTIST WITNESSES (see EXPERTS), 403 *et seq.*, 413.

SEAL OF COURT, when essential to copy, 188.

SEARCH, character of required to prove loss of documents, 210.

SECONDARY EVIDENCE GENERALLY (see HEARSAY).

SECONDARY EVIDENCE of documents is inadmissible, 152.

- record facts cannot be proved by parol, 153.
- otherwise as to incidents collateral to records, 154.
- of administrative records parol evidence is inadmissible, 155.
- parol evidence not admissible on cross-examination, 156.
- statutory designation of writings not necessarily exclusive, 157.
- primary means immediate, 158.
- general test is not authority but immediateness, 159.
- no primary testimony is rejected because of faintness, 160.
- written secondary evidence inadmissible, 161.
- of telegrams original must be produced, 162.

Exceptions to Rule.

- Rule does not apply where parol evidence is as primary as written, 163.
- public officers' commissions need not be produced, 164.
- nor charters of acting corporations, 164 *a.*
- so where the party charged admits the contents of the document, 165.

INDEX.

SECONDARY EVIDENCE—(*continued*).

- summaries of voluminous documents can be received, 166.
- so of parol evidence of things fleeting and unproducible, 167.
- so of documents which cannot be brought into court, 168.
- statute may require marriage to be proved by record, 169.
- lost documents* provable by parol, 199.

So when Document is in Hands of Opposite Party.

- Notice to produce is necessary when document is in hands of opposite party, 212.
- after refusal secondary evidence can be given, 213.
- notice must be timely, 214.
- notice to produce does not make a paper evidence, 215.
- notice not necessary for document on which prosecution is brought, 216.
- nor of notice to produce, 217.
- collateral facts as to instruments may be proved without notice, 218.

What Copies can be received, 174 et seq.

SECRETS OF STATE, when privileged, 515.

SEDUCTION, corroborative evidence required in, 388.

SELF-CRIMINATION, not compelled, 463.

SELF-DISSERVING ADMISSIONS of deceased persons, where admissible, 248.

SELF-SERVING DECLARATIONS.

- self-serving declarations inadmissible for defendant, 690.
- exception as to *res gestae*, 691.
- coincident declarations admissible to prove authority, 692.
- and so as to state of party's mind, 693.
- weight of self-serving declarations, 694.

"SENIOR," when to be proved, 100.

SEPARATION OF WITNESSES, when required, 446.

SHEEP, variance as to proof of, 124.

SHIFTING OF BURDEN, error as to, 330.

SHIP, presumption as to loss of, 815.

SHIPWRECK, presumptions from, 815.

SHORT-HAND WRITER, official, proof by, 174.

SICKNESS, modes of proving, 271, 458 *et seq.*

SICK WITNESS, when testimony of, can be reproduced, 230.

SILENT ADMISSIONS, effect of, 679-83.

"SIMULTANEOUS," meaning of, 584.

SKILLED WITNESSES (see EXPERTS), 403 *et seq.*

SLEEP, effect of, in invalidating a confession, 675.

SPOILIATION, presumption against, 741.

SOLVENCY, inferences as to, 821.

SPECIALISTS, when entitled to testify as such (see EXPERTS), 403 *et seq.*

SPOKEN WORDS, how to be proved, 120 *a.*

SPOILIATION, presumptions against (see PRESUMPTIONS), 741 *et seq.*

STATEMENT, when defendant may make on trial, 427.

INDEX.

STATE PAPERS, when admissible evidence, 525.

STATE'S ATTORNEY, when privileged as a witness, 512.

STATE'S EVIDENCE, rights of witness giving, 443.

STATE SECRETS, when privileged, 513.

STATUTES: LEGISLATIVE JOURNALS: EXECUTIVE DOCUMENTS.

Public statutes prove their recitals, 522.

otherwise as to private statutes, 523.

journals of legislative proof as to recited facts, 524.

so of executive documents, 525.

STENOGRAPHER, official, proof by, 174.

STOLEN GOODS, PRESUMPTION FROM.

Possession of stolen goods or of other fruits of crime as an inference of guilt, 758.

possession must be recent, 759.

ear-marks to be proved, 760.

defendant's explanation to be considered, 761.

similar inferences in embezzlement and murder, 762.

in burglary, 763.

receiving, proof of, 44.

SUBPŒNA, the usual mode of enforcing attendance, 345.

must be personally served, 346.

SUBSCRIBING WITNESS, when calling of, is necessary, 193.

SUBSEQUENT OFFENCES, when relevant, 38, 45.

SUCCESSIVE OFFENCES, effect of judgments on, 591.

SUICIDE, questions as to, 781.

SUMMARIES OF DOCUMENTS, when admissible, 166.

SUNDAY, proof of offences committed on, 106.

SUPPRESSION OF EVIDENCE, inference from, 741 *et seq.*, 748, 749.

SURGEONS, when experts (see EXPERTS), 412.

SURPLUSAGE.

Unnecessary words can be rejected, 138.

effect of *videlicet*, 141.

aggravation and inducement may be discharged, 142.

otherwise when allegation is essential, 143.

differentia between major and minor offence, 144.

allegations of number and quantity may be distributively proved, 145.

descriptive averments must be proved, 146.

otherwise as to formal language, 147.

"feloniously" may be so rejected, 148.

SURVEYORS, admissible as experts, 414.

SURVIVORSHIP, inferences of, 811.

SWEARING WITNESS, practice as to, 353.

SYMPTOMS, party's explanation of, when admissible, 271.

SYSTEM may be proved by prosecution to illustrate intent, 32.

illustrated by successive blows, 33.

INDEX.

SYSTEM—(continued).

- by successive forgeries, 34.
- by successive adulteries, 35.
- by successive firings, 36.
- by successive poisonings, 37.
- by subsequent offences, 38.

TAG on trunk may be proved by parol, 168.

TAMPERING WITH EVIDENCE, inference from, 741 *et seq.*

TEETH, identification by, 804.

TELEGRAMS must be proved by original, 102.

when admissions, 645.

TELEGRAPHIC COMMUNICATIONS not privileged, 506.

TENDENCY to commit offence, proof of, inadmissible, 65.

"TENOR," how to be proved, 114.

"TERROR," inferences from, 751.

TESTIMONY, when provable against a party as an admission, 668-9.

THREATENING LETTERS, venue as to, 113.

THREATS.

Defendant's declarations of intent and threats admissible for prosecution
756.

deceased's threats admissible for defence, 757.

and so of threats of prosecutor, 757.

THREATS AND PROMISES, when excluding confessions (see CONFES-
SIONS), 646.

THIRD PARTIES, statements of, when hearsay, 225.

TIME.

Time proved may be any day prior to finding, 103.

exception as to records and written documents, 103 *a.*

offences of other dates than that proved excluded, 104.

offence shut out by statute of limitations cannot be proved, 105.

time, when essence of offence, must be proved, 106.

as giving presumption of death, 809.

as limiting *res gestae*, 262.

TOOLS OF CRIME, inferences from, 734, 764, 765, 774-9.

inspection of, 314.

TOMB-STONES, may be described by parol, 168.

TORTS, burden as to proof of, 323.

TOWN-MEETING, records of, when evidence, 526.

TRANSLATION, variance as to, 114.

TREASON, number of witnesses required in, 386.

proof of venue in, 111.

TRUTH OF DOCUMENT, when presumed, 728.

TRUTHFULNESS OF WITNESS, how assailed, 486.

how sustained, 490.

INDEX.

UNANSWERED LETTER, when party bound by, 682.

"UNDERTAKING," variance as to proof of, 116 *a*.

UNIFORMITY AND CONTINUANCE.

Burden on party seeking to prove change in existing conditions, 816.

residence, 817.

occupancy, 818.

habit, 819.

coverture, 820.

solvency, 821.

foreign law is presumed to be the same as our own, 822.

Constancy of nature presumed, 823.

Of physical sequences, 824.

Of animal habits, 825.

Of conduct of men in masses, 826.

UNKNOWN INSTRUMENTS, how to be pleaded and proved, 92.

UNKNOWN PERSONS, how names of to be pleaded and proved, 97.

UNKNOWN WEAPONS, indications as to, 764.

UNNECESSARY AVERMENTS, need not be proved, 138.

VALUE, provable from reputation, 258.

to be proved by experts, 416.

variance as to, 126.

VARIANCE.

Instrument by which Wrong is inflicted.

Agency by which wrong is inflicted must be substantially proved, 91.

material variance is fatal, 92.

unknown instruments may be so described, 98.

Names of Persons.

Such names must be proved as averred, 94.

so as to ownership, 94.

enough if indictment gives name in popular use, 95.

sufficient if name be *idem sonans*, 96.

variance between "known" and "unknown" may be fatal, 97.

alias dictus allows alternative proof, 98.

middle name, when distinctive, must be proved, 99.

variance between "Junior" and "Senior," 100.

variance as to description is fatal, 101.

proof of acts by agent will sustain averment of acts by principal, 102.

corporation name must be proved, though charter need not be produced,
102 *a*.

Time and Place.

Time proved may be any day prior to finding, 103.

exception as to records and written documents, 103 *a*.

as to continuous offences, 103 *b*.

offences of other dates than that proved excluded, 104.

offence shut out by statute of limitations cannot be proved, 105.

INDEX.

VARIANCE—(*continued*).

time, when essence of offence, must be proved, 106.
place must be proved within jurisdiction of court, 107.
proof may be inferential, 108.
when place is descriptive variance is fatal, 109.
venue in homicide, 110.
venue in larceny, conspiracy, and treason, 111.
venue as to extra-territorial principal, 112.
venue in cases of illegal letters and challenges, 113.
intent, 734, 740.

Written Instruments and Records.

When "tenor" is set out, variance is fatal, 114.
accuracy required as to records, 115.
when legal effect is given, sufficient if proof substantially conforms, 116.
general designation to be accurate, 116 a.
when variance is doubtful, case is for jury, 117.
lost or unobtainable documents may be proved by parol, 118.
loss must be satisfactorily shown, 119.
inspection may be ordered, 120.

Words spoken.

Words spoken to be substantially proved, 120 a.

Goods, Numbers, and Sums.

Articles described must be substantially proved, 121.
coin must be specifically proved, 122.
proof must come up to some one article charged, 123.
animals must be substantially proved as described, 124.
variance in number immaterial, 125.
variance as to value immaterial, unless value be descriptive, 126.
collective value does not sustain specific, 127.

Negative Averments.

Burden on defendant to prove matter peculiarly in his own knowledge, 128.

Divisible Averments.

Defendant may be convicted of part of offence charged, 129.
may be convicted of minor offence, 130.
any proved assignment will be sufficient, 131.
one of several articles in larceny is enough, 132.
and so of several objects in conspiracy, 133.
and so of divisible predicates, 134.
and so of cumulative intents, 135.
defendants may be severally convicted, 136.
divisibility extended by statute, 137.

Surplusage.

Unnecessary words can be rejected, 138.
effect of *videlicet*, 141.
aggravation and inducement may be discharged, 142.

INDEX.

VARIANCE—(*continued*).

- otherwise when allegation is essential, 143.
- differentia between major and minor offence, 144.
- allegations of number and quantity may be distributively proved, 145.
- descriptive averments must be proved, 146.
- otherwise as to formal language, 147.
- “feloniously” may be so rejected, 148.
- acquittal from, no bar, 583.

Intent.

- No variance if party charged contemplated result as a contingency, 149.
- otherwise when specific intent is averred, and conflicting intent is proved, 150.
- as to probability of intention, 734, 740.

VENUE, how to be proved (see PLACE), 107, 113.

VERACITY OF WITNESS, how assailed and defended, 486, 490.

VERDICT, when a bar, 574.

VERDICTS, when admissible by themselves, 609.

VIDELICET, effect of as to variance, 141.

VIEW BY JURY, inferences from, 797.

- how to be taken, 312.

VOICE, identification by, 803.

VOIR DIRE, practice as to, 447.

“WARRANT,” variance as to proof of, 116 *a*.

WEAPON, variance as to, 92.

- inferences from, 765, 768, 774–9.

- may be tested in court, 314.

WEATHER, may be proved by public records, 528.

- inferences as to, 816, 823.

WIFE, when admissible for or against her husband (see HUSBAND AND WIFE), 390.

- killing of, inferences in cases of, 785.

- subjection of, when inferred, 133.

- coercion of, 733.

WITNESSES.

Procuring Attendance.

- Subpœna the usual mode of enforcing attendance, 345.

- subpœna must be personally served, 346.

- fees allowable to witness, 347.

- in felonies expenses need not be prepaid, 348.

- witness refusing to attend is in contempt, 349.

- attachment granted on rule, 350.

- habeas corpus* may issue to bring in imprisoned witness, 351.

- witness may be required to find bail for appearance, 352.

Oath and its Incident's.

- Oath is an appeal to a higher sanction, 353.

INDEX.

WITNESSES—(continued).

witness is to be sworn by the form he deems most obligatory, 354.

affirmation may be substituted for oath, 355.

Privilege from Arrest.

Witness not privileged as to criminal arrest, but otherwise as to civil, 356.

Competency and Credibility.

Competency is for court, 357.

competency is presumed, 358.

ordinarily competency should be excepted to before oath, 359.

distinction between primary and secondary does not apply to witnesses, 360.

laws regulating admissibility not unconstitutional, 360 *a.*

atheism at common law disqualifies, 361.

evidence may be taken as to religious belief, 362.

infamy at common law disqualifies, 363.

removal of disability by statute, 363 *a.*

excepted cases where convict may testify, 364.

removal of disability by pardon, 365.

admissibility of infants depends on intelligence, 366.

no absolute presumption from infancy, 367.

court may examine witness or continue trial, 368.

deficiency of percipient powers if total excludes, 369.

in insanity the same tests are applicable, 370.

witness may be examined by judge as to capacity, 371.

inquisition only *prima facie* proof, 372.

capacity to perceive a condition of credibility, 373.

and so of capacity to narrate, 374.

deaf and dumb witnesses not incompetent, 375.

bias to be taken into account in estimating credibility, 376.

and so of want of familiarity with topic, 377.

and so of capacity to remember, 378.

want of circumstantiality a ground for discredit, 379.

Falsum in uno, falsum in omnibus, not universally applicable, 380.

literal coincidence in oral statements suspicious, 381.

affirmative testimony stronger than negative, 382.

when credit is equal, preponderance to be given to numbers, 383.

credibility of witnesses is for jury, 384.

intoxicated witnesses may be excluded, 384 *a.*

counsel in case may be witnesses, 385.

Number of.

In treason two witnesses are required, 386.

rule in perjury, 387.

in bastardy and seduction, 388.

in divorce cases, 389.

Husband and Wife.

Husband and wife cannot testify for or against each other, 390.

INDEX.

WITNESSES—(continued).

- and so for or against each other's co-defendants, 391.
- rule does not apply where acquittal of one co-defendant does not affect the other, 392.
- exception in case of violence, 393.
- exception in case of abduction and rape, 394.
- when admissible against admissible for, 394 a.
- but may be a witness to prove marriage collaterally, 395.
- cannot be compelled to criminate each other, 396.
- distinctive rules as to bigamy, 397.
- cannot testify as to confidential relations, 398.
- effect of death and divorce on admissibility, 399.
- general statutes do not remove disability, 400.
- otherwise as to special enabling statutes, 401.
- husband and wife may be admitted to contradict each other, 402.

Distinctive Rules as to Experts.

- Expert testifies as a specialist, 403.
- may be examined as to laws other than the *lex fori*, 404.
- but cannot be examined as to matters non-professional, or of common knowledge, 405.
- whether conclusion belongs to specialty is for court, 406.
- expert may be examined as to scientific authorities, 407.
- expert must be skilled in his specialty, 408.
- court decides as to impeaching or sustaining, 409.
- limits to be defined by court, 410.
- but not to include matters of ordinary observation, 411.
- medical man must be an expert in his school, 412.
- so of scientists, 413.
- so of practitioners in a business specialty, 414.
- so of artists, 415.
- so of persons familiar with a market, 416.
- on questions of sanity not only experts but friends and attendants may be examined, 417.
- expert may be examined as to hypothetical case, 418.
- may explain his opinion, 419.
- his testimony to be jealously scrutinized, 420.
- especially when *ex parte*, 421.
- post-mortem* observations, 422.
- examination of blood-stains, 423.
- examination of handwriting, 424.
- as to terms of art, opinions on conceded facts, obscure terms, etc., 425.
- he may be specially feed, 426.

Defendants as Witnesses.

- Defendant at common law may make statement, 427.
- by statute may be sworn as witness, 428.
- party is subject to the ordinary limitation of witnesses, 429.

INDEX.

WITNESSES—(*continued*).

- may be cross-examined to the same extent, 430.
- may be examined as to his motive, 431.
- cannot avoid relevant questions on the ground of self-crimination, 432.
- may be contradicted on material points, 433.
- may be re-examined, 434.
- what he says may be used against him on subsequent trial, 664.
- no presumption against defendant for not testifying, 435.
- counsel not to allude to non-testifying, 435 a.
- distinctive provisions in particular States, 436.
- husband and wife not affected by statute, 437.
- otherwise as to co-defendants, 438.

Accomplices and Co-Defendants.

- Accomplices* competent for prosecution, 439.
- an accomplice is a voluntary co-worker, 440.
- corroboration required to sustain, 441.
- to what corroboration must extend, 442.
- right of, to pardon, 443.
- latitude allowed in cross-examining, 444.
- co-defendants at common law not admissible for each other, 445.

Examination of.

- Judge may order separation of witnesses, 446.
- voir dire* a preliminary examination, 447.
- all witnesses on back of indictment must be produced, and so of all witnesses to transaction, 448.
- interpreter to be sworn, 449.
- witnesses refusing to answer, punishable by attachment, 450.
- witness is no judge of the materiality of his testimony, 451.
- court may examine witness, 452.
- witness is protected as to answers, 453.
- examination and cross-examination governed by same rules as in civil suits, 454.
- leading questions excluded, 454 a.
- witness cannot be asked as to conclusion of law, 455.
- nor as to motives of other persons, 456.
- nor can opinion ordinarily be given, 457.
- otherwise when opinion is fact at short-hand, 458.
- so as to noises, smells, and identifications, 459.
- so as to facts which cannot be expressed in concrete, 460.
- witness may give substance of conversation, 461.
- vague impressions are inadmissible, 462.
- witness cannot be compelled to criminate himself, 463.
- nor to expose himself to fine or forfeiture, 464.
- privilege in this respect can only be claimed by witness, 465.
- danger of prosecution must be real, 466.
- exposure to civil liability no excuse, 467.

INDEX.

WITNESSES—(*continued*).

nor to police or liquor prosecutions, 468.
court determines as to danger, 469.
waiver of part waives all, 470.
pardon and indemnity do away with protection, 471.
for the purpose of discrediting witness, answers will not be compelled to questions imputing disgrace, 472.
otherwise when such questions are material, 473.
witness may be asked whether he has been in prison, 474.
questions may be asked as to religious belief, 475.
and so as to questions of motive, or veracity, or *res gestae*, 476.
and so as to bias, 477.
presumption from refusing to answer, 478.
witness's answers as to prior conduct conclusive, 479.
compelled answers cannot be used against witness, 480.

Impeaching and sustaining.

Rules in criminal the same as in civil issues, 481.
opposing witness can be impeached by proving that he formerly stated differently, 482.
witness must first be asked as to such statements, 483.
witness cannot be contradicted on matters collateral, 484.
witness's answer as to motives may be contradicted, 485.
his character for truth may be attacked, 486.
questions to be limited by time and place, 487.
bias may be shown, 488.
infamy may be shown to impeach credibility, 489.
impeaching witness may be attacked and sustained, 490.
impeached witness may be sustained, 491.
but not by proof of former statements, 492.

Reëxamination

Party may reëxamine witness, 493.
witness may be recalled, 494.
witness may be re-cross-examined, 495..

Privileged Communications.

Lawyer not permitted to disclose communications of client, 496.
not necessary that relationship should be formally instituted, 497.
nor is privilege lost by termination of relationship, 498.
client cannot be compelled to disclose communications made by him to his lawyer, 499.
privilege must be claimed in order to be applied and may be waived, 500.
communications, to be privileged, must be made to party's exclusive adviser, 501.
lawyer not privileged as to information received by him extra-professionally, 502.
information received out of scope of professional duty not privileged, 503.

INDEX.

WITNESSES—(continued).

- privilege does not extend to communications in view of breaking the law, 504.
- communications between party and witnesses privileged, 505.
- telegraphic communications not privileged, 506.
- priests not privileged at common law as to confessional, 507.
- judges cannot be compelled to disclose grounds of judgment, 509.
- nor jurors as to their deliberations, 510.
- juror if knowing facts must testify as witness, 511.
- prosecuting attorney privileged as to confidential matter, 512.
- state secrets are privileged, 513.
- and consultations of legislature and executive, 514.
- police secrets privileged, 515.
- medical attendants not privileged, 516.
- no privilege to ties of blood or friendship, 517.
- alleged parent cannot be examined as to access in cases involving legitimacy, 518.
- when persons calling bound by statement of, 681.

WITNESSES IN FORMER TRIAL, EVIDENCE OF.

- Evidence of deceased witness in former trial admissible, 227.
- death of witness may be presumed from lapse of time, 228.
- so of witnesses out of jurisdiction or subsequently incompetent, 229.
- so of insane or sick witness, 230.
- mode of proving evidence in such case, 231.

WITNESSES OUT OF PROCESS, when testimony can be reproduced, 229.

WORDS SPOKEN.

- Words spoken to be substantially proved, 120 a.

WOUND, inferences from, 769–72, 774.

- description of by witnesses, 412.

WOUNDS, variance as to, 92.

WRITING, how proved, 549 *et seq.*

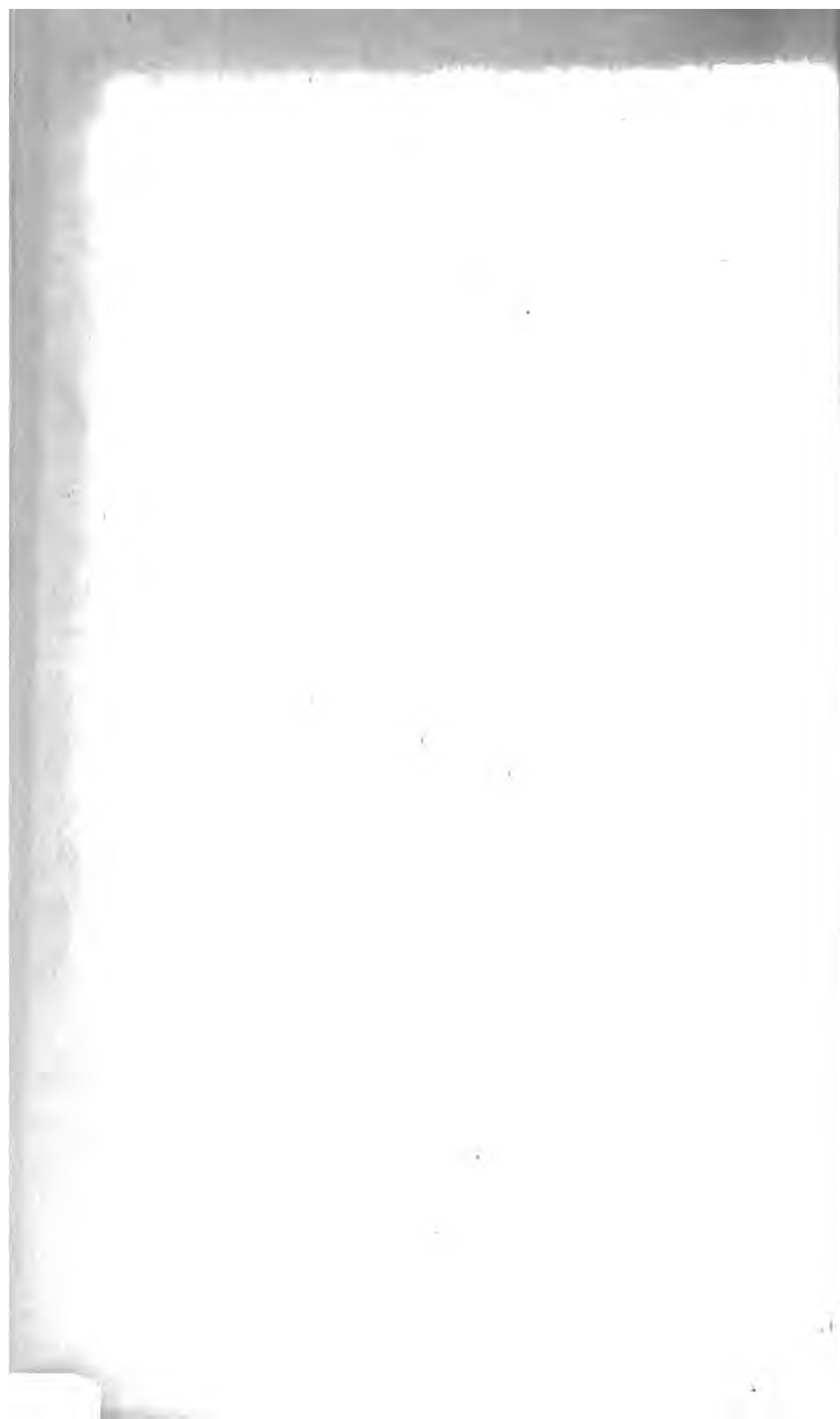
WRITINGS, cannot be varied by parol, 152, 620.

WRITS, JUDICIAL, when admissible, 612.

WRITTEN INSTRUMENTS AND RECORDS.

- When “tenor” is set out, variance is fatal, 114.
- accuracy required as to records, 115.
- when legal effect is given, sufficient if proof substantially conforms, 116.
- general designation to be accurate, 116 a.
- when variance is doubtful, case is for jury, 117.
- lost or unobtainable documents may be proved by parol, 118.
- loss must be satisfactorily shown, 119
- inspection may be ordered, 120.

WRONG DOER, presumption against, 741.











Stanford Law Library



3 L105 062 008 L64